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How and Why the Marketplace of Ideas Fails

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HOW AND WHY THE MARKETPLACE OF IDEAS FAILS*

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I. INTRODUCTION

I am grateful for the opportunity to address this distinguished Conference. It will be interesting to compare our discussions with those from the possibly even more distinguished London P.E.N. Symposium on the 300th Anniversary of *Areopagitica*, in 1944.[1] We would presumably adopt (President) E.M. Forster's observations on the pleasures and the duty of getting our minds clear for the future,[2] but many of the P.E.N. participants' World War II concerns are not ours. Their world is no longer ours, any more than Milton's (or Holmes') world is ours. Each generation must reinvent the worthy *Areopagitica* to reflect its own concerns, and my perhaps unpopular argument is that an accumulation of currently-inappropriate assumptions around the "*Areopagitica* idea" necessitate a substantial reformulation of that idea.

Areopagitica is thought[3] to enter our First Amendment jurisprudence through Justice Holmes' (and Justice Brandeis') *Abrams* dissent, in 1919:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is

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1. FREEDOM OF EXPRESSION: A SYMPOSIUM (Herman Ould ed., 1970).

2. E.M. Forster, *Presidential Address*, *in* FREEDOM OF EXPRESSION: A SYMPOSIUM 9, 10 (Herman Ould ed., 1970).

3. Holmes' analogy has been traced to persons influenced by Milton—Jefferson and Mill for example—as well as to Milton. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring) (*Abrams* marketplace of ideas notion based on Jefferson's writings); Harold J. Laski, *The Areopagitica of Milton After 300 Years*, *in* FREEDOM OF EXPRESSION: A SYMPOSIUM 168, 177 (Herman Ould ed., 1970) ("the spirit of the *Areopagitica* seems once more to come to life" in Holmes' "great dissent"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (ideas from Mill and in *Areopagitica* first introduced into American law by *Abrams* dissent); Thomas David Jones, *Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination and the First Amendment*, 23 HOW. L.J. 429, 448-49 (1980) (Milton's and Mill's "myopic" and "Olympian belief in the free trade of ideas," that the good and true must always triumph over the evil and false).

> 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. That at any rate is the theory of our Constitution.[4]

Along with Justice Brandeis' (and Justice Holmes') *Whitney* concurrence,[5] this *Abrams* analogy of ideas to markets reflects a joint effort to "sell" a judicial activism over the First Amendment to their colleagues and to the public. That their sales effort succeeded is shown by the subsequent judicial willingness to draw their analogy.[6] Analogy is the weakest form of argument in logic, but it is frequently the best we have in law. It is thus unfortunate that their marketplace of ideas analogy depends upon four implicit and "implausible assumptions for its coherence."[7] A coherent structure of free speech analysis arguably cannot be built upon so much implausibility.

Much of this implausibility was not obvious to Holmes (or to Milton), but implausibility now serves to mar the analogy's rhetorical beauty. For example, Charles Lawrence can plausibly argue that: "The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of

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4. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (Prior to World War I, the First Amendment attracted little political, judicial, or scholarly interest.).

5. *Whitney*, 274 U.S. at 375.

6. The most comprehensive list is Ingber's, *supra* note 3, at 2 n.2:

See, e.g., Board of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 866-67 (1982); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-38 (1980); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760 (1976); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 248 (1974); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Time, Inc. v. Hill, 385 U.S. 374, 382 (1967).

I would add to this list: Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm'n, 447 U.S. 557, 592-94 (1980) (Rehnquist, J., dissenting) (no sharp distinction between a marketplace for goods and a marketplace for ideas can long be maintained); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (classrooms as the quintessential marketplace of ideas); Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity unprotected because it does not contribute to the marketplace of ideas); Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting) ("The free trade in ideas which the Framers . . . visualized disappears. In its place there is substituted a new orthodoxy, an orthodoxy that changes with the whims of the day."); Dennis v. United States, 341 U.S. 494, 503, 545-46, 549-50, 553 (1951).

7. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3 (1989).

its chief commodities, and ever since the market opened, racism has remained its most active item in trade."[8]

I will illustrate some of my arguments with references to *R.A.V.*,[9] the most serious challenge that the marketplace of ideas analogy has faced recently. In *R.A.V.*, a minor (allegedly) burnt a wooden cross on an African-American family's lawn and was charged under a Bias-Motivated Crime Ordinance. The Supreme Court held this Ordinance to be an unconstitutional infringement on R.A.V.'s free speech rights.

II. INAPPROPRIATE ASSUMPTIONS

The first of the Holmes/Brandeis implicit assumptions is that their analogy is logically defensible, that there are enough significant points of resemblance between the speech process and the economists' model of a "free" (unregulated) and competitive market for goods and services—if only judges will perfect speech competition by striking down such governmental regulations as they can identify.[10] This is similar to Milton's arguments,[11] if he would permit his pre-capitalist and not overtly materialist sentiments to be dressed up in the language of a neoclassical economics—a field where Holmes displayed more enthusiasm than expertise. Milton was, however, reluctant to trust to something like market forces when it came to blasphemous and atheistic tracts,[12] just as

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8. Charles R. Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 468. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385-86 (1991) (Racist speech lends credibility to views of the dominant group and disempowers any minority rebuttal, "a result at odds, certainly, with marketplace theories of the first amendment.") A powerful "narrative jurisprudence" about minority suffering serves as a counterweight to uncritical celebrations of First Amendment doctrines.

9. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). White, Blackmun, Stevens, and O'Connor, JJ., believed the ordinance to be invalid because it was "overbroad," while the other five Justices (per Scalia, J.) held the ordinance to be "facially" invalid under the First Amendment, because it purported to regulate the content of speech. R.A.V. was guilty under a content-neutral criminal law of trespass, however.

10. *See Central Hudson*, 447 U.S. at 592-94.

11. It is harder than the alchemist's task, "to sublimat any good use out of" licensing restrictions on the publication of books. John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing. To the Parliament of England* (1644), *in* THE PROSE OF JOHN MILTON 265, 282-83 (J. Max Patrick ed., 1967) [hereinafter *Areopagitica*]. An "*Oligarchy* of twenty ingrossers" (i.e., monopolists or what we would call oligopolists today) would try "to bring a famin upon our minds again" by restraining publication. *Id.* at 325. *See* THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 612 (3d ed. 1967) (meaning of "engross" in 1596).

12. Milton praised the Athenian censors' banning of "blasphemous and Atheisticall" materials, while they tolerated "voluptuousnesses and the denying of divine providence. . . ." *Areopagitica, supra* note 11, at 273-74. He condemns the Pope's going beyond "matters Heretical" to censor all writings in 1515, "as if *S. Peter* had bequeath'd them the keys of the Presse." *Id.* at 279, 279 n.91.

judges today do not trust the marketplace to govern hard-core pornography.[13] In any event, numerous "failures" can be discovered in any ideas marketplace—for example, the racism reflected in *R.A.V.* These failures cast doubt on the appropriateness of the marketplace of ideas analogy, and they can be used to justify *some* of the governmental regulations that the justices abhor.

The second assumption, made explicit by Milton,[14] by the Justices' *Whitney* concurrence, and later by Justices Harlan[15] and Brennan,[16] is that the

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St. Paul's followers could burn the "magick" Ephesian books because this was a private, voluntary act. *Id.* at 286. *See* F.E. HUTCHINSON, MILTON AND THE ENGLISH MIND 65 (1946) (Milton's tolerance does not extend to "popery and open superstition. . . .").

13. *See* Miller v. California, 413 U.S. 15, 29 (1973); Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity is unprotected because it does not contribute to the marketplace of ideas).

14. Perhaps Milton's strongest argument is that the "State shall be my governours, but not my criticks; they may be mistak'n in the choice of a licencer, as easily as this licencer may be mistak'n in an author. . . ." *Areopagitica, supra* note 11, at 302. Tongue in cheek, he praises Parliament's obedience to "the voice of reason from what quarter soever it be heard," and he begins by noting that the "utmost bound of civill liberty [is] attain'd . . . when complaints are freely heard, deeply consider'd, and speedily reform'd. . . ." *Id.* at 266, 277.

As a humanist, Milton stresses the development of a civic "vertu" which is very Christian and otherwise very different from Machiavelli's. *See id.* at 288, 296-97. Having proclaimed the "first tidings" of Reformation, England is now full of the "backwardest schollers" because of suppressions by Churchmen. *Id.* at 320. But through "the solidest and sublimest points of controversie and new invention," England could cast "off the old and wrincl'd skin of corruption" and become "a noble and puissant Nation rousing herself." *Id.* at 324. (This kind of "progressive" nationalism is seen in many of the less critical celebrations of the First Amendment). An "inquisitionall rigor" has not made Italy and Spain "the better, the honester, the wiser, the chaster." *Id.* at 298. *See* HUTCHINSON, *supra* note 12, at 61 (Milton allows "Church and Commonwealth to keep a vigilant eye upon such publications as may infect the nation with dangerous mischief, but he warns against the still greater danger of fettering the expression of opinion."); Laski, *supra* note 3, at 171 (Milton believed that knowledge unlocks all doors to virtue and to rightful power). Areopagitica is "the first fundamental plea for extending the idea of religious liberation to every sphere of secular life." *Id.*

15. Cohen v. California, 403 U.S. 15, 24 (1971) (per Harlan, J.):

> The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

See LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 240-41 (1986): historically, speech activity was an "integral and vital element" in moving from autocracy to democracy, and in reducing citizen antagonism and estrangement. *But see id.* at 229: the "actual relationship" between free speech and political decisionmaking is "subtle and concerned with developing a general *capacity* rather than with feeding units of information into a mental machine." (This "general *capacity*" arguably remains underdeveloped, despite an abundant free speech.)

ideas marketplace is essential to an effective functioning of the democratic *process*. Government serves an informed electorate by making informed decisions, the relevant information having been mediated and coordinated through the ideas marketplace. This is the "place" where political ideas attain a legitimacy by passing the tests of a fair process, legitimacy being the basis for recognizing genuine political obligations. Nothing could be more important under our Constitution than an effective democratic process. Alexander Meiklejohn makes this assumption into the centerpiece of his absolutist protection of the "political" speech category—as part of a "systemic" freedom rather than as an individual right.[17] The problem is that we can scarcely recognize the process or system addressed by this assumption, since it amounts to an eighteenth century, *Federalist No. 51* kind of democracy. In such a democracy, there is an active public participation, a relative equality among speech inputs and outputs, and a freedom from the overweening influence of organized interest groups, political action committees, media "sound bites," and an attendant public cynicism about the fairness of the process.

The third assumption is that a fragmented society, where individuals are isolated one from another except as markets coordinate their ideas and activities, is both what we have and what we want. People are seen as deeply rational loners who are comfortable with uncertainty, complexity, and more than a little disorder. We are supposedly eager to demonstrate our dignity, autonomy, and tolerance while avidly debating the issues of the day.[18] This assumption is seen

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16. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring).

> [T]he First Amendment . . . has a *structural role* to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," . . . but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.

Id.

17. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18-19, 22-27 (1948); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. *See* BOLLINGER, *supra* note 15, at 46 (citing Meiklejohn, nothing more constricting than a ROBERT'S RULES OF ORDER is appropriate for regulating citizens performing their sovereign functions); *id.* at 61 (quoting Meiklejohn, "To be afraid of ideas . . . is to be unfit for self-government."); *infra* notes 24-36 and accompanying text (analyses of "political" speech).

18. *See* BAKER, *supra* note 7, at 7; BOLLINGER, *supra* note 15, at 239, 247; Delgado, *supra* note 8, at 379; Steven Helle, *Whither the Public's Right (Not) to Know? Milton, Malls, and Multicultural Speech*, 1991 U. ILL. L. REV. 1077, 1080 (the assumption that individuals are rational and have an existence or meaning apart from society is implausible under the philosophies of Hume, Rousseau, and Durkheim); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 476-77, 479 (1987) (under social contract theories, legitimacy turns on opportunities for

at play in *Areopagitica*,[19] is vulnerable to a communitarian critique,[20] and is markedly at odds with a frequently-observed intolerance and the pursuit of personal security through a quietude and conformity.

Milton is at his most interesting and eloquent[21] in the fourth assumption

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individual political participation); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 535.

19. *See* MAUREEN QUILLIGAN, MILTON'S SPENSER: THE POLITICS OF READING 48 (1983): in *Areopagitica*, "readers will never learn [to] distinguish good from evil unless they are allowed a choice." A learning process is necessary because good and evil look so much alike. *Id.* When "God did enlarge the universall diet of mans body, saving ever the rules of temperance, he then also . . . left arbitrary the dyeting and repasting of our minds. . . ." *Areopagitica, supra* note 11, at 286. The "rules of temperance" would appear to permit some governmental regulation of the intemperate and, here and elsewhere, the "repasting" of the mind is treated as a matter between the individual and God. *Compare* Salvador de Madariaga, *Liberty in Society*, *in* FREEDOM OF EXPRESSION: A SYMPOSIUM 58, 62 (Herman Ould ed., 1970) (quoted in note 20, *infra*).

20. *See, e.g.*, Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992). Criticizing Milton, Salvador de Madariaga, *supra* note 19, argues that:

> Society cannot fully know itself . . . since even man cannot fully know himself. . . . [T]he only approach to knowledge which may enable a society to live not quite as a lunatic asylum is through study of collective life. Now the complexity, the subtlety, the vastness of collective life . . . is so monstrously out of proportion with the powers of even the cleverest of us that nothing but the free exchange of trials and errors of all the men of good will [will suffice].

de Madariaga, *supra* note 19, at 62. (Note the "men of good will" qualification that presumably excludes racists like R.A.V.).

21. It is only the "troublers," the "dividers of unity," who would prevent an assembly of pieces of the body of "Truth." *Areopagitica, supra* note 11, at 318. Milton asks: "[W]ho ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing." *Id.* at 327. Like Holmes', Milton's Truth "can never be stabilised or defined. It is in a continuous state of emergence. . . ." Herbert Read, *On Milton's Areopagitica*, in FREEDOM OF EXPRESSION: A SYMPOSIUM 122, 127 (Herman Ould ed., 1970). But Milton departs from the practices of many today when he puts orthodoxy and authority (especially biblical authority) forward as standards of truth. de Madariaga, *supra* note 19, at 59. God functions as the prototypical *deus ex machina* in some of Milton's arguments. *See supra* note 12. When "false teachers are . . . busiest in seducing; . . . God then raises to his own work men of rare abilities. . . ." *Areopagitica, supra* note 11, at 330. To take a famous example, someone "who destroyes a good Booke, kills reason it selfe, kills the Image of God . . ." *Id.* at 272. Note the *good* book qualification: until the Inquisition, "Books were ever as freely admitted into the World as any other birth; . . . but if it prov'd a Monster, who denies, but that it was justly burnt, or sunk into the Sea." *Id.* at 281. (Such burning and sinking can and have been treated as marketplace transactions, but this absence of a "prior restraint" as a justification for subsequent restraints will jar many contemporary readers.)

Milton's Truth is discovered through purification: "that which purifies us is triall . . . by what is contrary." *Id.* at 288. (This echoes a Hegelian dialectic—without a materialism of course.) For "the pure all things are pure"; "knowledge cannot defile, . . . if the will and conscience be not defil'd." *Id.* at 285. (In other words, the kind of "hate speech" tolerated in *R.A.V.* will not spawn more racists or make existing racists worse.) What "wisdome can there be to choose, what continence to forbeare without the knowledge of evill?" *Id.* at 287. "[B]ad books . . . to a discreet and judicious Reader serve in many respects to discover, to confute, to forwarn, and to illustrate." *Id.* at 285. (This amounts to a workout in the "intellectual gym" described *infra* note 23 and

that helps to account for the continued popularity of the marketplace analogy, by offering something for everyone. Skeptics, pragmatists, and idealists alike are mollified because a radical objectivism—"truth" exists and is found through "robust debate" in the market—coexists with the radical relativism that is given fullest expression much later, in *Gertz*: "there is no such thing as a false idea."[22] Justice Holmes sounds like a Social Darwinist or an Adam Smith: competition will correct pernicious ideas ("upset . . . fighting faiths"), as the invisible hand of the ideas market (a naturalistic fallacy) guides the truth to victory. If this were indeed the case, we would expect demonstrably false ideas (e.g., the racism reflected in *R.A.V.*) to have lost influence over time. Instead, we see an ebb and flow in the influence of such ideas, a cycling that appears to respond to political and socioeconomic events. Like Milton's, our truth seems to be conditioned by our self-interest and our socialization. Falsity does not seem to aid in the search for this truth, or even in the search for beliefs in which we are most confident: "A needle is harder to find in a haystack than in two pieces of hay," and the notion that false ideas provide an "intellectual gym," where minds can be strengthened through exercise, reflects an unduly optimistic assessment of our reactions to falsity.[23]

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accompanying text.) *See also infra* note 43.

22. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). *See* Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 182 (1990) (this *Gertz* statement "emancipated the outrageous opinion from legal censure" through an "almost nihilistic" denial of constitutional authority to enact community values into law); Strossen, *supra* note 18, at 534 (*quoting* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 838 n.17 (2d ed. 1988). ("If the Constitution forces government to allow people to march, speak and write in favor of peace, brotherhood, and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide.").

23. FREDERICK SCHAUER, FREEDOM OF SPEECH: A PHILOSOPHICAL ENQUIRY 74 (1982). *See id.* at 23 (the fear of losing some truth through regulation is "relevant but hardly dispositive"); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 177 (1982) ("truth" is unlikely to emerge from racial insults, which "are not intended to inform or convince"; they "invite no discourse, and no speech in response can cure the inflicted harm"); Ronald Dworkin, *Mr. Liberty*, N.Y. REV. OF BKS., Aug. 11, 1994, 17, at 20 ("Holmes said that a free marketplace of ideas is the best way to discover truth, which makes no sense if there are only individual 'can't helps'"—Holmes's strong but intensely personalized views of morality—"and no real truth for free discussion to discover."); Ingber, *supra* note 3, at 15 (if indeed truth defeats falsity, it must be verifiable, objective, and unaffected by "socioeconomic status, experience, psychological propensities, . . . societal roles," or the way the ideas are packaged); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. OF CINN. L. REV. 1, 7 (1991) (like J.S. Mill, "we live in an age 'destitute of faith, but terrified at skepticism'"); *supra* note 22; *infra* note 43. *But see* Wolfson, *supra*, at 3 (citing RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 114 (1990)) (truth is the "consensus which develops over time" that "should be subjected to a Darwinian survival test"; a free market produces better results than a "command economy" in ideas, even if the majority comes to believe in astrology).

III. LEGAL ANALYSES

My description of these four assumptions is arguably necessary because the most important category—"political" speech[24]—wholly depends upon the marketplace of ideas, and thus on its implausible assumptions. If this marketplace does not exist and function as imagined, political speech theory becomes incoherent: there is no basis for believing that the relevant information is produced, consumed, and then assimilated into a democratic decisionmaking. The standard move under the dichotomous structure[25] of speech analysis is to put "good," protected, political speech (or, in other contexts, literary/artistic or scientific speech) into opposition with a pre-selected, exceptional category of unprotected or less-protected speech.[26] The speech being analyzed will be

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24. R.A.V. v. City of St. Paul, 505 U.S. 377, 421-36 (1992) (Stevens, J., concurring and citing cases): "Speech about public officials or matters of public concern receives greater protection than speech about other topics" because regulation raises "the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" and because "government must remain neutral in the marketplace of ideas. . . ." (Was R.A.V.'s cross burning of sufficient "public concern" to merit constitutional protection *for this reason*?)

25. While the urge to classify things probably inheres in all of thought, the categorization of speech issues has been an academic and judicial growth industry since *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The *Chaplinsky* Court admitted that certain kinds of speech are unprotected because of the harm they impose on individuals and society, and the race was soon on to develop coherent and persuasive criteria for distinguishing among categories of speech-harm. *Id.* at 571-72. These categories emerged slowly, as ad hoc responses to particular cases. Inertia and traditions of legal reasoning caused the contents of the categories to change more quickly than the categories themselves. These are conditions conducive to what Kuhn would likely call a "paradigm shift" in speech theory. *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1973).

Isolated factors must be organized somehow in order to make legal analysis possible, and categories offer "familiar landmarks of thought." Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 662 (1989). But, a jurisprudence-by-categorization too easily becomes a mere pigeonholing, a lazy acceptance of structure as a substitute for clear and hard thinking.

Some or much creativity gets lost when thoughts are squeezed into narrow categories—usually two categories at a time, since the pondering of three or more factors simultaneously can be managed only imperfectly and with difficulty. Facts are approached from an either/or perspective—they must either be "fighting words" or "political speech" in *R.A.V.*, for example—that forestalls the search for more relevant, realistic possibilities (e.g., "hate speech") that lurk in the grey areas between bright-line categories. A false dichotomy (or dilemma) frequently results from this process of mutual exclusion under a binary logic, and the legal conclusion will often be that you must take all of it, an absolutist free speech for example, or you will wind up with nothing. *See* Paul H. Brietzke, *Public Policy: Contract, Abortion and the CIA*, 18 VAL. U. L. REV. 741, 744-45, 753-54, 761-64 (1984).

26. Delgado, *supra* note 8, at 377, offers the most complete list of categories of unprotected speech (one of which will be put in opposition to "political speech" by a judge):

> speech used to form a criminal conspiracy or an ordinary contract; speech that disseminates an official secret; speech that defames or libels someone; speech that is obscene; speech that creates a hostile workplace; speech that violates a trademark or

uniquely protected if it *seems* to fit into the "good" category rather than into the unprotected category. This will be so unless the speech poses a "clear and present danger" which cannot be contained within the policies underlying the unprotected category (that has already been rejected). This "danger" must be serious indeed: American law treats as marginal inconveniences numerous speech-acts which judges in some other democracies regard as serious threats to a political or social stability. Our and their thought processes are certainly not very precise: "[W]e are merely guessing when we suppress [speech]; but we are also guessing when we decide not to suppress."[27]

In *R.A.V.*, Justice Stevens describes a history of the Court "narrowing the categories of unprotected speech."[28] One effect of this narrowing has been an explosive expansion in what counts as political speech. The attitude now seems to be that all non-obscene speech is somehow political, that the benefits from such speech must outweigh the harms almost by definition, and that the unprotected speech categories are conventional exceptions to be used sparingly, if at all, in a mature society. Anything now becomes protected political speech if (as in *R.A.V.*) the speaker can claim, with some minimal plausibility, that

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plagiarizes another's words; speech that creates an immediately harmful impact or is tantamount to shouting fire in a crowded theatre; "patently offensive" speech directed at captive audiences or broadcast on the airwaves; speech that constitutes "fighting words"; speech that disrespects a judge, teacher, military officer, or other authority figure; speech used to defraud a consumer; words used to fix prices; words ("stick 'em up—hand over the money") used to communicate a criminal threat; and untruthful or irrelevant speech given under oath or during a trial.

See BAKER, *supra* note 7, at 5 ("the constitutional protection of free speech bars certain governmental restrictions on noncoercive, nonviolent, substantively valued conduct, including nonverbal conduct"). Categories of less-protected or "low-value" speech include commercial speech and sexually-explicit materials.

27. SCHAUER, *supra* note 23, at 29 (characterizing this as a cost-benefit analysis). *See* Landmark Communications Inc., v. Virginia, 435 U.S. 829, 845 (1978) (The clear and present "danger must not be remote or even probable; it must immediately imperil.") (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)); BAKER, *supra* note 7, at 29; THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 27-28 (1986) (discussing legal practices in other countries); SCHAUER, *supra* note 23, at 141, 218 n.9; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-9, at 841-48 (1988) (The *Abrams* dissent, Abrams v. United States, 250 U.S. 616, 630 (1919), "infused more immediacy" into the clear and present danger test, but it is "marred by ambiguity" and open to the "cynical interpretation . . . that speech is protected only so long as it is ineffective."); Kretzmer, *supra* note 18, at 474 (an "article of faith," impossible to refute, that dangers of suppressing political speech are greater than for other types of speech).

28. *R.A.V.*, 505 U.S. at 428. In the earlier and closely-divided *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Court banned speech that had a substantial political content: a demand for action addressed to the Mayor and City Council. *Id.* at 266. The Court thus condoned "expansive state censorship" of a "matter of public concern." *Id.* at 271-72 (Black, J., dissenting). This is something it would presumably not do today, although the *R.A.V.* Court repeatedly cites *Beauharnais*.

"persecution" resulted from his or her advocacy of "disfavored ideas." While the cases announce brave judicial attitudes, analyses seem to be driven by fear—of the "slippery slope" (or of "letting the camel's nose into the tent") that often distorts legal reasoning by pouring substance into improbable worst-case "scenarios."[29]

The extreme version of this "parading of the horribles" is that, free speech being indivisible,[30] the first step away from a fundamentalist First Amendment inevitably leads down the road to political authoritarianism. The "thought police" will freeze our political consensus;[31] mere incivility will serve as an excuse for imposing censorship and reverse discrimination (or a "political correctness");[32] content regulation necessarily leads to a viewpoint regulation, which is much worse;[33] the licensing of specific governmental suppressions necessarily licenses more general ones;[34] examinations of "policy" will rapidly dilute our First Amendment "principle," and society will lose truth;[35] and socially-valuable experiments in discourse will be abandoned, with the result that many will be afraid to say anything.[36]

The main advantage of having so broad a political speech category, of adopting so gross a dichotomy, is that this tactic minimizes the risk of

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29. *See* BOLLINGER, *supra* note 15, at 36 (the "slippery slope" as a "standard argument" in law); SCHAUER, *supra* note 23, at 84 ("slippery slope" arguments should include demonstrations that the slope is *particularly* slippery over the facts in question); *id.* at 102-03 (leaving a margin for error should not mean that the search for principled delineations of the scope of free speech is abandoned); Strossen, *supra* note 18, at 518 ("Statements that defame groups convey opinions or ideas on matters of public concern.").

30. Strossen, *supra* note 18, at 534.

31. *See* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 224 (1991); Robert W. McGee, *Hate Speech, Free Speech and the University*, 24 AKRON L. REV. 363, 364 (1990).

32. *See* Anti-Defamation League v. FCC, 403 F.2d 169, 174 (D.C. Cir. 1968) (Group defamation is usually not actionable; however detestable, "this kind of speech . . . approaches the area of political and social commentary."); Marjorie Heins, *Banning Words: A Comment on "Words that Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 589-90 (1983); Massaro, *supra* note 31, at 214; *id.* at 237 (discussing attitude that all speech resulting from inter-group tensions must be treated as political speech); Strossen, *supra* note 18, at 518, 534.

33. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992) (Stevens, J., concurring); Wolfson, *supra* note 23, at 5 (one judicial breach in content neutrality will lead to others, in pursuit of uniformity and coherence). *See also* Strossen, *supra* note 18, at 530.

34. Kretzmer, *supra* note 18, at 472.

35. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); SCHAUER, *supra* note 23, at 24. *But see also id.* (this concern is "relevant but hardly dispositive. . . .").

36. Beauharnais v. Illinois, 343 U.S. 250, 273 (1950) (Black, J., dissenting) ("[I]n arguing for or against the enactment of laws that may differently affect huge groups, it is now very dangerous to say something critical of one of the groups."). *See* Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1894-95 (1992).

miscategorization: many of the unprotected, non-political categories have become so narrow that judges can hardly miss their aim at protecting the "speech that matters." This tactic carries risks of its own, however, of courts tolerating the kind of speech-harm that is seen in *R.A.V.* and that a slight broadening of *some* of the categories of unprotected, non-political speech would minimize.

IV. MARKET FAILURES

Advocates of a broad and absolutist political speech are right: dissenters are protected against the tyranny of the majority, without having to prove the "hard-to-measure worth" of free speech.[37] This is an obviously-important protection, during crisis times or when the speech-harm can indeed be cured by more speech, but it should not forestall the search for protections which are more "cost-effective" in terms of having fewer speech-harm side effects. The nature of such protections is suggested by persistent critiques of the political speech/marketplace of ideas nexus. Critics plausibly argue that this nexus operates "to exaggerate the evils of government and [as in *Areopagitica*] the goodness of people," to "understate the risks and harms of speech and to overstate its benefits,"[38] and to understate the physical and psychological dangers, and often the futility, of attempts to counter bad speech with good. Stanley Ingber concludes that the ideas marketplace changes little and has little to do with an informed choice. Rather, this nexus serves to socialize the citizenry into a conformity to some perspectives rather than others. The "marketplace of ideas is as flawed as the economic market . . . [, and] ideas that support an entrenched power structure or ideology are most likely to gain acceptance."[39]

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37. TRIBE, *supra* note 27, § 12-2, at 793. *See R.A.V.*, 505 U.S. at 427 (Stevens, J., concurring) (discussing miscategorization risks arising because "pornography that is part of a 'serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device', may be entitled to constitutional protection"); SCHAUER, *supra* note 23, at 144 (there can be no simple formula—"Obscene pictures may be used to make a political argument; commercial advertising may be artistically creative; literature may carry an economic message."); Kretzmer, *supra* note 18, at 477, 497; Wolfson, *supra* note 23, at 20, 33 (The outrageous can be the mark of the avant garde as well as an attempt to control mediocrity, and symbolic speech is relatively harmless unless it is directed against specific persons.).

38. BOLLINGER, *supra* note 15, at 237.

39. Ingber, *supra* note 3, at 17, 27. *See* BOLLINGER, *supra* note 15, at 9 (the idea that society elevates itself through acts of extraordinary tolerance); Massaro, *supra* note 31, at 221; Ingber, *supra* note 3, at 29-30 (discussing Board of Educ. v. Pico, 457 U.S. 853 (1982)) (government's ability to remove books from library is limited, but government is not required to foster a diversity of experience and an openness to change by, e.g., acquiring a broader range of books).

Society is not a debating club like the Oxford Union, not a "town meeting or . . . a group of scientists interested in figuring out some truth."[40] Producers often speak to make a profit, and they are usually very different people from the ostensible consumers, who often misunderstand or ignore the message, often lack a viable channel for communicating their response, and are often afraid to make fools of themselves by speaking up. Feeling cut off from an active participation, many people are left with the passivity of an evening in front of the TV that is controlled (even after the advent of cable TV) by oligopolistic networks practicing a very definite viewpoint censorship. Many subjects or perspectives are ignored or relegated to fragmented "market surrogates," like a "counterculture" newspaper or a "public access" TV channel, because they are thought to be "distressing" or "unentertaining" and, thus, unprofitable. Most of effective political speech is really a commercial speech, and it would receive less ("low value") protection if the Supreme Court pushed some of its analyses to their logical conclusions.[41]

The deep (economic)[42] rationality assumption characteristic of the ideas marketplace, and of other markets as well, cannot hold in the real world:

> it ignores a host of factors that make us human, including altruism, habit, bigotry, panic, genius, luck or its absence, and factors such as peer pressures, institutions, and cultures that turn us into social

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40. BOLLINGER, *supra* note 15, at 229.

41. *See* BAKER, *supra* note 7, at 95 ("[M]arket practices, paradigm examples of instrumental action, reliably produce only commodity ends."); *id.* at 204 ("Speaking anthropomorphically, the competitive market directs commercial speech toward creating the world as 'profit' requires"—a constant increase in desires which our purchases will not satisfy, and a molding of human images around this purpose rather than around what we might want the world to become); TRIBE, *supra* note 27, § 12-18, at 943; C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 979-80 (1978) (the media mostly reinforce audience attitudes, and advertisers are similarly unlikely to upset the status quo); Paul Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 758 (1992) (market surrogates spring up in areas where the main market does not function, and they segregate activities when they are used to create barriers to entering valuable markets); *id.* at 759. *See also* Ingber, *supra* note 3, at 25, 86 (discussing some of the dangers of what arguably are market surrogates). *But see* Wolfson, *supra* note 23, at 40 (Consumers test out ideas much as they do goods and services—"there is freedom and autonomy, prosperity and initiative.").

42. Economic analysis of social issues where commercial motives are not popularly thought to dominate have been widely criticized, but analyses can be useful if they are modified to take account of these criticisms. *See, e.g.*, Brietzke, *supra* note 41, *passim*; Strossen, *supra* note 18, at 566; Wolfson, *supra* note 23, at 3; *id.* at 37-38 (The law and economics of James Buchanan and some others paradoxically agrees with the "old . . . Marxist left"—"Speech is merely the epiphenomenon of power," in a "despairing vision of society" which is "nihilistic and cynical to its core.").

> animals. A dehumanized, desocialized, and often sexist "economic man" [or "speech man"] supposedly goes through life as if it were one long series of analogies to isolated transactions on the New York Stock Exchange.[43]

Rationality assumes the ability to separate the often seductive form of the message from its substance, and rationality may dictate a recourse to quietude or violence rather than to discussion.[44] The actual outcomes from political speech in a putative marketplace of ideas are often very different from the rational ones projected by speech theory.

Neoclassical (or Chicago School) economics approaches the marketplace of ideas by asking, in effect: How much is free speech worth to you, how much are you willing to "pay" for it? This is an unhelpful perspective on insuring an access to the exchange of information, and a political access generally (in Holmes' second assumption), since the poor are unable to pay (in money, time, education, or other scarce resources) as much as it takes to protect their speech. Indeed, this is what makes them poor, in speech and other areas, and it makes the ideas marketplace into an analogy which is very long on liberty (based on the willingness to pay) and very short on equality (because many are *unable* to pay). For example, the poor do not get to participate in our most efficient information market: the New York Stock Exchange that, through its rapid reactions, exerts a massive influence on which political policies can be adopted. The New York Stock Exchange is a significant constraint on "robust" debate, since some potentially worthwhile policies are not mentioned officially—for fear of how the New York Stock Exchange will react. Even the garrulous Robert Reich learned to be cautious. Also and to the extent that the "targets" of hate

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43. Brietzke, *supra* note 41, at 753. *See* Baker, *supra* note 41, at 972; *id.* at 974 (Truth cannot be objective, since "knowledge depends on how people's interests, needs, and experiences lead them to slice and categorize an expanding mass of sense data."); *id.* at 977; Helle, *supra* note 18, at 1079 (citing Jay Janson on the rationality assumption in Milton, Jefferson, and Mill); *id.* at 1080 (such rationality notions contrast sharply with the ideas of Hume, Rousseau, and Durkheim, who question an individual rationality and whether the individual has existence or meaning apart from society); Massaro, *supra* note 31, at 227-28 (citing Richard Rorty, some philosophers are skeptical of the "rationalism" underlying free speech; notions of good and evil are contingent and there is no neutral, ahistorical way of choosing among them—a perspective that makes free speech even more compelling for some); *supra* notes 18-20, 23 and accompanying text. *But see also* BAKER, *supra* note 7, at 18 ("Limitations on speech will deepen our admitted irrationality and increase the probability of deleterious conclusions.").

44. SCHAUER, *supra* note 23, at 78; Ingber, *supra* note 3, at 31.

speech are poor, they will lack the marketplace means of countervailing and correcting hatred, or of rewarding tolerance, unless they can rely on the paternalism of others who have the means.[45]

The marketplace of ideas analogy, thus, cannot explain the indeterminacy (from a "duopoly," like that of pro-choice versus right to life) that sometimes results from a bargaining over ideas between groups or communities with very different "utility functions" (wants and needs). Based on the ability to pay as they are, other political bargains "are all-too-determinate: the rich rarely surrender even marginal advantages at a price the poor can afford, while the poor frequently surrender important interests for a pittance."[46] This is particularly likely if hate speech like R.A.V.'s deprives minorities of the psychological integrity they need to bargain effectively. In brief: "No one has seriously suggested that the existing distribution of access opportunities . . . is fair or is apportioned in accordance with the contribution each group can make to a 'best' understanding of the world."[47] Under the circumstances, many people who do not feel themselves part of a broad "establishment" (a group which certainly includes most judges) believe the speech process to be unfair. For them, the legitimating function of "free" speech, sought so avidly in Justice Brandeis' *Whitney* concurrence, has failed to materialize.[48]

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45. Brietzke, *supra* note 41, at 780. *See* T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 327, 339 (1992) ("[D]iscrimination in the economic sphere is particularly egregious in a political system based on a market economy purportedly dedicated to equal opportunity for wealth-maximizing individuals."); Baker, *supra* note 41, at 971 (exceptionally, obscenity cases ignore the marketplace willingness to pay criterion of social value); Ingber, *supra* note 3, at 29-30; *id.* at 75, 86 (discussing a status quo bias, a blindness to potential evils outside the market boundaries of ideas people are willing to pay for). We do not trust lawful markets to allocate some of the other things irrelevant to democracy—crack or commercialized sex, for example—so why trust the market to allocate racist ideas? *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.9 (1974) ("an opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood"—"truth rarely catches up with a lie").

46. Brietzke, *supra* note 41, at 754. *See* Brietzke, *supra* note 25, at 879.

47. Baker, *supra* note 41, at 978. See BAKER, supra note 7, at 204 (quoting C.B. Macpherson) ("the market system . . . creates the wants which it satisfies," and there is no reason to expect that this "will reflect or permit" the "full development of the individual personality"); ROBIN PAUL MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT 70 (1991) ("[W]ealth maximization discourse can ignore the issue of whether African Americans or Hispanics, for instance, have anything to exchange in the marketplace," or whether they "have been systematically deprived of an opportunity to acquire the wealth necessary to bargain voluntarily."); Aleinikoff, *supra* note 45 (quoted in *supra* note 45); Baker, *supra* note 41, at 975 (In the face of disagreement, the ideas marketplace generates the "best" understanding only if it "distributes influence among various people or groups such that optimal compromises are reached."); Brietzke, *supra* note 41, at 787.

48. BAKER, *supra* note 7, at 16-17; Harel, *supra* note 36, at 1919-21. *See* Ingber, *supra* note 3, at 49 (Dominant groups with establishment views see the ideas market as working well, while dissidents see this market as an ideology which diffuses protest by giving the illusion of control.). *But see also id.* at 36 (Alexander Bickel's argument that the fairness of the ideas market, rather than

If it can be said to exist, the ideas marketplace is shot through with "market failures,"[49] the effects of which often make governmental interferences seem puny by comparison. Today, if not in Holmes' or Milton's time, there is no "free" or "natural" ideas market. There is no "there" there because unorganized and perhaps unorganizable speakers are unable to compete with the wealthy corporations and organized interest groups that have access to sophisticated public relations tools and communications technologies. Wealthy and powerful groups seldom participate in the ideas market unless a profit can be made or their interests are somehow threatened. When such groups choose to participate, they sometimes succeed in fragmenting or (by erecting barriers to entry) in closing information markets to rival ideas,[50] so as to increase their profits or to gain "economic rents"[51] through the political process. A badly-

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its wisdom, justifies its continued acceptance).

49. Unfortunately, the theory of market failure is not well developed and consists of little more than a series of policy recommendations. Market failures arguably include: the problem of "public goods," of things which belong to everyone and for which no one wants to pay; "externalities," social costs and benefits that are not taken into account by private parties in their transactions; and fragmentation, barriers to entry, and a lack of competition in markets. "Few economists realize or admit that market failures . . . are literally matters of definition, of what we want markets to do that they are not doing." Brietzke, *supra* note 41, at 763 n.75, 765. In sum, the market failure argument is that: "Real-world conditions prevent the completely laissez-faire economic market—praised as a social means to facilitate the optimal allocation and production of goods—from achieving socially desired results." BAKER, *supra* note 7, at 4.

The overall effect is that speech is a public (free) good for some—frequently and paradoxically those best able to pay for it—but not for others. *See id.* at 45, 285 n.5. A market failure perspective tolerates governmental intervention for efficient allocations or desired distributions in ways that do not restrict speech freedoms. Baker, *supra* note 41, at 981-82. For lists of market failures concerning speech see *id.* at 965 ("monopoly control of the media, lack of access of disfavored or impoverished groups, techniques of behavior manipulation, irrational response to propaganda, and the nonexistence of value-free, objective truth"); Ingber, *supra* note 3, at 38-39 (pickets, leafleting, and sound trucks are no longer effective counterweights to the mass media; "monopolistic practices, economies of scale, and an unequal distribution of resources" determine which ideas reach the public, and access to the media is fraught with status quo biases); Massaro, *supra* note 31, at 221 (The "prevailing metaphors and clichés" are insensitive to the relative market power of various speakers, and the physical and psychological dangers of meeting bad speech with good.).

50. BAKER, *supra* note 7, at 38; Brietzke, *supra* note 41, at 742, 759, 776. If an ideas marketplace exists, it presumably operates on university campuses. Yet the nation's universities have recently offered abundant evidence of market failures that "more speech" has done little or nothing to cure: "severe or pervasive harassment based on membership in a group whose identifying characteristic is practically or historically linked to serious prejudice." Mary Ellen Gale, *On Curbing Racial Speech*, 1 RESPONSIVE COMM. 47, 56 (1990-91). *See id.* at 54.

51. Economic rents are the difference between the rate of return in a market where the supply is temporarily or permanently fixed and the rate of return in a competitive market. Talented baseball players earn economic rents because the "natural" supply of their skills is narrowly limited, and an exclusive food franchisee at an airport also earns economic rents because the franchisor has artificially restricted the supply of food and drink to a "captive" audience. Similarly, a racist may seek wealth and/or power by artificially restricting his or her "targets'" life-chances.

informed or misinformed public, a market failure in itself, sends inconsistent signals to politicians, and this helps special interest groups frequently to dominate politics by manipulating information and influence. Consider the level and tone of recent "debates" over the crime and health care bills.

While there is little agreement on the precise nature and significance of market failures over speech, a market failure perspective would have us focusing on the relevant issues, rather than on implausible assumptions about how individual interests in speech are automatically transformed into the public interest by an invisible hand. Neoclassical or Chicago School economists recognize market failures as the sole justification for regulation, and Laurence Tribe cites cases for the proposition that the First Amendment "right to know" carries "the implication that government, while it may not close the market, may move to correct its defects and regulate its incidental consequences."[52]

Some speech regulation undoubtedly stems from politicians seeking a particular speech outcome, while doubting their premises and power. But a market failure perspective shows that this is not the sole explanation of speech regulation that Holmes assumed it to be.[53] At the least, the political speech category should be finely tuned: made *somewhat* less overinclusive and intrusive on the core policies that motivate the creation of unprotected speech categories. The Supreme Court should open up private and public channels of communication, through *modest* attempts to equalize access to the ideas markets. This would ameliorate market failures and create a better balance—a more dynamic tension, really—between a liberty and an equality in speech. Such efforts would certainly not amount to the broad equality of opportunity or the

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In brief, failures in speech and other political markets, *see supra* note 49, enable special interest groups to dominate politics by making "bribes." The bribe may take the legally-sanitized form of a political action committee's contribution, or it may be a credible promise (or threat) to deliver votes on election day. Bribes serve to mitigate political opposition, and the expectation is that the politician will grant opportunities for economic rents in return. Brietzke, *supra* note 41, at 769. *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1359, & n.147 (1988). A racist group, for example, may bribe key politicians who will then promote or wink at racist activities. Much, if not most, of the information available for consideration in an ideas marketplace is now channelled through government. Ingber, *supra* note 3, at 37, 74-75. Much of this information is controlled through the bribery, economic rent-seeking, etc. of special interest groups, tactics which amount to erecting barriers to entering the ideas market.

52. TRIBE, *supra* note 27, §§ 12-19, at 946 ("*See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) . . . . To be sure, the Court has ordinarily rejected the notion that the speech rights of some may be sacrificed to enhance the relative access of others [citing cases] . . . ."). *See id.* at 946 (Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), supports this proposition); *id.* at 946-47 ("This strand of doctrine is most pronounced in the commercial speech field," citing cases); Baker, *supra* note 41, at 1006 (discussed in note 54, *infra*). *See also* Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (quoted in note 54, *infra*).

53. BOLLINGER, *supra* note 15, at 62 (citing Holmes).

governmental determination of speech outcomes that the speech traditionalists seem to fear.[54]

Virulently racist speech could, for example, be treated as an "unfair trade practice" or as "false and misleading advertising" in an ideas marketplace. Such antitrust-type regulations would be designed to ameliorate failures in competition that perpetuate demonstrably false ideas like R.A.V.'s, ideas which still bear the taint of governmental support under existing First Amendment interpretations.[55] Analyses under the Coase Theorem[56] suggest another justification for the

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54. *See Beauharnais*, 343 U.S. at 285 n.2 (Douglas, J., dissenting) (Through *Dennis*, 341 U.S. 494, and *Feiner*, 340 U.S. 315, the Court "engrafted the right of regulation onto the First Amendment"—"an ominous and alarming trend."); BAKER, *supra* note 7, at 85 (The key issues of 'normal politics' are—"What types of inputs are proper and how the process can be designed to respect our equality and liberty while promoting our humanity and strengthening community."); *id.* at 90 (the main merit of the "market failure theory" is its concern with reducing domination); BOLLINGER, *supra* note 15, at 107 (Constitutional law is not simply "a barrier against entry"; it can be used to help "shape the intellectual character of society."); SCHAUER, *supra* note 23, at 40 (A sovereign people can empower government to restrict speech, just like any other liberty.); Baker, *supra* note 41, at 981-82 (discussed in *supra* note 49); *id.* at 1006 (the "market failure model" recognizes affirmative claims to get needed information which is not otherwise readily available). *But see* BAKER, *supra* note 7, at 41 (such a model operates to sacrifice liberty to gain equality); Baker, *supra* note 41, at 989-90 (market failure models should be rejected, since they restrict liberty and require much state intervention). I hope that my proposals here and *infra* cure these defects, although my proposals are unlikely to please speech traditionalists.

55. *See* Strossen, *supra* note 18, at 545. *But see id.* at 560 ("If the marketplace of ideas cannot be trusted to winnow out the hateful, then there is no reason to believe that censorship will do so."). My proposals aim to minimize censorship, but there is obviously a need for caution on this constitutional tightrope.

56. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). In the ideal Coasian world of zero transaction costs, we would expect a speaker to abandon his constitutionally-protected racist speech on payment of a bribe of the appropriate size; this is, after all, the wealth-maximizing thing to do. But as we know, such a bribe is unlikely to be paid and accepted in the real world: a deeply offended individual may be willing but unable (too poor) to pay the bribe, and the (transaction) costs of organizing a group of offended people to bargain with the racist and to share the cost of the bribe may be too high (because of, *inter alia*, "free riders" within the group). The would-be bribing individual or group may be irrational or reluctant to proceed because there are few (if any) constitutional means of preventing the speaker's reversion to racist speech at some later date. The speaker might not accept the bribe because he is economically irrational (he is a True Believer in racism, immune to bribes), because (as a "holdout") he is trying to extort a bribe far in excess of the benefit of the speech to himself, and/or because he speaks for some or many others ("externalities") who cannot be contacted and bribed due to high transaction costs and/or their own irrationalities or attempts to act as holdouts.

On this basis, a legal prohibition of at least the most virulent forms of racist speech is justified because it approximates the "bargain" the parties would reach "voluntarily" under the Coase Theorem, were it not for high transaction costs (including free rider and holdout problems), irrationalities, and market failures (including externalities and the legal failure of being unable to enforce a future abstention from racist speech). The proposed regulation would be wealth maximizing for society: the gainers (offended persons) would likely gain so much that they *could* compensate the loser(s) (the speaker and perhaps his friends) and still come out ahead. (As is the

regulation of virulently racist speech, and also that *R.A.V.* was wrongly decided.

Carlos Santiago Nino offers a related philosphical perspective, one based on the notion that a constitutional liberalism like ours serves to protect a personal autonomy. The acts of officials, attempts to censor hate speech for example, are widely seen as a greater danger to this autonomy than are official omissions: failures to deal with the indignities that flow from hate speech for example. Nino deals with this facile lawyer's distinction between acts and omissions by proposing a standard akin to John Rawls' "difference principle:"[57] "one may restrain the autonomy of some if this results in increasing the autonomy of people who are less autonomous than those whose autonomy is being diminished."[58] In other words, we can restrain the autonomy of those who would utter virulently racist speech, to benefit people who are rendered "less autonomous" by hatred and discrimination in the wider society. Such a maximization of autonomy is one major goal of the marketplace of ideas analogy. Nino's standard would also help to implement another liberal maxim—Kant's second formulation of the categorical imperative—by treating less autonomous people as ends (by, e.g., promoting their dignity) rather than as the means for venting racist spleens.[59]

V. CONCLUSION

Milton's world is not (forgive me) "Wayne's World": collectively, we are now better educated, less religious or at least less reverent, more democratic, and somewhat more egalitarian in the distribution of wealth and power. Organizational and technological changes have raised many concerns that Milton never considered, while laying to rest some of his worst fears. For example,

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case with most other wealth-maximizing changes in the law, this compensation need not actually be paid.) Over time, this legal change would likely make it more difficult (costly) to organize racists and easier (cheaper) to organize their opponents, and this would erode support for politicians who advocate or wink at racism. *See generally* BAKER, *supra* note 7, at 83; Brietzke, *supra* note 41, at 769. On this analysis, *R.A.V.* would appear to be wrongly decided because it protects rather than regulates virulently racist speech.

57. JOHN RAWLS', POLITICAL LIBERALISM 6-7 (1993) ("[T]he social and economic inequalities attached to offices and positions are to be adjusted so that, whatever the level of those inequalities . . . , they are to the greatest benefit of the least advantaged members of society.").

58. CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 61 (1996). *See id.* at 49; *id.* at 56 (tendency under liberalism to protect a negative and formal liberty, at the expense of claims to equality and social justice).

59. *See id.* at 47 (The value of autonomy is reflected in the moral discourse of liberalism—achieving cooperation through a consensus based on reasons rather than authority or coercion.); *id.* at 62 (Kant's treating of people as ends rather than means is a liberal canon of "nonexploitation"); *id.* at 65 (autonomy harmed by omissions as well as acts, especially by officials who, e.g., spend money for defense rather than for public housing, in an interpersonal morality of enormous scope).

it is now unlikely that a "good Booke" (which now seems to be one that many will pay to read) could be erased from civilization. But seeking to better Milton, we frequently wind up doing worse: must we "watch—and even applaud—when cultural and constitutional tools designed to plow the social ground for planting seeds of tolerance and diversity instead are beaten into swords by bigots and wielded to injure or destroy the fragile hopes and rights of historically despised minorities?"[60] The answer is "yes" for the Court that decided *R.A.V.*, but few outcomes remain stable for long in our First Amendment jurisprudence.

This jurisprudence embodies many of our deepest collective beliefs—or at least what five justices at any given time believe we believe—and we and the justices constantly pine for something which is intellectually and politically "better" from our speech theory. We may have lost some of our historic fear that all speech regulation inevitably frustrates the will of the people, and perhaps we realize that this will of the "people" often gets badly manipulated through an ostensibly free speech. The symbolic and educative functions of law could now be used a little more actively, to help create the kind of society we can and should become.[61] Absent a reformulation, the marketplace of ideas analogy serves to celebrate failures of legal imagination. Perhaps it is the firm expectation that we can and should do better that is *Areopagitica*'s main contribution to getting our minds clear for the future.[62]

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60. Gale, *supra* note 50, at 48. *See* BOLLINGER, *supra* note 15, at 97 (Under the "straightforward calculation of expediency" characteristic of the "fortress model" of free speech, "the legal problem in the end appeared to come down to a simple matter of the need to exchange protection of bad speech for greater security for good speech.").

61. SCHAUER, *supra* note 23, at 84. *See* BAKER, *supra* note 7, at 205:

> The very purpose of legal regulation, of political choice, is often to consider which values we want to create and which we want to discourage—that is, to consider what type of people do we want to be. The market's incapacity to embody this self-definitional dialogue makes a public or political sphere essential.

62. *See* Laski, *supra* note 3, at 169 (how could Milton, the angry foe of the English Church, "become the protagonist of a secular humanism the principles of which we have not yet ventured to apply after three centuries of further experience"); Read, *supra* note 21, at 122 ("the dust has settled on ten thousand tracts" that originally provoked *Areopagitica*, but every new tyranny brings it to life again); *supra* note 2 and accompanying text. *But see also* de Madariaga, *supra* note 19, at 59 (Milton "failed to live up to our standards of what an apostle of freedom of thought should be.").