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The Violence of Free Speech and Press Metaphors

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THE VIOLENCE OF FREE SPEECH AND PRESS METAPHORS

ERIN C. CARROLL*

ABSTRACT

Today, our free speech marketplace is often overwhelming, confusing, and even dangerous. Threats, misdirection, and lies abound. Online firestorms lead to offline violence. This Article argues that the way we conceptualize free speech and the free press are partly to blame: our metaphors are hurting us.

The primary metaphor courts have used for a century to describe free speech—the marketplace of ideas—has been linked to violence since its inception. Originating in a case about espionage and revolution, in a dissent written by Oliver Wendell Holmes, a thrice-injured Civil War veteran, the marketplace has been described as a space where competition and force order the rungs on a ladder climbing toward truth. Power and violence are at home in the speech marketplace. Unsurprisingly, these same characteristics animate the defining metaphor for a key free speech institution: the press is a “watchdog.” In First Amendment law, the press’s role is to attack government for its misdeeds.

As linguists have shown, metaphors are not simply rhetorical icing. They shape human understanding and behavior—sometimes in dangerous ways. The marketplace and watchdog metaphors have this power, and with it they have helped to create a speech environment where violence can feel routine.

No easy fix exists for the violence in our public sphere. But new metaphors could help us reconceptualize the ways we communicate. This Article explains how.

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But one has to wonder, what it is about a culture that can only value itself through the lexicon of death?...

What happens to our imagination when we can only celebrate ourselves through vanquishing?...

And so I think, what happens if we alter our language? Where would our future be? Where will we grow towards, if we start to think differently about how the world is?

—Ocean Vuong¹

INTRODUCTION

The marketplace of ideas metaphor has shaped American law and culture's conception of free speech and the free press for a century. Few legal metaphors have been as powerful.² Originating in a case about espionage and revolution, in a dissent written by Oliver Wendell Holmes, a thrice-injured Civil War veteran, the marketplace is a space where competition and force are means of ordering the rungs on a ladder climbing toward truth.³ Power, competition, and even violence are all at home in the free speech marketplace.

These same characteristics animate a preeminent free speech institution: the press. The press is a watchdog. The Supreme Court has interpreted the First Amendment to say that the press's primary role is to attack government for its misdeeds.⁴ Journalists view this role as a professional calling.⁵

¹ Interview by Krista Tippett with Ocean Vuong, *A Life Worthy of Our Breath*, ON BEING (April 30, 2020), <https://onbeing.org/programs/ocean-vuong-a-life-worthy-of-our-breath-2022/>.

² See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L. J. 821, 825 (2008); HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 49 (1992).

³ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 44 (2021).

⁴ See Ronnell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALABAMA L. REV. 253, 258 (2014) (noting that of the positive roles the Supreme Court assigns to the press, the Court “overwhelmingly” refers to the press “as a watchdog”).

⁵ See BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 201 (4th ed. 2021).

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But while these libertarian metaphors of the marketplace and watchdog indicate that competition combined with power is the precursor to truth's triumph, combat is not the only path to truth. Relatedly, as these metaphors are entangled with theories of deliberative democracy, competing and attacking are not the only way to govern.

Today, our free speech marketplace is rife with threats, misdirection, and lies. Meanwhile, the press is trying to reimagine itself as it faces existential crises of trust, economics, and purpose. There is no easy fix. But part of our effort should be examining the violent rhetoric we use to describe free speech and the free press.⁶

As cognitive linguists have shown, metaphors are not simply “harmless stylistic devices” or “oratorical ornaments.”⁷ Rather, metaphors shape human understanding and behavior.⁸ Through metaphor, time *becomes* money, a problem *becomes* a puzzle, and argument *becomes* war.⁹ In this same way, free speech has become a competitive marketplace and the press has become a watchdog. Speech and news are combat; our news pages, news feeds, and cable TV shows are places where violence is too often viewed as unexceptional. How can metaphor—the tool we use to conceptualize virtually everything—help us reimagine free speech as something other than a battle?

As a starting point, we could look to science. Developments in biology and physics offer new metaphorical possibilities. The upshot of these developments is that truth need not be rooted solely in competition and bloodshed, but is also grounded in collaboration and synthesis.¹⁰ Supplementing our speech and press metaphors with ones based in these qualities would be powerful. It could shift the way we think about truth, information-gathering, community, and governing. It could aid in imagining a press that serves a richer array of roles benefitting citizens and democracy.

The legal literature on the marketplace of ideas metaphor is robust.¹¹ This Article seeks to advance it in four ways. First, the focus of its critique is new. While past criticism of the marketplace metaphor has tended to center on economics and the descriptive inaccuracies of the metaphor, this Article's critique is grounded in linguistics and rhetoric—specifically the danger of having a metaphor that is foundational not only to speech but to politics be so heavily invested in competition and violence. This Article's thrust is also not on descriptive failings, but on the prospective and normative power of metaphor. It seeks to build on the work of feminist and critical race scholars who have established that power, hierarchy, and violence contaminate our

⁶ See Whitney Phillips, *The Toxins We Carry*, COLUM. JOURNALISM REV. (Fall 2019), https://www.cjr.org/special_report/truth-pollution-disinformation.php (describing information pollution); BARBIE ZELIZER, PABLO J. BOCZKOWSKI, & C.W. ANDERSON, *THE JOURNALISM MANIFESTO 2* (2022) (“Journalism needs to revisit its engagement with society, rethink its priorities, rekindle relevancies gone dormant and question its default settings. If it does not, its future is surely at risk.”).

⁷ See Haig Bosmajian, *Dehumanizing People and Euphemizing War*, CHRISTIAN CENTURY (Dec. 5, 1984), <https://web.archive.org/web/20070823112602/http://www.religion-online.org/showarticle.asp?title=1442>.

⁸ GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5, 6, 8, 244 (1980). *Id.* at 6, 8, 244.

⁹ See *id.* at 4, 7-9, 145.

¹⁰ See PAUL MURDIN, *THE UNIVERSE: A BIOGRAPHY* 147 (2022) (describing collaborative work in astronomy).

¹¹ Joseph Blocher's *Institutions in the Marketplace of Ideas* and Morgan Weiland's *First Amendment Metaphors: The Death of the 'Marketplace of Ideas' and the Rise of the Post-Truth 'Free-Flow of Information* provide a thorough overview of scholarship in this area. See Blocher, *supra* note 2, at 823-29; Morgan N. 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. OF L. & HUMANS. 366, 368 n.2 (2022).

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speech marketplace.¹² It also ties the linguistic critique of the marketplace metaphor to an identical critique of a key press metaphor, the watchdog. Because both of these metaphors are characterized by competition and violence, they reinforce one another, making it even more important that we understand and interrogate how they function.

Second, this Article argues that our speech environment need not (and likely should not) be defined by a single metaphor. Linguists have shown that concepts and objects—especially when they are complex—are often understood via multiple, even seemingly contradictory metaphors.¹³ Making space for metaphors beyond the marketplace would lead to a more nuanced understanding of our free speech arena and its institutions. Supplementing the marketplace metaphor, rather than banishing it, would also protect the vital processes that are deeply associated with the speech marketplace—the search for truth and democratic deliberation. With more nuanced metaphors, we might more effectively theorize or even legislate in the area of speech—a landscape where longstanding rules offer little help for solving current dilemmas.¹⁴

Third, this Article ventures beyond critique and suggests where we might look for other metaphorical possibilities.¹⁵ Recent developments in biology and physics provide fodder.¹⁶ Although not claiming to have uncovered a metaphor as sticky as the marketplace, this Article offers up metaphors we might adopt. In keeping with this Article’s theme of cooperation (rather than competition) as a path to knowledge, I hope that others will choose to build upon and improve these ideas.

Finally, the Article test drives proposed metaphors to investigate how we might envision the press, a key First Amendment institution, as more than a watchdog protecting citizens, but also a system dedicated to collaborative knowledge and community-building. It shows how the use of new metaphors might provide a richer understanding of the press function in three types of cases for which journalists are bracing—a revisiting of the *New York Times v. Sullivan*¹⁷ defamation standard, a civil or criminal case against a journalist for data scraping under the Computer Fraud and Abuse Act, and the prosecution of a journalist under the Espionage Act.

I. THE MARKETPLACE OF IDEAS METAPHOR—A CENTURY AND COUNTING

The dominance of the marketplace metaphor in the realm of American free speech doctrine and culture likely cannot be overstated. The marketplace occupies a huge part of the

¹² See MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, & KIMBERLÈ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 1 (1993).

¹³ See LAKOFF & JOHNSON, *supra* note 8, at 221.

¹⁴ See, e.g., Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 *YALE L.J. F.* 427, 427, 453 (Nov. 16, 2021), https://www.yalelawjournal.org/pdf/F7.FranksFinalDraftWEB_z23irc84.pdf; Tim Wu, *Is the First Amendment Obsolete?*, 117 *MICH. L. REV.* 547, 548 (2018).

¹⁵ An insightful article by Morgan N. Weiland argues that the free flow of information metaphor has “flown beneath the scholarly radar ... becom[ing] as important today as the marketplace of ideas” and that the metaphor has its own deleterious effects. She concludes “with a call to judges, lawyers, and scholars to craft a better First Amendment metaphor that we can live and govern by.” Weiland, *supra* note 11, at 410. At least two authors have proposed alternative metaphors, but the metaphors have not yet garnered significant debate or traction. See Greg Lukianoff, *Coronavirus and the Failure of the ‘Marketplace of Ideas,’* *FIRE* (March 13, 2020), <https://www.thefire.org/coronavirus-and-the-failure-of-the-marketplace-of-ideas/> (proposing the “lab in the looking glass”); Jared Schroeder, *Toward a Discursive Marketplace of Ideas: Reimagining the Marketplace Metaphor in the Era of Social Media, Fake News, and Artificial Intelligence*, 52 *FIRST AMEND. STUDIES* 38, 40 (2016) (proposing the “discursive marketplace”).

¹⁶ See THOMAS HEALY, *THE GREAT DISSENT* 34 (2013).

¹⁷ 376 U.S. 254 (1964).

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American imagination about what free speech can and should be. This is partly by design; judges and scholars have invoked the metaphor again and again both to praise and critique it. Repetition and attention have strengthened it. But the metaphor also has a certain innate power. Simply by virtue of being a metaphor, the marketplace shapes our conception of free speech without our even being fully conscious of it.

The Section that follows begins by establishing just how firm a grip the marketplace has on Americans' collective understanding of free speech. It then describes the way in which metaphors sculpt human understanding and behavior. Finally, as a foundation for this Article's critique of the marketplace metaphor, it briefly summarizes the extensive critiques scholars have levelled at it.

A. *The Birth of the Marketplace*

The words that reign as the most significant in the United States Reports on the topic of free speech first appear in a dissent. In objecting to the majority's Espionage Act conviction of Charles Abrams, a socialist who urged protest of the World War I draft, Supreme Court Justice Oliver Wendell Holmes wrote:

[M]en ... may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹⁸

And so, against the backdrop of a war, the marketplace of ideas was born.

The metaphor has come to stand not only for the theory that truth is the end-goal of a robust competition between ideas,¹⁹ but that through combat, high-quality information will prevail in the marketplace and low-value or false ideas will perish. Per the theory, the freer the marketplace is from government interference and the more vigorous the competition, the better and truer the triumphant information.²⁰

The metaphor's power over how we understand free speech both legally and culturally is pervasive.²¹ First Amendment scholar Vincent Blasi writes that Holmes's dissent "may be the single most influential judicial opinion ever written on that subject" of free speech.²² And, in the same vein, a student note in the *Harvard Law Review* said, "It is almost impossible to overstate the importance of Justice Holmes's dissent in shaping American law and society."²³

¹⁸ *Abrams*, 250 U.S. at 630.

¹⁹ See Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 176 (2015) ("The key notion in Holmes's metaphor is, therefore, competition.").

²⁰ Blocher, *supra* note 2, at 824.

²¹ *Id.* at 825 ("[The metaphor's] influence has been both descriptive and normative, dominating the explanation of and the justification for free speech in the United States.").

²² Vincent A. Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1343 (1997).

²³ Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1314 (2005); see William P. Marshall, *In Defense of the Search for Truth as First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (noting that the metaphor has been "virtually canonized").

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Like a river etching a canyon, the impact of the marketplace of ideas metaphor has deepened over time. But even in its infancy, its power as a linguistic reference and a rhetorical tool was evident. For example, just a few years after *Abrams*, the American Civil Liberties Union referenced the marketplace metaphor in its brief in *Tennessee v. Scopes*.²⁴ On appeal of the guilty verdict against its client for teaching evolution in a public school, the ACLU sweepingly argued that “the *theory of our Constitution* is that in the competition of ideas, truth will prevail.”²⁵ Decades later, commitment to the metaphor had become more entrenched. In 1960, philosopher, free speech advocate, and ACLU board member Alexander Meiklejohn wrote that establishing truth through the marketplace “is not merely the ‘best’ test. There is no other.”²⁶

Over time, devotion to the metaphor went far beyond card-carrying ACLU members. By the 1960s, the Supreme Court was using the phrase in majority opinions and indicating the marketplace theory was *the* driver of the First Amendment. In the 1969 opinion *Red Lion Broadcasting Co. v. FCC*,²⁷ Justice Byron White wrote for the Court, “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”²⁸ And by the 1970s, Ronald Coase, an early and influential figure in the law and economics movement, similarly found the metaphor so pervasive that he described the marketplace of ideas as “[t]he rationale of the First Amendment.”²⁹

Even as our free expression environment has changed dramatically in the last several decades, the marketplace remains the foremost metaphor we have to think about speech.³⁰ Our national belief that “risky” speech can be neutralized by clashing with less-risky speech is dogma, according to feminist legal scholar Catherine MacKinnon.³¹ “Americans are taught this view by about the fourth grade and continue to absorb it by osmosis from everything around them for the rest of their lives,” writes MacKinnon.³² Although, as will be described, legal scholars have strongly critiqued the metaphor, its power does not seem significantly dulled. It may, in fact, still be peaking. As legal scholar Thomas Healy writes in *The Great Dissent*, Holmes’s marketplace of ideas has “worked [its] way into our collective consciousness, becoming part of our language, our view of the world, and our identity as a nation.”³³ Felix Frankfurter had predicted this. He wrote in 1927 that Holmes’s “dissenting opinion in the *Abrams* case will live as long as English prose has the power to thrill.”³⁴

²⁴ See *State of Tennessee v. Scopes*, ACLU, <https://www.aclu.org/other/state-tennessee-v-scopes> (last visited Dec. 2, 2022).

²⁵ See LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* 166 (2016) (emphasis added).

²⁶ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73 (1960).

²⁷ 395 U.S. 367 (1969).

²⁸ *Id.* at 390. This language was quoted by *McConnell v. FEC*, 540 U.S. 93, 265 (Thomas, J., concurring in part).

²⁹ R.H. Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1, 27 (1977).

³⁰ See Alexander Tsesis, *Deliberative Democracy, Truth, and Holmesian Social Darwinism*, 72 SMU L. REV. 495, 495 (2019) (“Justice Oliver Wendell Holmes Jr.’s ‘marketplace of ideas’ analogy continues to deeply influence First Amendment doctrine.”).

³¹ CATHERINE A. MACKINNON, *ONLY WORDS* 76 (1993); Susan H. Williams, *Feminist Theory and Freedom of Speech*, *Free Speech Theory*, 84 INDIANA L.J. 999, 1000 (2009).

³² MACKINNON, *supra* note 31, at 76.

³³ HEALY, *supra* note 16, at 250.

³⁴ Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 138 (1927).

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B. A Primer on Metaphorical Power

Multiple forces have contributed to the dominance of the marketplace metaphor. One is the mechanics of the common law system. Once Holmes introduced it in 1919, it was perpetuated via *stare decisis*. Its use waxed in the 1960s and even though it has ebbed and flowed from decade to decade, its popularity remains strong. Today, a search of Supreme Court opinions shows that more than eighty contain the phrase “marketplace of ideas” or a close variation.³⁵ The most recent of these was in 2022.³⁶

Yet, as powerful as the doctrine is, linguistics may be at least as responsible for the longevity and power of the marketplace metaphor. Vincent Blasi argues, “To become a vital part of the living Constitution” a value (like free speech) must “succeed at the level of rhetoric; it must have its great quote.”³⁷ This does not mean it need only be clever, although cleverness helps. With respect to one rhetorical device specifically—metaphor—its power is also immense when it resonates with human belief and experience.³⁸ At its most basic, metaphor is a way of “understanding and experiencing one kind of thing in terms of another.”³⁹ But when a metaphor truly resonates with our understanding of the world around us, we adopt it and make it a foundation for conceptual systems.⁴⁰ Expressions and word choices then populate those systems, and the systems shape how we think and behave.⁴¹

Some examples: life is often conceptualized as a journey, and the expressions used to describe life manifest this idea. (“After leaving my job, I was at a *fork in the road*.” “I never guessed my life would *take this path*.”). Likewise, we conceptualize knowledge as light.⁴² (“The *lightbulbs* went off when she figured it out.” “The book was *enlightening*.” “He’s not that *bright*—a real *dimwit*.”). Or, time is compared to money. (“We *wasted* hours on that.” “She’s *budgeted* a week to complete the project.”).⁴³

As our language becomes populated with words and phrases consonant with the metaphor, this not only shapes our thinking but our behavior. Because time is money, we start to experience it as a resource.⁴⁴ We strive to preserve it; we become frustrated when it is squandered. It is not an exaggeration to say that “[w]hat we do every day is very much a matter of metaphor,” according to cognitive linguists George Lakoff and Mark Johnson.⁴⁵

As with metaphors governing life, knowledge, and light, metaphors governing speech have grown linguistic offshoots: “We traded *barbs*.” “Her point *won* out.” “I *lost* that argument.” “She *shot down* all of his explanations.” Although, as will be discussed, the marketplace

³⁵ Based on the following Westlaw search conducted December 2, 2022 with a U.S. Supreme Court cases database: market! w/2 ideas. The search yielded eighty-four opinions. Seemingly the only false positive in the batch was *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which contained “marketing ideas.” Of the eighty-three remaining, six were issued in the 1960s, fifteen in the 1970s, twenty-one in the 1980s, seventeen in the 1990s, eleven in the 2000s, nine in the 2010s, and four between 2020 and 2022.

³⁶ See *City of Austin v. Regan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1479 (2022).

³⁷ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 523 (1977).

³⁸ LAKOFF & JOHNSON, *supra* note 8, at 145.

³⁹ *Id.* at 5.

⁴⁰ *Id.* (“The metaphor is not merely the words we use—it is our very concept [of the thing].”).

⁴¹ *Id.* at 3.

⁴² See Whitney Phillips, *Light Disinfects*, 4 GEORGETOWN L. TECH. REV. 379, 381-82 (2020).

⁴³ See LAKOFF & JOHNSON, *supra* note 8, at 7-9.

⁴⁴ See *id.* at 8.

⁴⁵ *Id.* at 3.

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metaphor is not the original source of a link between speech and violence, it has fortified that link.

Given the power of metaphor to govern behavior, the impact of new and shifting metaphors is significant. Linguists Lakoff and Johnson argue that “[m]uch of cultural change arises from the introduction of new metaphorical concepts and the loss of old ones.” Thus, metaphor holds tremendous promise (or pitfalls) for molding the future.⁴⁶ When a metaphor is thick—by which I mean that it resonates with human experience and has spawned a network of language consistent with it—the metaphor may become self-fulfilling.⁴⁷ For example, if we experience speech as a marketplace, and we populate our language about expression with terms laden with conflict and power, then the strength (literal and figurative) of the marketplace metaphor is reified.

Also, as effectively as metaphor can create meaning and spawn action, it can obstruct these things.⁴⁸ By leading us to conceptualize something like speech in one way, the metaphor is necessarily prompting us *not* to conceptualize it as something else.⁴⁹ So, for example, by equating freedom of expression to a marketplace, we are not equating it to a forest, a galaxy, an orchestra, a classroom, or a dance. Metaphor opens up some possibilities and seals off others. As Lakoff and Johnson explain, by understanding argument as a battle, “we are preoccupied with the battle aspects, [and] we often lose sight of the cooperative aspects.”⁵⁰

C. Critiques of the Marketplace

The marketplace metaphor has been challenged extensively. Some might argue exhaustively. Those critiques tend to fall into four buckets. They fault the metaphor for failing to capture accurately: 1) how markets function; 2) how humans function; 3) how truth functions; or 4) how power functions.

In the first bucket, legal scholars have argued that the metaphor rests on a flawed understanding of how markets operate.⁵¹ As just one example of this critique, Thomas W. Joo has argued that the marketplace metaphor’s central contention—that “speech should be ‘free’ because markets are ‘free’ and because markets produce ‘truth’”—is not based “on a realistic description of what markets do or how they are actually regulated.”⁵² Instead, the theory of the marketplace of ideas is based on “an unsupported normative assertion in favor of deregulation in both of those contexts,” meaning both speech and economic markets, Joo argues.⁵³

In a second and related bucket, scholars have critiqued the metaphor’s assumptions about human behavior.⁵⁴ These scholars argue that speakers and listeners are not like actual buyers and

⁴⁶ *Id.* at 139-140 (describing the “network of entailments” that accompanies a metaphor and the “reverberation[s]” of those entailments).

⁴⁷ *Id.* at 156.

⁴⁸ *Id.* at 13.

⁴⁹ See MERLIN SHELDRAKE, *ENTANGLED LIFE: HOW FUNGI MAKE OUR WORLDS, CHANGE OUR MINDS, AND SHAPE OUR FUTURES* 173 (2020); LAKOFF & JOHNSON, *supra* note 8, at 13.

⁵⁰ LAKOFF & JOHNSON, *supra* note 8, at 10.

⁵¹ See, e.g., Thomas W. Joo, *The Worst Test of Truth: The “Marketplace of Ideas” as Faulty Metaphor*, 89 TULANE L. REV. 383, 386-87 (2014); Blocher, *supra* note 2, at 831.

⁵² Joo, *supra* note 51, at 386-87.

⁵³ *Id.* at 387.

⁵⁴ See RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. UNIV. L. REV. 419, 420 (2020); Lyrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*,

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sellers. For example, Paul Brietzke wrote that the marketplace of ideas seems to assume a “dehumanized, desocialized, and often sexist ‘economic man’ [or ‘speech man’] supposedly go[ing] through life as if it were one long series of analogies to isolated transactions on the New York Stock Exchange.”⁵⁵

Critical race scholars have similarly argued that the marketplace’s emphasis on robust speech as a path to truth misunderstands human nature and interactions. Richard Delgado and Jean Stefancic write that an “empathic fallacy” underlies the marketplace: “The notion that more speech, more talking, more preaching, and more lecturing can counter [a] system of oppression is appealing, lofty, romantic, and wrong.”⁵⁶ In most cases, we cannot, “think, talk, read, and write our way out of bigotry and narrow-mindedness, out of our limitations of experience and perspective,” they add.⁵⁷ Media law scholar C. Edwin Baker made a related argument when he wrote that “mere discussion” was an inadequate mechanism for arriving at truth given differences in people’s social experiences and understandings of the world.⁵⁸

Third, scholars have questioned the usefulness of any truth that a marketplace would surface. As feminist legal scholar Susan H. Williams notes, the truth heralded by the marketplace is a Cartesian one, which is an “objective,” universally valid, and acontextual truth.⁵⁹ Even if such a truth exists, it is a flimsy substitute for one that is more nuanced and culturally situated, especially if we are looking to this truth as a basis for opinion formation in a democracy.⁶⁰

Finally, scholars have argued that the marketplace metaphor fails to account for real-world power differentials between speakers. The marketplace tends to normalize existing power hierarchies rather than upend them. As Delgado and Stefancic write, “Elite groups use the supposed existence of a marketplace of ideas to justify their own superior position.”⁶¹ Weaving together the critiques based on truth and power, Williams writes, “In our philosophical tradition, truth has too often been used to assuage a longing for certainty, and certainty has, in turn, been purchased at the price of hierarchy.”⁶² Given the market’s inattentiveness to power, it is impotent to truly provide for free speech.⁶³ As MacKinnon writes, “Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood.”⁶⁴

In this way, the critique goes, the marketplace can lead to results that are injurious to all but the most elite. This might be because those at the bottom of the hierarchy are forced to endure violent or hateful speech.⁶⁵ It might be because their speech is censored; it is not allowed

2010 U. ILL. L. REV. 799, 802 (2010); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 UNIV. COLO. L. REV. 649, 649 (2006).

⁵⁵ Paul Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962-63 (1997).

⁵⁶ Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills*, 77 CORNELL L. REV. 1258, 1288 (1992).

⁵⁷ See *id.* at 1261.

⁵⁸ C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1992). And although this critique is leveled at market rhetoric generally, technology and law scholar Julie E. Cohen’s contends that market talk seems to sidestep humanity altogether. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF 5 (2012). She writes, “The environment within which artistic and intellectual culture emerges and evolves isn’t a market, though it contains markets. It is a social entity, generated by patterns of human and institutional interaction.” *Id.*

⁵⁹ Williams, *supra* note 31, at 1000-1001.

⁶⁰ See *id.* at 1007.

⁶¹ See Delgado & Stefancic, *supra* note 56, at 1286.

⁶² Williams, *supra* note 31, at 1013.

⁶³ See MACKINNON, *supra* note 31, at 77-78.

⁶⁴ *Id.* at 78.

⁶⁵ *Id.* at 71.

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a hearing on equal footing. Threatening and violent speech might lead to self-censorship—a “chilling effect.” These harms have often been understood as acceptable collateral damage of the marketplace.⁶⁶ Protection of violent or hateful speech tends to trump other concerns and values.⁶⁷

These critiques, especially collectively, are significant. But regardless, the marketplace metaphor persists. Courts still rely on it. And numerous scholars argue that it is capacious and flexible enough not only to fit our current free speech environment but to serve as a model of the speech environment to which we should aspire.⁶⁸ This Article makes a different argument.

II. THE VIOLENT MARKETPLACE & WATCHDOG: NEW CRITIQUES

The marketplace metaphor provides neither a complete description of our existing speech environment nor a compelling vision for what our speech environment should be. This is because the metaphor is dangerous and limiting in its insistence on competition and violence in the attainment of truth. Thanks in part to the marketplace metaphor, free speech doctrine has created a speech ecology in which combat is often viewed as a necessity, even a social good. Given the amount of extreme, threatening, and hateful speech circulating in our expressive environment, given the thin line between violent speech and action, given the metaphor’s relationship to democratic decision making, and given autocracy’s creep, a close examination of the violent underpinnings of the market is important.⁶⁹

This Section seeks to show how the metaphor is rooted not just in competition, which can result in loss, but in violence, which threatens a more profound injury. It also seeks to show how violence has sown violence. It begins with Oliver Wendell Holmes and his preoccupation with violence. Although I do not argue that Holmes intended when he wrote in his *Abrams* dissent about the “free trade in ideas” and the “competition of the market” to foment a speech environment rife with violence (he may have even intended the opposite), his rhetoric helped plant that seed.

This Section then attempts to detail some of the metaphor’s impact. It describes how the competition and violence used to describe the free speech marketplace became threaded through subsequent free speech cases. Then, to provide another concrete example of the metaphor’s impact, it focuses on how the marketplace metaphor has shaped our understanding of a key free speech institution, the press. If there is a single metaphor that defines the press—and especially its democratic role—it is the watchdog. It is no coincidence that this metaphor, like the marketplace, is characterized by hierarchy, competition, and violence. In this way, the metaphors are mutually reinforcing.

⁶⁶ See MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 111 (2019) (critiquing the marketplace metaphor and the harm it inflicts).

⁶⁷ MACKINNON, *supra* note 31, at 72 (“[T]he power of those who have speech has become more and more exclusive, coercive, and violent as it has become more and more legally protected.”).

⁶⁸ See, e.g., Blocher, *supra* note 2, at 828 (arguing that a theory of “New Institutional Economics” “rehabilitates Holmes’s doctrine-changing metaphor”); Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 NOTRE DAME L.R. 1725, 1725 (2019) (arguing that the Supreme Court should have more often adopted the marketplace of ideas theory); Weiland, *supra* note 11, at 369-70 (noting that “scholars continue to operate within the metaphor’s logic”).

⁶⁹ No single, agreed-upon definition of violence exists. See, e.g., Trudy Govier, *Violence, Nonviolence, and Definitions: A Dilemma for Peace Studies*, 40 PEACE RSCH. 61, 61 (2008) (describing the difficulty and importance of defining violence and nonviolence for the discipline of peace studies). For purposes of this Article, I understand violence to encompass both physical force that is intended to harm as well as threatening communications intended to harm.

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A. Oliver Wendell Holmes: Perpetual Soldier

Both the judge credited with sparking the marketplace metaphor and the case in which he sparked it were shaped by violence. Supreme Court Justice Oliver Wendell Holmes did not use the words “marketplace of ideas” in his canonical dissent in *Abrams v. United States*. That phrase would not be used in a Supreme Court opinion until decades later. But Holmes’s wording was close enough for him to be credited as the metaphor’s author. He described a “free trade of ideas” and indicated “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁷⁰

Lauded as one of the greatest jurists to ever grace a courtroom, Holmes has been described by some as “courtly and gregarious.” But he has also been described as “intellectually combative,” elitist, egotistical, and cynical.⁷¹ He was also, at times, ruthlessly cold when it came to others’ beating hearts.⁷²

Holmes was born a Boston Brahmin, son of a prominent doctor and essayist.⁷³ He surprised some when he enlisted in the Union Army during the Civil War. (He left Harvard without even telling the Registrar.)⁷⁴ But, according to constitutional law scholar Jamal Greene, his service was not born of a deep desire to emancipate enslaved people in the South. As Greene writes, Holmes was “strangely ambivalent towards abolition.”⁷⁵ Holmes himself said he was driven by an “abstract conviction.”⁷⁶

Holmes survived the war, but not without a good bit of luck. For the rest of his life, his body most certainly bore the scars of his service. He was seriously wounded three times.⁷⁷ In 1861, at Ball’s Bluff in Leesburg, Virginia, enemy fire hit Holmes in the stomach and chest, bouncing off a rib and passing through his back.⁷⁸ The next year, at the Battle of Antietam, yet another bullet passed through him—this time traversing his neck and just missing his windpipe.⁷⁹ Not long after, Confederate sharpshooters shattered Holmes’s heel when he was outside of Fredericksburg.⁸⁰ This injury ended Holmes’s military career, and in 1864, he enrolled in Harvard Law School.⁸¹ In describing his decision to go to law school, Holmes said his father had “put on the screws” for him to go.⁸²

Beyond marking his body, Holmes’s service stuck with him indelibly. Holmes’s friend Walter Lippmann described Holmes as “the gay soldier who can talk of Falstaff and eternity in

⁷⁰ 250 U.S. at 360.

⁷¹ See GREENE, *supra* note 3, at 45; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 199-200 (2004).

⁷² See *Buck v. Bell*, 274 U.S. 200, 207-208 (1927) (condoning forced sterilization saying that “[t]here generations of imbeciles are enough”).

⁷³ See GREENE, *supra* note 3, at 44-45; STONE, *supra* note 71, at 199; HEALY, *supra* note 16, at 1.

⁷⁴ GREENE, *supra* note 3, at 46.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 44.

⁷⁸ *Id.* at 46.

⁷⁹ *Id.*

⁸⁰ BRAD SNYDER, THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM 312 (2017).

⁸¹ *Oliver Wendell Holmes, Jr.: Chief Justice Memorial*, MASS.GOV, <https://www.mass.gov/person/oliver-wendell-holmes-jr> (last visited Dec. 2, 2022).

⁸² *Contributor Oliver Wendell Holmes Jr.*, LAPHAM’S QUARTERLY, <https://www.laphamsquarterly.org/contributors/holmes-jr> (last visited Dec. 2, 2022).

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one breath” and called Holmes’s very presence “an incitement to high risks.”⁸³ But a more somber assessment came from one of Holmes’s former clerks who said: “The judge was a soldier...and he always talked in terms of a soldier.”⁸⁴ And perhaps due to the benefit of temporal distance, Vincent Blasi wrote plainly: “Holmes was fascinated by lethal force.”⁸⁵

A remarkable amount of Holmes’s writing and speeches invoke war and violence.⁸⁶ For example, in *The Common Law*, he asks in what profession other than law “does one plunge so deep in the stream of life—so share its passions, its battles, its despairs, its triumphs?”⁸⁷ In *Natural Law*, Holmes argues that men would “fight and die” for their preferences “if important.”⁸⁸ As an example, he says, “Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.” And although, of course, an exaggeration, it is notable that he chose a disagreement over a beverage as grounds for violence. But again, it seems that for Holmes, violence was the water in which we swim. As he was fond of saying, “Every society rests on the death of men.”⁸⁹

Weapons of war literally loomed over Holmes’s work. Above the fireplace in his study, hung two swords—one used by his great-grandfather in the French and Indian War and the other carried by Holmes in the Civil War.⁹⁰ Because the Supreme Court building had yet to be built, this study was not simply a private space.⁹¹ It was where Holmes worked and entertained.⁹² Hanging nearby, in a closet, were Holmes’s Civil War uniforms, stained with his own blood.⁹³

Holmes’s intellectual influences were vast. Some of the more prominent thinkers whom Holmes admired viewed life as a competition and were not squeamish about life being snuffed out in the crush of that competition. For example, Holmes was a devotee of Thomas Malthus.⁹⁴ Malthus believed that population growth would interfere with human subsistence. For Malthus, violence was a “positive check” on such growth and would allow for human survival.⁹⁵

⁸³ STONE, *supra* note 71, at 199.

⁸⁴ SNYDER, *supra* note 80, at 105.

⁸⁵ Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 25 (2004).

⁸⁶ See, e.g., OLIVER WENDELL HOLMES, THE HOLMES READER 107 (Julius J. Marke, ed. 1955) (stating in an 1895 speech to the Harvard Law School Association, “lately my thoughts have been turned to, ‘old, unhappy, far-off things, And battles long ago’”); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918-19) (“I used to say, when I was young, that truth was the majority vote of that nation that could lick all others.”); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 43-44 (1881),

https://www.google.com/books/edition/The_Common_Law/xXouAAAAIAAJ?hl=en&gbpv=1&bsq=the%20comm on%20law (“No society has ever admitted it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its arm, it seizes them, and marches them, with bayonets in their rear, to death ... If a man is on a plank in the deep sea which will float only one, and a stranger lays hold of it, he will thrust him of if he can. When the state finds itself in a similar position, it does the same thing.”).

⁸⁷ STONE, *supra* note 71, at 199.

⁸⁸ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 48 (1918).

⁸⁹ HEALY, *supra* note 16, at 6.

⁹⁰ *Id.* at 2. But see SNYDER, *supra* note 80, at 24 (stating that both swords belonged to Holmes’s great grandfather).

⁹¹ SNYDER, *supra* note 80, at 22.

⁹² *Id.*

⁹³ Contributor Oliver Wendell Holmes Jr., *supra* note 82.

⁹⁴ GREENE, *supra* note 3, at 47.

⁹⁵ *Id.* This belief was on full display in Holmes’s statement in *Buck v. Bell*, the Supreme Court case that allowed for forced sterilization, thereby sanctioning eugenics. See 274 U.S. 200, 207-08 (1927). He wrote, “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.” *Id.* at 207.

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Holmes, too, was an admirer of Charles Darwin, the biologist synonymous with the phrase “survival of the fittest.”⁹⁶ (Darwin had likewise been influenced by Malthus.)⁹⁷ According to Darwin, all living beings are the result of a process of “natural selection” through which the strong prevail and the weak die off.⁹⁸ As Darwin wrote in the introduction to *On the Origin of Species*, the “struggle for existence” is ongoing and “more individuals of each species are born than can possibly survive.”⁹⁹ “Natural selection” was, in his view, inevitable. Competition and violence were defining characteristics of this natural state.¹⁰⁰ Holmes, too, was a committed social Darwinist, believing that humans who were socially powerful or could adapt to become powerful would prevail.¹⁰¹

None of this is to argue that Holmes (aside from his years as a Union soldier) was a violent person, wished violence on others, or sought to create a speech environment overrun with violence. Yet, violence was, for him, very much a part of human experience and even human progress.¹⁰² As one of his biographers, G. Edward White wrote, Holmes believed “that majoritarian power and force were the principal determinants of social policy.”¹⁰³ And as Holmes himself states in *The Soldier’s Faith*, “For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine ... Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war.”¹⁰⁴

Given Holmes’s experience and predilections, it is not surprising that violent rhetoric was routine in his writing about the law and, specifically, free speech. Constitutional law scholar Ronald K.L. Collins writes that “[t]he idea of struggle, rooted in the blood-soaked fields of battlegrounds seeded by human casualties became central to [Holmes’s] thought, including his thoughts on freedom of expression.”¹⁰⁵ The violence is often subtle, baked into a verb choice, for example. But it is also sometimes plainer, such as in comparisons between speech and fighting.

Both forms are illustrated in a 1918 letter to Judge Learned Hand.¹⁰⁶ The first sentence subtly paints conversation as a battle.¹⁰⁷ Holmes writes: “Dear Hand: Rarely does a letter *hit* me so exactly where I live as yours, and unless you are *spoiling for a fight* I agree with it

⁹⁶ HEALY, *supra* note 16, at 34.

⁹⁷ CHARLES DARWIN, THE AUTOBIOGRAPHY OF CHARLES DARWIN 1809-1882 120 (Nora Barlow ed.) 1958, <http://darwin-online.org.uk/content/frameset?pageseq=1&itemID=F1497&viewtype=text>.

⁹⁸ *See id.* at 89.

⁹⁹ CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE 5 (1859), http://darwin-online.org.uk/converted/pdf/1859_Origin_F373.pdf.

¹⁰⁰ This is evidenced from the book’s complete title: *On the Origin of Species by Means of Natural Selection or the Preservation of Favored Races in the Struggle for Life. Id.*

¹⁰¹ Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 3 J. OF LAW & POLITICS, 451, 455, 457 (1988).

¹⁰² *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 448 (1993) (quoting a 1929 Holmes correspondence about *United States v. Schwimmer*, 279 U.S. 644 (1929), a case in which Holmes dissented from an opinion denying a pacifist naturalization, to say: “I agree with your condemnation of armchair pacifists ... on the general ground that until the world has gotten farther along war not only is not absurd but is inevitable and rational”).

¹⁰³ *Id.* at 391.

¹⁰⁴ *See* Oliver Wendell Holmes, *The Soldier’s Faith*, in THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES Vol. 3 487 (Sheldon M. Novick ed. 1995)

¹⁰⁵ THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 7 (Ronald K.L. Collins ed. 2010).

¹⁰⁶ LEARNED HAND, REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 68 (Constance Jordan ed. 2013).

¹⁰⁷ *Id.*

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throughout.”¹⁰⁸ Later in the letter, after Holmes has set out various arguments in support of free speech, Holmes is more overt, writing: “[M]an’s destiny is to fight. Therefore take thy place on one side or the other, if with the added grace of knowing that the Enemy is as good a man as thou, so much the better, but kill him if thou canst.”¹⁰⁹ Here, Holmes suggests that the path to knowledge, truth, and social progress can be conceived of as a battlefield. In conveying this comparison, which is so brutal and devastating, Holmes betrays no sentiment. Perhaps given his life experience, this is to be expected. Yet, his words are strangely cold.

B. *The Abrams Dissent: A Product of War*

In invoking the marketplace metaphor and describing it as he did, Holmes injected a rhetorical violence into the *Abrams* dissent. But this is not the only source of violence in the case. Violence is at the heart of the *Abrams* dissent in three ways. The first is its historical context—the trauma and fear surrounding World War I. The second is the nature of the case at issue; in applying the Espionage Act, the Court had to grapple with the link between speech and violence. The last is the violence that Holmes chose to bring. Each will be discussed in turn here.

The First Amendment itself was born of a revolt against Great Britain driven in part by fury about government censorship, but interpretation of it got off to a slow start.¹¹⁰ World War I pressed the Supreme Court into action. Government prosecutions of emigres, socialists, and labor leaders under the Espionage Act forced the Court to decide whether free speech needed to be constrained at all, and if so, how. Global violence was forcing the Court and Americans more generally to consider whether and how they could feel both free and safe. A keen awareness was also developing—at least among lawyers and policy makers—that the striking of this balance had to consider how best to separate high-value information from propaganda.¹¹¹

*Abrams v. United States*¹¹² was one of nine cases based on the Espionage Act of 1917 to come before the Supreme Court in the years immediately following World War I.¹¹³ The war had exacted a catastrophic toll on the United States. There had been significant debate about the decision to enter it, but in seeking a declaration of war, President Woodrow Wilson made clear that dissent would not be tolerated when he said: “if there should be disloyalty, it will be dealt with a firm hand of stern repression.”¹¹⁴ He followed through. Congress passed the Espionage Act in 1917, which outlawed various interference with the American war effort, and Wilson signed it into law.¹¹⁵ Leaving no doubt as to the country’s seriousness about prosecuting perceived offenders, Attorney General Thomas Gregory said of war dissenters, “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”¹¹⁶

¹⁰⁸ *Id.* at 69 (emphasis added).

¹⁰⁹ *Id.* at 70.

¹¹⁰ Wu, *supra* note 14, at 551.

¹¹¹ See WEINRIB, *supra* note 25, at 80.

¹¹² 250 U.S. 616 (1919).

¹¹³ Beyond *Abrams*, these cases include: *United States ex rel. Milwaukee Social Democratic Publ’g Co. v. Burleson*, 255 U.S. 407 (1921); *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Pierce v. United States*, 252 U.S. 239 (1920); *Schaeffer v. United States*, 251 U.S. 466 (1920); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Sugarman v. United States*, 249 U.S. 182 (1919); *Schenk v. United States*, 249 U.S. 47 (1919).

¹¹⁴ STONE, *supra* note 71, at 137.

¹¹⁵ *Id.* at 151-52.

¹¹⁶ *Id.* at 152-53.

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The opinions in the first four Supreme Court cases regarding the Espionage Act to reach the Supreme Court—*Schenk v. United States*,¹¹⁷ *Frohwerk v. United States*,¹¹⁸ *Debs v. United States*,¹¹⁹ and *Abrams v. United States*¹²⁰—form the foundation of modern First Amendment law. This foundation, writes constitutional law scholar David Cole, is not located in the holdings of the cases, but in their rhetoric.¹²¹ The rhetorical crescendo arrives with *Abrams* and the marketplace, but let's start at the beginning.

The first Espionage Act prosecution to reach the Supreme Court was of Charles Schenk. Schenk was a socialist who oversaw the printing and distribution of thousands of leaflets aimed at World War I conscripts.¹²² The leaflets argued, among other things, that the draft violated the Thirteenth Amendment's prohibition against slavery and urged its readers, "Do not submit to intimidation" and "Assert Your Rights." In the Court's opinion, Holmes "admit[ted] that in many places and in ordinary times" the leaflet would have been constitutional.¹²³ But context matters, and it was wartime.¹²⁴ Holmes continued:

The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing panic ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.¹²⁵

Here, Holmes establishes the "clear and present danger" test. Based on it, he concludes that in wartime, Schenk's actions violated the provision of the Espionage Act that proscribed obstructing the recruitment of soldiers.¹²⁶

Holmes's *Schenck* opinion was issued March 3, 1919. One week later, the Court upheld Espionage Act convictions in two more opinions, also written by Holmes: *Frohwerk v. United States*¹²⁷ and *Debs v. United States*.¹²⁸ Jacob Frohwerk was a copy editor whose conviction was based on a series of articles in the Missouri *Staats Zeitung* (German for "State Newspaper"). According to Holmes's summary, the articles praised Germany, talked about the suffering of conscripts and the futility of the war, and suggested the war was being fought "to protect some rich men's money."¹²⁹ In affirming the conviction, Holmes claimed that there was "not much to choose between expressions to be found in [the Frohwerk articles] and those before us in *Schenk v. United States*"—meaning that Holmes couldn't distinguish the two cases in any legally significant way.¹³⁰

¹¹⁷ 249 U.S. 47 (1919).

¹¹⁸ 249 U.S. 204 (1919).

¹¹⁹ 249 U.S. 211 (1919).

¹²⁰ 250 U.S. 616 (1919).

¹²¹ David Cole, *Agon at the Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 879 (1986).

¹²² 249 U.S. at 49.

¹²³ *Id.* at 52.

¹²⁴ *See id.* at 52.

¹²⁵ *Id.*

¹²⁶ *Id.* at 53.

¹²⁷ 249 U.S. 204 (1919).

¹²⁸ 249 U.S. 211 (1919).

¹²⁹ *See* STONE, *supra* note 71, at 195.

¹³⁰ *Id.* at 207.

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Yet, this is not wholly convincing, if only because it is so conclusory. Plus, Holmes hints that something else underlies the outcome. He writes that if evidence existed that Frohwerk was “a poor man,” working “at less than a day laborer’s pay,” toiling under the thumb of a boss who could “use or reject [Frohwerk’s articles] as he saw fit,” then things might have turned out differently. In such a situation, Holmes writes that “there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed.”¹³¹ In other words, if Frohwerk had been weak, poor, or otherwise without agency, then his words would have been less consequential. Holmes seems to uphold Frohwerk’s conviction, at least in part, because Holmes views Frohwerk as a speaker with some degree of power. This suggests that the significance of speech in the still-to-be-named marketplace of ideas is somehow correlated with the might of the speaker.¹³²

This theory is also consistent with Holmes’s affirmation, that same week, of the conviction of Eugene Debs. Debs was a 1912 presidential candidate who received more than a million votes. His arrest came after speaking to a crowd of more than 1,000 outside an Ohio prison that held Socialists convicted of violating the Sedition Act.¹³³ Although it has been described as “essentially a stump speech,” Holmes found that it contained “a prophecy of the success of the Socialist crusade.”¹³⁴ In a short opinion, Holmes flatly concludes: “Without going into further particulars we are of opinion that the verdict ... for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained.”¹³⁵ With that, Debs was sent to serve a ten-year sentence. (President Warren G. Harding commuted it in 1921.)¹³⁶ Holmes’s shares little reasoning in his opinion, and it is entirely possible that the result was motivated by Debs’s prominence and power.

Why Holmes subsequently opposed the Espionage Act conviction in *Abrams* has been called a “wonderful mystery” by constitutional law scholar Geoffrey Stone.¹³⁷ And Cole has said that Holmes’s *Abrams* “dissent may mark as strong a self-revision as American legal culture has known.”¹³⁸ But Holmes’s sense of the defendants’ power might help explain what has interpreted as an about-face.¹³⁹

Charles Abrams was one of five Jewish Russian emigres arrested for printing flyers, *The Hypocrisy of the United States and her Allies* (in English) and *Workers—Wake Up* (in Yiddish), and throwing them out the fourth-floor window of a Manhattan hat factory.¹⁴⁰ Referring to the defendants as “alien anarchists,” Justice John Clarke’s majority opinion stated that “the plain

¹³¹ *Id.* at 208-09.

¹³² *See id.* at 210.

¹³³ *Id.* at 196.

¹³⁴ *Id.* at 214; HEALY, *supra* note 16, at 3.

¹³⁵ STONE, *supra* note 71, 216.

¹³⁶ Douglas C. Dow, *Debs v. United States (1919)*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/289/debs-v-united-states> (last visited Dec. 2, 2022). Debs would even receive a million votes for president while serving his prison sentence. ZAC GERSHBERG & SEAN ILLING, THE PARADOX OF DEMOCRACY: FREE SPEECH, OPEN MEDIA, AND PERILOUS PERSUASION 129 (2022).

¹³⁷ *See* STONE, *supra* note 71, at 208.

¹³⁸ Cole, *supra* note 121, at 882.

¹³⁹ 250 U.S. at 624 (Holmes, J., dissenting); STONE, *supra* note 71, at 198. Additional likely influences on Holmes include a scathing critique of *Schenk*, *Frohwerk*, and *Debs* published by prominent legal scholar Ernst Freund in *The New Republic*, the magazine co-founded by Holmes’s friend Walter Lippmann. *Id.* at 201. Holmes was also subject to lobbying by Harold Laski and Zechariah Chafee, both influential free speech proponents, as well as Judge Learned Hand. *Id.* at 202-03; GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 140 (2d ed., 2010).

¹⁴⁰ *See* STONE, *supra* note 71, at 203-05; 250 U.S. at 619.

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purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe.”¹⁴¹

Despite supporting convictions in *Schenk*, *Frohwerk*, and *Debs*, here, Holmes disagreed. In the most-often quoted portion of his dissent, Holmes wrote that “men . . . may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by the 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.”¹⁴² Less quoted, but also notable are the words Holmes used to describe the defendants. He wrote:

Even if I am technically wrong and enough can be squeezed from these *poor and puny anonymities* to turn the color of legal litmus paper . . . the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of *ignorance and immaturity* when honestly held, as I see no reason to doubt that it was held here.¹⁴³

What Holmes suggests here is that these defendants themselves are powerless. As a result, they personally (much less their speech) could not compete in the marketplace and so, pose no imminent danger. Far from celebrating them for contributing to a quest for truth, they are “poor and puny anonymities”; they are irrelevant. They are acting from a “creed of ignorance and immaturity”; their views, have little to no value. It is not even worth punishing them. The marketplace, per Holmes, is too rough and demanding a place for these defendants with these ideas to even compete.

Now, to be fair, my argument may well be seizing on something that Holmes did not intend. His free speech jurisprudence has been described as “idiosyncratic.”¹⁴⁴ There is perhaps no analytical thread that neatly ties these cases together. As G. Edward White writes of Holmes’s free speech jurisprudence, it “took delight in rhetorical ambiguity and overstatement.”¹⁴⁵

Yet, it is noteworthy that this delight in overstatement includes painting the marketplace for speech as violent. Although Holmes might have described competition in the marketplace as “reasoned discussion” or even “impassioned conversation,” he goes further. He pushes past competition and into violence. This is not a salon or town hall. It is a battlefield. For example, Holmes writes that “truth is the only ground upon which their wishes safely can be carried out.” (“[T]heir” refers to the “men” of “fighting faiths” who are competing in the market.) And so “truth” is described as a kind of green zone—a safe place. This suggests that the area around it is anything but safe.

Holmes continues, “we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” Here, Holmes delimits the violence that our public sphere should tolerate; that which “imminently threatens” is banned. But the limit seems

¹⁴¹ 250 U.S. at 623.

¹⁴² *Id.* at 630.

¹⁴³ *Id.* at 629 (emphasis added).

¹⁴⁴ WHITE, *supra* note 102, at 413.

¹⁴⁵ *Id.*

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illusory given that even speech we “believe to be fraught with death” should be permitted. In addition, he refers to our need to be “eternally *vigilant*” and defend our “*pressing* purposes of the law” with an “immediate *check*.” These words all invoke a degree of fear or force.¹⁴⁶

On one level, this violent rhetoric makes sense. Holmes is talking about a limit on free speech for threats of imminent violence. But the language he uses is gratuitously violent. In this way, the marketplace, which depends on competition and power, but doesn’t necessarily require violence to be functional, starts to become enmeshed with violence.

Holmes himself did not invoke the marketplace metaphor again in his opinions, but he did express continued resolve to maintain a marketplace that permitted violent speech. This resolve was most notably on display in *Gitlow v. New York*.¹⁴⁷ In that case, the majority upheld the conviction under a New York criminal anarchy statute of Benjamin Gitlow for facilitating the creation of the *Left Wing Manifesto* for a faction of the Socialist Party.¹⁴⁸ In its opinion, the Court lowered the bar set in *Schenk* for determining what constituted a “clear and present danger.” The Court ruled that even though the *Left Wing Manifesto* contained no explicit advocacy of force or violence, that such advocacy could be inferred. “Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described,” the opinion stated.¹⁴⁹

In dissent, Holmes resisted the idea that some ideas are too dangerous to tolerate. Joined by Justice Brandeis, he wrote, “It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement.”¹⁵⁰ He added that virtually no matter how dangerous an idea, it should be allowed its chance to duel in the marketplace. Using language invoking overthrow and force, he wrote, “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”¹⁵¹ In this dissent, as constitutional law scholar Alexander Tsesis writes, Holmes demonstrates the way in which his marketplace theory “runs headlong into majoritarian relativism and mob rule.”¹⁵²

C. The Broader Fight: Speech as Battle

Despite the importance of Holmes and the *Abrams* dissent, the link between speech and battle was not forged by a single man or a single Supreme Court case.¹⁵³ That link predates Holmes. Deeper down in these roots is John Milton’s *Areopagitica*.¹⁵⁴ Milton’s 1644 speech to

¹⁴⁶ The Oxford English Dictionary notes that to be vigilant is to be “wakeful and watchful; steadily on the alert” and it provides numerous examples invoking a fear of danger. OXFORD ENGLISH DICTIONARY, oed.com (last visited Feb. 1, 2023). To “press” is to “bear with weight on, upon, or against.” *Id.* To “check” is “to place or come into opposition; to clash,” “to come into collision with, strike, hit,” “to clash, come into hostile contact.” *Id.*

¹⁴⁷ 268 U.S. 652 (1925).

¹⁴⁸ *Id.* at 655.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 673 (Holmes, J., dissenting).

¹⁵¹ *Id.*

¹⁵² See Tsesis, *supra* note 30, at 498.

¹⁵³ See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628 (1986) (arguing that the “social organization of violence manifests itself in the secondary rules and principles which generally ensure that no single mind and no single will can generate the violent outcomes that follow from interpretive commitments”).

¹⁵⁴ Weiland, *supra* note 11, at 369 n.3 (noting that “Scholars generally agree that the metaphor’s animating principles can be traced to the work of John Milton and John Stuart Mill” and noting numerous sources). Although there is still some “heated debate about the accuracy of this lineage and the precise origins of the metaphor.” *Id.*

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British Parliament is a classic defense of free speech and viewed by many as foundational to the American free speech tradition. Specifically, Milton was arguing against the British government's censorial practice of controlling or "licensing" printing. But most important about *Areopagitica* for our purposes, is that Milton likened the discovery of truth to blood sport. He wrote: "Let [truth] and Falsehood grapple; who ever knew Truth put to the wors[e] in a free and open encounter?"¹⁵⁵ Beyond these often-quoted words, Milton spins the war metaphor out further. He described man on a quest for knowledge as a soldier in a battle and the despised practice of licensing as "but weakness and cowardise in the wars of Truth."¹⁵⁶

Another influence on Holmes and his marketplace theory was philosopher John Stuart Mill.¹⁵⁷ Mill's writings on free speech likewise contain violent imagery. In his opus, *On Liberty*, Mill wrote that truth does not always "triumph[] over persecution" nor does it have "any inherent power denied to error, of prevailing against the dungeon and the stake."¹⁵⁸ And perhaps a bit less bloody, but still referencing a struggle, Mill added: "The real advantage which truth has, consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when favourable circumstances it escapes persecution until it. Has made such head as to withstand all subsequent attempts to suppress it."¹⁵⁹ Again referencing friction (if not fighting), Mill wrote that truth depends on "a balance to be struck between two sets of conflicting reasons."¹⁶⁰

Fast forward to the World War I era, a few years before Holmes would write his *Abrams* dissent. The First Amendment is receiving renewed attention and intellectuals are trying to discern its meaning. They start to use language that suggests a need to use force to overcome the danger of containment. For example, in 1915, the newly-formed American Association of University Professors put forward its first Declaration of Principles on Academic Freedom and Academic Tenure. It stated that "research universities" were meant to "advance knowledge by the unrestricted research and unfettered discussion of impartial investigators."¹⁶¹ At the same time, the ACLU was advocating for free speech as related to labor rights—specifically the right of agitation. As labor law scholar Laura Weinrib writes, ACLU leaders "linked liberty to the 'freedom to agitate for social change without restraint.'¹⁶² Thus, for one of the key organizations fighting for free speech (and ultimately promoting the marketplace of ideas), free speech was a tool for struggle.¹⁶³

(citing HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 54-57 (1992); JOHN DURHAM PETERS, THE "MARKETPLACE OF IDEAS," IN TOWARD A POLITICAL ECONOMY OF CULTURE: CAPITALISM AND COMMUNICATION IN THE TWENTY-FIRST CENTURY 65, 66-72 (Andrew Calabrese & Colin Sparks, eds.).

¹⁵⁵ JOHN MILTON, AREOPAGITICA: A SPEECH TO THE PARLIAMENT OF ENGLAND FOR THE LIBERTY OF UNLICENSED PRINTING 175 (Ed. T. Holt White, 1819); Blocher, *supra* note 2, at 830.

¹⁵⁶ MILTON, *supra* note 155, at 176.

¹⁵⁷ See Christoph Bezemek, *The Epistemic Neutrality of the "Marketplace of Ideas": Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 173 (2015). In fact, Holmes noted in a book in which he listed everything he read, that he had read *On Liberty* in 1919; *Abrams* was decided in November of that year. THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER, *supra* note 105, at 213.

¹⁵⁸ JOHN STUART MILL, ON LIBERTY 52-53 (2d ed. 1859).

¹⁵⁹ *Id.* at 53-54.

¹⁶⁰ *Id.* at 66.

¹⁶¹ WEINRIB, *supra* note 25, at 150.

¹⁶² *Id.* at 204.

¹⁶³ *Id.* at 19.

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The marketplace metaphor cannot be divorced from this context of likening speech to a battle. Part of the reason the metaphor has been so successful is that it fits comfortably within this history. A market will always invoke power relationships, which will always lead to friction and competition between factions. As sociologist and communications scholar Tressie McMillan Cottom writes, “what is commodified is always, always stratified.”¹⁶⁴ In this way, violence becomes an expected and tolerated outgrowth of speech.

Before moving on to discuss the ramifications of a violent marketplace, I want to address a forceful potential critique of my argument. Some would claim, fairly, that although a marketplace may be competitive, it is not inherently violent. Certain philosophers and legal theorists claim that market exchanges actually help avert violence.¹⁶⁵ Yet, in retort, there are economists and political theorists who would argue that capitalism and markets can be violent or, at the least, destructive.¹⁶⁶ For example, economist Stephen Marglin has argued that a focus on markets “undermin[es] the centrality of community in our lives” and that economics “celebrates the self-interested, calculating individual and the market as a means of realizing individual satisfactions.”¹⁶⁷

Moreover, even if it is true that literal markets can be a refuge rather than a lion’s den, it does not prevent the marketplace metaphor from being conceived of as violent.¹⁶⁸ This is because what is entailed by a *literal* marketplace as understood by economists is not determinative of how the marketplace *metaphor* impacts our conceptualization of free speech. As linguists Lakoff and Johnson write, “In most cases, what is at issue is not the truth or the falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it.”¹⁶⁹ In other words, the power of a metaphor does not stem from the literal meaning of the referent (here, the marketplace). Rather, it stems from how we understand that referent in the context of the metaphor itself.

In fact, the evidence suggests that Holmes himself did not intend to import the characteristics of a literal marketplace into free speech jurisprudence. After all, in his famous dissent in *Lochner v. New York*,¹⁷⁰ Holmes wrote that a “Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views.”¹⁷¹ And as one of

¹⁶⁴ TRESSIE MCMILLAN COTTOM, *THICK AND OTHER ESSAYS* 59 (2019).

¹⁶⁵ See Jules L. Coleman, *Markets, Methods, Morals, and the Law*, 66 ALA. L. REV. 169, 195 (2014) (arguing that markets “offer a buffer to ordinary political debate and contribute to political stability”).

¹⁶⁶ See ELISABETH R. ANKER, *UGLY FREEDOMS* 23 (2022) (discussing Karl Marx’s communism and noting that “[c]apitalism’s freedom in profitmaking and individual self-interest produce world-historic violence upon workers and the poor while all people are alienated from others and from their own work in the process of economic exchange”).

¹⁶⁷ STEPHEN A. MARGLIN, *THE DISMAL SCIENCE: HOW THINKING LIKE AN ECONOMIST UNDERMINES COMMUNITY* 2-3 (2008). Even the economic theories of luminaries like John Maynard Keynes and Adam Smith have been described as “a sustained exercise in empathy-building, attempting to create on paper the solidarity that has failed to materialize in practice.” See Corey Robin, *The Trouble with Money*, THE N.Y. REV. OF BOOKS (Dec. 22, 2022), <https://www-nybooks-com.proxygt-law.wrlc.org/articles/2022/12/22/the-trouble-with-money-john-maynard-keynes/>.

¹⁶⁸ As an aside, it is possible that resistance to the argument that markets are violent could be rooted in a resistance to critiquing markets period. Criticism of markets generally has been frowned upon in many disciplines, including journalism and communication studies. See Victor Pickard, *The Violence of the Market*, 20 JOURNALISM 154 (2018), <https://journals.sagepub.com/doi/full/10.1177/1464884918808955>.

¹⁶⁹ LAKOFF & JOHNSON, *supra* note 8, at 20.

¹⁷⁰ 198 U.S. 45 (1905).

¹⁷¹ *Id.* at 75-76 (Holmes, J., dissenting).

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Holmes's biographers, Thomas Healy wrote, Holmes "was not claiming that there is a literal 'marketplace of ideas' or that speech magically produces an objective and verifiable truth via the mechanism of the invisible hand, as some of his more obtuse detractors have argued. He was drawing a picture to help us see the way in which free and open debate promotes the ultimate good."¹⁷² That is, Holmes likely used language about competition and even violence in the market—as is true of much of his rhetoric—because it was "arresting and memorable."¹⁷³ Holmes loved language and that may be the entire explanation for his choice of metaphor.¹⁷⁴

D. *The Marketplace's Casualties*

Even if Holmes did not believe a marketplace was inherently violent or seek to engulf our free speech environment in flames, his combat-laden rhetoric helped to reinforce a link between the marketplace and violence. As a product of his era, his experiences, and his predilections, along with his undeniable intellect and writing flair, he reinscribed this link and helped to perpetuate its use in law and culture for a century and counting. In doing so, Holmes laid a legal foundation for a speech environment characterized by competition and violence. This foundation is comprised of Supreme Court cases invoking the marketplace and describing speech in terms of competition, power, and violence (even when violence is not otherwise explicitly at issue in the case). Building on this foundation is legal scholarship that also, perhaps unwittingly, uses violent rhetoric to talk about speech. We can also see the cultural impacts of the metaphor. This Section traces the lineage of the metaphor, and particularly its violent aspects, through case law and scholarship.

With respect to case law, the first jurist to actually use the label "market place of ideas" was Justice William O. Douglas in a 1953 concurring opinion in *United States v. Rumely*.¹⁷⁵ Prior to *Rumely*, even though "market place" (or "marketplace") did not feature in case law, Holmes's imagery from *Abrams* likening free speech to a fight did. For example, in the 1945 case *Associated Press v. United States*,¹⁷⁶ the Court wrote that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹⁷⁷ Even more vividly, in *Terminiello v. City of Chicago*,¹⁷⁸ in which the Court reversed the breach of peace conviction of a suspended Catholic priest who had given a racist speech to a large crowd, the Court wrote that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."¹⁷⁹ Again, although this case does not use the word marketplace, it fleshes out the metaphor by noting, "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."¹⁸⁰

¹⁷² HEALY, *supra* note 16, at 207-08

¹⁷³ WHITE, *supra* note 102, at 445.

¹⁷⁴ White writes, "Holmes the judge was often consumed by the sheer attraction of language itself" even when his phrases "collapse as analytical guidelines." *Id.* at 444-45, 452.

¹⁷⁵ 345 U.S. 41, 56 (1953).

¹⁷⁶ 326 U.S. 1 (1945).

¹⁷⁷ *Id.* at 20.

¹⁷⁸ 337 U.S. 1 (1949).

¹⁷⁹ *Id.* at 4.

¹⁸⁰ *Id.*

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Since *Rumely*, the Court has invoked the marketplace metaphor often. And in many of these invocations, the Court has paired the metaphor with rhetoric that is gratuitously violent. Gratuitous because the references to violence are not linked directly to an inherently violent aspect of the case (an actual threat or an actual assault). Rather, the violent references are purely rhetorical. They seem intended solely for impact.

Here is a non-exhaustive illustration of how the Supreme Court describes the marketplace: It is “uninhibited”¹⁸¹ and a place where “truth will ultimately prevail.”¹⁸² In the marketplace exists “competition.”¹⁸³ There is a “clash of different views and conflicting ideas.”¹⁸⁴ It is where we “subject” ideas to “refutation.”¹⁸⁵ This process is akin to a “joust of principles protected by the First Amendment.”¹⁸⁶ Within the marketplace, lies present “dangers.”¹⁸⁷ Likewise, speech restrictions or regulations on the marketplace “interfere”¹⁸⁸ with or are a “threat” to the functioning of it.¹⁸⁹ Truth has ultimate “power.”¹⁹⁰

It is also noteworthy that male judges who coined and perpetuated the marketplace metaphor almost certainly envisioned the market as a space dominated by men. Since Eve committed the original sin by eating an apple from the tree of knowledge, the search for truth has been viewed as a male pursuit.¹⁹¹ (Correspondingly, subterfuge, disguise, and dissimulation have been gendered feminine.)¹⁹² The Supreme Court indicated that the marketplace had been a male domain in a 1975 opinion not about free speech but child support. Declaring unconstitutional a Utah law indicating females reached the age of majority at 18 and males at 21 (resulting in fewer years of child support for female children), the Court decried “old notions” about gender norms.¹⁹³ It wrote, “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”¹⁹⁴ Thus, the space for ideas was exclusively for men. Although gendering the marketplace male does not make it

¹⁸¹ *Nat’l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); *Citizens United v. FEC*, 558 U.S. 310, 335 (2010); *Red Lion*, 395 U.S. at 390; *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“Many persons . . . will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”).

¹⁸² *See Nat’l Inst. of Fam. and Life Advocs.*, 138 S. Ct. at 2374; *Red Lion*, 395 U.S. at 390.

¹⁸³ *Nat’l Inst. of Fam. and Life Advocs.*, 138 S. Ct. at 2375; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 774-75 (1976) (“The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the marketplace”).

¹⁸⁴ *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

¹⁸⁵ *McDaniel v. Paty*, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) (“The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.”).

¹⁸⁶ *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

¹⁸⁷ *Time, Inc. v. Hill*, 385 U.S. 374, 408 (1967) (Harlan, J., concurring in part and dissenting in part) (discussing the importance of “checking” in the marketplace and the “dangers of unchallengeable untruth” when the market is not functioning).

¹⁸⁸ *City of Austin v. Regan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1479 (2022).

¹⁸⁹ *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (noting that speech restrictions “threaten to reduce diversity and competition in the marketplace of ideas”); *United States v. Alvarez*, 567 U.S. 709, 732 (Breyer, J., concurring) (discussing concerns about how “regulation can threaten speech-related harm” in the marketplace of ideas).

¹⁹⁰ *Nat’l Inst. of Fam. and Life Advocs.*, 138 S. Ct. at 2375.

¹⁹¹ *See SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY* 44 (2019).

¹⁹² *See id.* at 23.

¹⁹³ *See Stanton v. Stanton*, 421 U.S. 7, 9, 14-15 (1975).

¹⁹⁴ *Id.* at 14-15.

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inherently violent, it is easier for it to take on that characteristic given stereotypes, backed up by evidence, of men's higher propensity for violence.¹⁹⁵

Beyond these explicit references to the marketplace, even in cases that don't use the word but discuss free speech, courts use violent terminology. Perhaps the most central of these cases, especially for purposes of this Article because of the prominent role of the press, is *New York Times v. Sullivan*. This is the case in which the Court establishes the "actual malice" standard for defamation of a public figure. Justice William Brennan writes, "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁹⁶ These words—robust, vehement, caustic, sharp, attack—all invoke competition and violence. "Robust"—which the Court has repeatedly used to describe an ideal speech environment¹⁹⁷—is a reference to physical strength.¹⁹⁸ "Vehement" can mean relating to "pain, illness" and "great strength or violence."¹⁹⁹ "Caustic" concerns the "burning, corrosive, destructive of organic tissue."²⁰⁰ "Sharp" and "attack" also, of course, invoke harm and violence. This language from *Sullivan* has been referenced by more than 1,000 subsequent federal and state court cases.²⁰¹

Likewise, in analyzing the marketplace and free speech more generally, scholars employ the same brand of violent rhetoric. Some of this seems born of necessity in that describing the marketplace—as the law has shaped it—entails violence. For example, historian Sophia Rosenfeld writes of the First Amendment generally that, "The law was intended to stimulate the pursuit of truth by allowing ideas of all kinds to *fight it out* for the public's attention in a growing commercial marketplace."²⁰² Likewise, constitutional law scholar Joseph Blocher, in writing about the marketplace metaphor, notes that, "Holmes's marketplace metaphor invokes a place where individuals (speakers) trade goods and services (ideas) in a *competitive* environment where the good ideas are destined to *beat out* the bad."²⁰³ And even more forcefully, Blasi writes that in Holmes's view, "what is needed for ideas is a vibrant, *brutal weeding-out process*

¹⁹⁵ See *2019 Crime in the United States*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested> (last visited Dec. 19, 2022) (noting that "[n]early 73 percent (72.5) of the persons arrested in the nation during 2019 were males. They accounted for 78.9 percent of persons arrested for violent crime"); *Global Study on Homicide*, UNITED NATIONS OFFICE ON DRUGS AND CRIME 23 (July 2019), <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf> ("Men commit about 90 per cent of all homicides recorded worldwide").

¹⁹⁶ 376 U.S. 254, 270 (1964).

¹⁹⁷ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

¹⁹⁸ *Robust*, OXFORD ENGLISH DICTIONARY, oed.com (last visited Dec. 2, 2022) ("Relating to, requiring, or promoting physical strength or hardiness.").

¹⁹⁹ *Vehement*, OXFORD ENGLISH DICTIONARY, oed.com (last visited Dec. 2, 2022).

²⁰⁰ *Caustic*, OXFORD ENGLISH DICTIONARY, oed.com (last visited Dec. 2, 2022).

²⁰¹ This was determined by using Westlaw, which singles this language out in an editorial enhancement called a "headnote." Westlaw indicates that the headnote that quotes this language has been cited by 1028 subsequent cases as of October 30, 2022.

²⁰² See ROSENFELD, *supra* note 191, at 56 (emphasis added).

²⁰³ Blocher, *supra* note 2, at 838 (emphasis added); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 27 (1984) ("Conflicts in the marketplace, therefore, are not likely to lead to conclusive agreement on what is 'true' or 'best.' Rather the marketplace serves as a forum where cultural groups with differing needs, interests, and experiences, *battle to defend or establish* their disparate senses of what is 'true' or 'best.'").

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analogous to the function markets for goods and services perform in *killing off* inefficient enterprises and *forcing* unproductive workers to be fired.”²⁰⁴

At other times, scholars use violent rhetoric when it isn’t strictly necessary. For example, one scholar wrote, “Although the marketplace metaphor remains the *reigning* (if somewhat *embattled*) justification for free speech, it has yet to fully incorporate an understanding of institutions.”²⁰⁵ In a more literal example of how scholars view the marketplace as violent, one recent article celebrating the metaphor began with an anecdote imagining what it might be like to be a buyer in an information marketplace.²⁰⁶ She described it as a place where “sellers accost you,” and while some sellers are calm, others are “loud, red-faced, and combative—indignantly screeching” as well as “forceful and unyielding.”²⁰⁷ Far from a place of peaceful and beneficial exchange, this marketplace invokes power dynamics, competition, and even violence in the sellers’ accosting buyers and being “combative” toward them.

Airing the violent nature of this rhetoric in case law and in scholarship is not primarily a critique of its value. (I have found it surprisingly difficult to avoid violent rhetoric in drafting this Article.) It is also the case that this rhetoric could, in certain instances, be interpreted differently than I have interpreted it. For example, in the 1960s, free speech scholar Harry Kalven, Jr. lauded the “uninhibited, robust, and wide-open” language as expressing “gusto and enthusiasm.”²⁰⁸ But regardless, we need to be very concerned with the dominance of this metaphor given how intertwined it has been with violence. This dominance has helped acculturate us to tolerate and expect a certain amount of violence in our free speech realm. (Kalven’s article ends with his quoting Meiklejohn on the First Amendment: “We must think for it as well as fight for it.”)²⁰⁹ In other words, using violent language to talk about the marketplace and describe the marketplace does precisely what Lakoff and Johnson would predict—it tends to render our speech environment a more violent place, increasingly populated by violent speech.

This means we are caught in a literally vicious cycle. The marketplace metaphor and its accompanying violent rhetoric desensitize citizens to violent speech; violent speech is normalized²¹⁰ and doctrine becomes even more speech-protective.²¹¹ As English professor Aaron R. Hanlon notes in an article about the former *Breitbart* writer Milo Yiannopoulos, “Ultimately, the ‘marketplace of ideas’ is a confused argument that promises the triumph of good ideas while delivering ordinary and unproductive provocation.”²¹²

Over the last century, as free speech has been linked to violence, American free speech jurisprudence has been characterized more and more by extremes. Holmes’s dissent in *Gitlow* was a harbinger. This is the dissent, noted earlier, in which he wrote, “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of

²⁰⁴ Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 85, at 24 (emphasis added).

²⁰⁵ Blocher, *supra* note 2, at 847

²⁰⁶ See Rachel L. Jones, *Can You Have Too Much of a Good Thing?: The Modern Marketplace of Ideas*, 83 MISSOURI L. REV. 971, 974-75 (2018).

²⁰⁷ *Id.* at 971.

²⁰⁸ Harry Kalven, Jr., “Uninhibited, Robust, and Wide-Open”—A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289, 289 (1968).

²⁰⁹ *Id.* at 302 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 6 (1960)).

²¹⁰ See Pickard, *supra* note 168 (arguing that in the United States, “we treat the market’s effects on nearly everything [including the “market’s violence”]—as an inevitable force of nature beyond our control, or, at the very least, a public expression of democratic desires”).

²¹¹ See FRANKS, THE CULT OF THE CONSTITUTION, *supra* note 66, at 117.

²¹² Aaron R. Hanlon, *The Myth of the “Marketplace of Ideas” on Campus*, THE NEW REPUBLIC (Mar. 6, 2017), <https://newrepublic.com/article/141150/myth-marketplace-ideas-campus-charles-murray-milo-yiannopoulos>.

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the community, the only meaning of free speech is that they should be given their chance and have their way.”²¹³ Here Holmes rejects the view that democratic deliberation should necessarily be the only basis for change.²¹⁴ He opens the door to violence as a possibility.²¹⁵

Catherine MacKinnon refers to these 1920s-era free speech cases as the “formative trauma” of modern free speech doctrine.²¹⁶ It was during this era, she argues, that “we got the idea that we must protect ideas regardless of the mischief they do in the world.”²¹⁷ Framed differently, using the words of Ronald Coase, we developed an “extreme faith” in “competitive markets” to regulate speech while government stayed out of the way.²¹⁸

As Americans, we have prided ourselves on having the freest form of free speech.²¹⁹ When speech is weighed against other values, speech is nearly always the victor. In weighing speech against equality, speech has won out.²²⁰ In pitting speech against privacy, speech has won out.²²¹ In balancing speech against various harms, speech wins out time and again.²²² And within the world of speech, the Court has given protection to things like lies²²³ and videos showing torture of live animals.²²⁴ It is true that “true threats” do not enjoy the protection of the First Amendment.²²⁵ Yet, in the key case on this issue, the Supreme Court did not find that the Ku Klux Klan attempting to set fire to a cross on the lawn of an African-American family qualified as a true threat.²²⁶

Our uber speech protective environment persists even as hate speech thrives.²²⁷ It is difficult to quantify hate speech, but at the very least, there is anecdotal evidence that it is increasing. Even thirty years ago, the founders of the critical race theory movement wrote that “Of late, there has been an alarming rise in the incidence of assaultive speech. Although this is hardly a new phenomenon—hate speech is arguably as American as apple pie—it is a social

²¹³ 268 U.S. at 673 (Holmes, J., dissenting).

²¹⁴ *Id.*; see also Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 85, at 39.

²¹⁵ See 268 U.S. at 673.

²¹⁶ MACKINNON, *supra* note 31, at 38.

²¹⁷ *Id.*

²¹⁸ Coase, *supra* note 29, at 1.

²¹⁹ See generally, Howard Zinn, *The Myth of American Exceptionalism: Howard Zinn at MIT*, HOWARDZINN.ORG, <https://www.howardzinn.org/collection/mythamerican-exceptionalism-mit/> (“[W]e are fond, in the United States of congratulating ourselves for how wonderful we are and how we are the best—we are the greatest—we are the strongest—we are the most prosperous—we are the freest—we are the most democratic.”).

²²⁰ See Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1959 (2018) (describing how the Supreme Court’s post-2008 rulings thwarting economic and social welfare regulation led to “widespread accusations that the Court had created a ‘new *Lochner*’”).

²²¹ See Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1198 (2005) (describing the Supreme Court’s “project of giving the First Amendment preemptive force over tort law”).

²²² See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (noting that “speech cannot be restricted simply because it is upsetting or arouses contempt”).

²²³ *Alvarez*, 567 U.S. at 716.

²²⁴ *United States v. Stevens*, 559 U.S. 460, 482 (2010).

²²⁵ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

²²⁶ *Id.* at 347-48. In *Black*, the Court held that Virginia could ban cross burning, but it could not be, in essence, a strict liability ban. See *id.* Any ban needed to require proof of intent to intimidate that went beyond the burning of the cross. *Id.* Because, according to the majority, such proof was absent, the conviction was vacated. *Id.* at 367-68.

²²⁷ See Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. OF CHICAGO L. REV. 1241, 1242, 1335 (2021) (describing the Supreme Court’s “expansive free speech jurisprudence” but the failure of that jurisprudence to guarantee “the diversity and vitality of public debate, and the health of the system writ large”).

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practice that has gained a new strength in recent years.”²²⁸ Today, the Internet makes the broadcasting of extreme speech nearly frictionless. The resulting tsunami of extreme (and often violent) speech is daily news.²²⁹

The harmful effect of violent speech on our wellbeing and our democracy is becoming more obvious by the day. As Mari J. Matsuda observed decades ago, recipients of racist hate speech “have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.”²³⁰ This, in turn, alters the composition of our public sphere—especially when the victims of violent speech are public figures. As our public sphere becomes more violent, targets of this violence are less likely to want to take part in it. Evidence of this exists in the field of journalism, in which online threats and abuse seem to be increasing exponentially.²³¹ Women are increasingly leaving the profession to avoid being targets.²³²

Politicians and public servants are also under attack.²³³ More than 80 percent of local public officials—including health, school, and election officials—report that they have experienced harassment, threats, and violence.²³⁴ In 2021, nearly 80 percent of poll workers told researchers from the Brennan Center for Justice that they wanted government-provided security.²³⁵ Even the Department of Homeland Security has signaled in a National Terrorism Advisory System Bulletin that the U.S. faces a growing danger from “violent domestic extremists,” angered in part by Donald J. Trump’s 2020 election loss “as well as other perceived grievances fueled by false narratives.”²³⁶ Of course, January 6, 2021 is evidence of this.²³⁷

²²⁸ MATSUDA, LAWRENCE, DELGADO, & CRENSHAW, *supra* note 12, at 1.

²²⁹ See Susan Benesch, *Incendiary Speech that Spurs Violence Is Rising In US, But Tools Exist to Shrink It*, JUST SECURITY (Nov. 21, 2022), <https://www.justsecurity.org/84209/incendiary-speech-that-spurs-violence-is-rising-in-us-but-tools-exist-to-shrink-it/>.

²³⁰ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2337 (1989).

²³¹ Julie Posetti, Nermine Aboulez, Kalina Bontcheva, Jackie Harrison, & Silvio Waisbord, *Online Violence Against Women Journalists: A Global Snapshot of Incidence and Impacts*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. 1, 1 (2020), <https://www.icfj.org/sites/default/files/2020-12/UNESCO%20Online%20Violence%20Against%20Women%20Journalists%20-%20A%20Global%20Snapshot%20Dec9pm.pdf>.

²³² Julie Posetti & Nabeelah Shabbir, *The Chilling: A Global Study of Online Violence Against Women Journalists*, INT’L CTR. FOR JOURNALISTS 10-11 (2022) https://www.icfj.org/sites/default/files/2022-11/ICFJ_UNESCO_The%20Chilling_2022_1.pdf; *Sexism’s Toll on Journalism*, REPS. WITHOUT BORDERS 1, 25 (2021), https://rsf.org/sites/default/files/sexisms_toll_on_journalism.pdf.

²³³ Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. OF DEMOCRACY 160 (Oct. 2021), <https://www.journalofdemocracy.org/articles/the-rise-of-political-violence-in-the-united-states/> (noting that “acts of political violence in the United States have skyrocketed in the last five years”).

²³⁴ Clarence E. Anthony, Tina Lee, Jacob Gottlieb, & Brooks Rainwater, *On the Frontlines of Today’s Cities: Trauma, Challenges and Solutions*, NAT’L LEAGUE OF CITIES 14 (2021), <https://www.nlc.org/wp-content/uploads/2021/11/On-the-Frontlines-of-Todays-Cities-1.pdf>.

²³⁵ *Id.*

²³⁶ Zolan Kanno-Youngs & David E. Sanger, *Extremists Emboldened by Capitol Attack Pose Rising Threat, Homeland Security Says*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/27/us/politics/homeland-security-threat.html>.

²³⁷ See Chris Cameron, *These Are the People Who Died in Connection With the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> (noting that a bipartisan Senate report released in June 2021 linked seven deaths to the Capitol attack but that the report was issued before two Metropolitan Police officers died by suicide).

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And the violence is not solely directed toward public figures.²³⁸ Social media platforms have been blamed for facilitating speech globally that has fueled anti-immigrant hate crimes and mass atrocity.²³⁹ Those who are perceived to be “other” are often the disproportionately the targets of online hate. A study funded by the U.S. Department of Justice concluded that “Online hate speech can create an environment in which offline can occur and can lead to a variety of harmful outcomes, including radicalization [and] violence.”²⁴⁰

With no comprehensive legal or policy efforts in the United States to combat this link between speech and violent action, it is likely to strengthen. Focusing on the propensity of one type of speech (disinformation) to sow violence, legal scholar Tim Wu argues that “techniques of disinformation can be understood as efforts to destroy the functioning marketplace of ideas.”²⁴¹ He adds that given rampant disinformation “[a]t an extreme, the marketplace of ideas becomes a barren slugfest.”²⁴²

This reality is manifest on Twitter. In Elon Musk’s initial months as CEO, he has welcomed purveyors of hate back onto the platform, eviscerated the teams of employees that moderated content, and himself tweeted a photo of two guns and four empty cans of Diet Coke captioned “My bedside table.”²⁴³ Musk’s Twitter is a posterchild for the links between capitalism, the marketplace of ideas, and violence.²⁴⁴ As Jelani Cobb, the dean of Columbia University’s journalism school, writes, Twitter “now subsidizes a billionaire who understands free speech to be synonymous with the right to abuse others.”²⁴⁵ With this, Cobb captures the current state of the marketplace of ideas—at least with respect to one dominant speech forum. It is a marketplace driven not by ideas or knowledge, but extraction and violence.

Writing in 2004 about the Holmesian marketplace metaphor Vincent Blasi stated, “The cultural/intellectual/political combat facilitated by free speech is, in Holmes’ vision, messy, unpredictable, often nasty, and impossible to domesticate. But it is what human flourishing in a competitive, evolving world is all about.”²⁴⁶ Can we attribute the messiness, unpredictability, nastiness, and combativeness to Holmes and the marketplace metaphor? Certainly not. As

²³⁸ See Cathy Buerger, *Speech as a Driver of Intergroup Violence: A Literature Review*, DANGEROUS SPEECH PROJECT 3, https://dangerousspeech.org/wp-content/uploads/2021/06/Speech-and-Violence-Lit-Review_As-Published.pdf.

²³⁹ See *The Social Atrocity: Meta and the Right to Remedy for the Rohingya*, AMNESTY INT’L 6 (2022), <https://www.amnesty.org/en/documents/ASA16/5933/2022/en/>; Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime*, 19 J. of the European Econ. Ass’n, 2131 (2020), <https://doi.org/10.1093/jeea/jvaa045>.

²⁴⁰ Meagan Cahill, Katya Migacheva, Jirka Taylor, Matthew Williams, Pete Burnap, Amir Javed, Han Liu, Hui Lu, & Alex Sutherland, *Understanding Online Hate Speech as a Motivator and Predictor of Hate Crime*, RAND SOC. & ECON. WELL-BEING 1 (Sept. 2019), <https://www.ojp.gov/pdffiles1/nij/grants/304532.pdf>.

²⁴¹ Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169, 172 (2020).

²⁴² *Id.*

²⁴³ Elon Musk (@elonmusk), TWITTER (Nov. 28, 2022, 4:48 AM), <https://twitter.com/elonmusk/status/1597165510595989504>. Meanwhile, Musk two days earlier had tweeted, “The goal is a trusted digital town square, where a wide range of views are tolerated, provided people don’t break the law or spam. For example, any incitement to violence will result in account suspension.” Elon Musk (@elonmusk), TWITTER (Nov. 26, 2022, 4:32 PM), <https://twitter.com/elonmusk/status/1596617972201967616>.

²⁴⁴ As I wrote this paragraph, I pulled up Musk’s Twitter account and it so happened that his most recent tweet was: “This is a battle for the future of civilization. If free speech is lost even in America, tyranny is all that lies ahead.” Elon Musk (@elonmusk), TWITTER (Nov. 28, 2022, 8:41 PM), <https://twitter.com/elonmusk/status/1597405399040217088?lang=en>.

²⁴⁵ Jelani Cobb, *Why I Quit Elon Musk’s Twitter*, THE NEW YORKER (Nov. 27, 2022), <https://www.newyorker.com/news/daily-comment/why-i-quit-elon-musks-twitter>.

²⁴⁶ Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 85, at 40.

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historian Sophia Rosenfeld writes, “militant factionalism and extremism, bringing democratic dysfunction and the threat of violence with them, have become the characteristic political values of our time.”²⁴⁷

We live in a violent society at a violent time. Even though metaphor influences human conceptualization and behavior, this influence is not unidirectional. Behavior and culture influence the language and metaphors we use. As George Orwell wrote in his 1946 essay *Politics and the English Language*, language “becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of language makes it easier for us to have foolish thoughts.”²⁴⁸ In other words, language and thought are mutually constitutive.

But even though the marketplace metaphor is certainly not solely responsible for our increasingly violent free speech space, metaphor has helped normalize and perpetuate violence in our speech environment. So, to return to Blasi, do we want to adopt Holmes’s vision, encapsulated in the marketplace metaphor, that combative speech is merely what “human flourishing in a competitive, evolving world is all about”?²⁴⁹ Is our marketplace today facilitating flourishing? Or, is it time to consider new metaphorical possibilities beyond the marketplace as the basis for pursuing truth?²⁵⁰

E. *Spotlighting the Marketplace’s Impact: The Watchdog Press*

Before moving to new metaphors, one other impact of the marketplace merits examination—its impact on how we label our most prominent free speech institution: the press. The press is a “watchdog”—an animal prized for its ability to sniff out wrongdoing and attack, if needed, to protect those in its care. The Supreme Court has suggested that to be a watchdog is the press’s most important constitutional function.²⁵¹ American journalists likewise view their watchdog role as one of their highest callings.²⁵² And surveys of the public, even in an era of declining trust in the press, show support for the press as a check on government abuse and corruption.²⁵³ The adulation and prominence of this watchdog role seems almost predictable if we understand our free speech marketplace as dominated by competition, hierarchy and violence.

This Part explains how courts have used the metaphor to describe the press and how the function, closely tied to the marketplace, is likewise infused with hierarchy and violence. It then describes how the press itself has adopted this role. From there, it pans out to examine how this metaphor is tied up with the only other significant press metaphor—the fourth estate. Finally, this Part describes how the two metaphors are entangled with the marketplace and libertarian ideals.

With respect to the judiciary’s description of the press as a watchdog, the Supreme Court has not invoked the metaphor as often as it has the marketplace of ideas. But it has used the watchdog metaphor and lower federal courts have followed suit. Moreover, even when it has not

²⁴⁷ ROSENFELD, *supra* note 191, at 154.

²⁴⁸ George Orwell, *Politics and the English Language* (April 1946), <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/politics-and-the-english-language/> (last visited Dec. 19, 2022); Bosmajian, *Dehumanizing People and Euphemizing War*, *supra* note 7.

²⁴⁹ See Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 85, at 40.

²⁵⁰ See ROSENFELD, *supra* note 191, at 172.

²⁵¹ Jones, *supra* note 4, at 258.

²⁵² KOVACH & ROSENSTIEL, *supra* note 5, at 201.

²⁵³ See *id.*

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necessarily invoked the word “watchdog,” the Supreme Court has done much to draw the contours of the role. That means, when the word is used, there is a rich story behind it.

A justice first used the watchdog metaphor to refer to the press in a 1979 concurrence in *Smith v. Daily Mail Publishing Co.*²⁵⁴ in which the Court invalidated a West Virginia statute criminalizing newspapers’ publication of the names of juvenile offenders.²⁵⁵ In that concurrence, Justice William Rehnquist referred to the importance of the press performing a “‘watchdog’ role.”²⁵⁶ More than a decade later, in *Leathers v. Medlock*, the Court referred to the press as a watchdog in upholding the extension of Arkansas’s sales tax to cable television services.²⁵⁷ Justice Sandra Day O’Connor wrote that the state tax did not “single out the press” and did not “therefore threaten to hinder the press as a watchdog of government activity.”²⁵⁸

Admittedly, these direct references to the watchdog are not incredibly significant. But they do put the watchdog label on a press role that was described in great detail in numerous cases from the 1960s and 1970s. For example, in *Cox Broadcasting v. Cohn*, the Court noted that the press “serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”²⁵⁹ In *Sheppard v. Maxwell*, it described the press as virtually a co-equal branch of government, explaining that the press “does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”²⁶⁰ And, in *Mills v. Alabama*, the Court called the press a “powerful antidote to any abuses of power by government officials.”²⁶¹

Circuit courts have learned the lessons about what a watchdog does from these cases and use the label with some regularity. They laud the importance of the press as a watchdog over public officials and call the watchdog role a “vital service.”²⁶² They have gone so far as to “recognize the value of investigative reporting to a democracy, and the danger of chilling such a valuable watchdog and source of information.”²⁶³

Legal scholars, too, have interpreted the courts’ opinions as establishing that the watchdog function is a key, and perhaps *the* key, press role.²⁶⁴ In the most famous scholarly explication of the constitutional importance of the watchdog role, Vincent Blasi refers to it as a “checking value.”²⁶⁵ By this, he means that the press serves to “check[] the abuse of power by public officials.”²⁶⁶ Courts and scholars regularly refer to Blasi’s “checking” language in describing the press’s watchdog function. For example, in his important article, *The Media That*

²⁵⁴ 443 U.S. 97 (1979).

²⁵⁵ *Id.* at 105-06.

²⁵⁶ *Id.* at 108-09 (Rehnquist, J., concurring).

²⁵⁷ 499 U.S. 439, 447 (1991).

²⁵⁸ *Id.*

²⁵⁹ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

²⁶⁰ *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

²⁶¹ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

²⁶² *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 834 n.4 (1988) (“Newspapers provided a vital service by acting as watchdog for the public.”); *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (2022) (noting the importance of the watchdog role of the press).

²⁶³ *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1086 n. 26 (1988).

²⁶⁴ *See, e.g.*, Helen Norton, *Government Lies and the Press Clause*, 88 UNIV. COLO. L. REV. 453, 454 (2018); Ronnell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. STATE L.J. 1301, 1357 (2017); Jones, *supra* note 4, at 258; C. Edwin Baker, *The Media that Citizens Need*, 147 U. Pa. L.R. 317, 396 (1998) (referring to the watchdog role and citing *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973)).

²⁶⁵ Blasi, *The Checking Value in First Amendment Theory*, *supra* note 37, at 648.

²⁶⁶ *Id.* at 525-27.

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Citizens Need, C. Edwin Baker wrote that “the watchdog role or what Vince Blasi dubbed the ‘checking function’—is probably the most important contribution the press can make to either democracy or to the public sphere.”²⁶⁷ This is particularly notable because of the etymology of the verb “check.” To check is “to place or come into opposition; to clash,” “to come into collision with, strike, hit,” “to clash, come into hostile contact.”²⁶⁸ It is a verb imbued with a degree of physical force.

It could be argued that a watchdog’s primary function is to stand guard. In that role the watchdog is not actively violent. Yet, a watchdog is only worth its salt if it is perceived as threatening. It must be able to frighten and be capable of lashing out. So even if the watchdog is not engaged in violence, its potential for violence needs to be close to the surface.

This is likewise true for the watchdog journalist. The threat of a watchdog press helps to keep the corruption of the powerful in check.²⁶⁹ Plus, even more so than an actual watchdog, the attack itself—in the form of critical coverage—is a regular and relished function. As Margaret Sullivan, a former public editor of the *New York Times*, writes, “A real journalist is one who understands, at a cellular level, and doesn’t shy away from, the adversarial relationship between the government and press—the very tension that America’s founders had in mind with the First Amendment.”²⁷⁰

Beyond violence, scholars and journalists themselves have also examined how the watchdog metaphor is entangled with hierarchy. The seeds of this connection between the marketplace, the watchdog press, and hierarchy were planted almost immediately after *Abrams* was issued. In his 1920 book *Liberty and the News*, in a chapter entitled *Journalism and the Higher Law*, the journalist Walter Lippmann, referred to *Abrams* directly. He wrote, “The theory of our constitution, says Mr. Justice Holmes, is that truth is the only ground upon which men’s wishes can safely be carried out.”²⁷¹ He added, “There can be no higher law in journalism than to tell the truth and shame the devil.”²⁷²

For Lippmann, a friend of Holmes (Holmes had, in fact, personally sent him and a few other confidants a copy of the *Abrams* dissent),²⁷³ the press was an elite information corps. It gathered and interpreted the news—especially news about government and political affairs—for the masses so that the masses could participate in democracy. For Lippmann, such elites were necessary given that “the real environment is altogether too big, too complex, and too fleeting for direct acquaintance.”²⁷⁴

This hierarchy with the press serving as an elite sitting atop the citizenry has shaped journalism since. As journalism scholars Barbie Zelizer, Pablo J. Boczkowski, and C.W. Anderson write, “[F]or most of the twentieth century, the ‘Lippmannian’ solution—elite

²⁶⁷ Baker, *The Media that Citizens Need*, *supra* note 264, at 324-25.

²⁶⁸ *Check*, OXFORD ENGLISH DICTIONARY, oed.com (last visited Dec. 2, 2022).

²⁶⁹ See, e.g., Pengjie Gao, Chang Lee, & Dermot Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, 135 J. OF FIN. ECON. 445 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S0304405X19301606> (noting “increased government efficiencies that result from the loss of a government watchdog after a newspaper closure” and citing other studies that show “media monitoring improves corporate governance outcomes”).

²⁷⁰ Margaret Sullivan, *Who’s a Journalist? A Question with Many Facets and One Sure Answer*, N.Y. TIMES (June 29, 2013), <https://archive.nytimes.com/publiceditor.blogs.nytimes.com/2013/06/29/whos-a-journalist-a-question-with-many-facets-and-one-sure-answer/>.

²⁷¹ WALTER LIPPMANN, *LIBERTY AND THE NEWS* 1, 4 (1920), <https://library.oapen.org/handle/20.500.12657/45896>.

²⁷² *Id.*

²⁷³ SNYDER, *supra* note 80, at 290, 292.

²⁷⁴ WALTER LIPPMANN, *PUBLIC OPINION* 11 (1922).

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journalism as an elite activity, produced by elites and ultimately for elites—has been seen as a dominant option for understanding the role of journalism in democracy, even if it does not fully reflect the ideas and interests of those outside spheres of political power.”²⁷⁵ This is the way that “market-aligned journalism has tended to function in western and global northern liberal democracies,” they add.²⁷⁶

Working journalists might flinch at the idea that the watchdog role is hierarchical. Journalists generally view investigative reporting as a public service to citizens, not a put down of them. A classic journalism text describes watchdog reporting as a “special category of journalistic enterprise, one in which the principles of independent inquiry and social advocacy blend into the highest form of journalistic public service.”²⁷⁷ And although there is much to this, it is also not a detached view. Yes, the hierarchy may be a benevolent one in which the press as a watchdog is truly trying “To Protect and to Serve”—to use a popular policing motto.²⁷⁸ But as police power over citizens is undeniable, so too is the power of the press over citizens. It has access to government and public information that citizens do not. It has its own bullhorn. And it has a husky agenda-setting power over public discourse that most members of the public do not. Plus, journalists and journalism scholars undermine themselves a bit when they (seemingly unintentionally) use violent rhetoric to talk about the press’s watchdog role. For example, one scholar refers to the role saying that “In the classic cliché, hard-hitting independent reporters ask tough questions of the powerful.”²⁷⁹ Similarly, the classic journalism text, in describing the watchdog role, says courts have protected journalists “so that they may aggressively serve the public’s need for information concerning matters of public welfare.”²⁸⁰

Panning out beyond the watchdog metaphor for a moment, as the marketplace metaphor is not solely responsible for linking free speech to hierarchy and violence, the watchdog metaphor is similarly not solely responsible for painting the press as hierarchical and aggressive. Another metaphor also bears some responsibility here. That metaphor is the fourth estate. First used in the 1700s to describe the British press,²⁸¹ when the metaphor was later adopted in the United States it was intended to convey that the press was a co-equal branch of government. As such, it could check them.²⁸² Although not as obviously violent a metaphor as the watchdog, the reference to an estate evokes a feudal system.²⁸³ This system was hierarchical and necessarily involved the wielding of power.²⁸⁴ Economist Adam Smith—also an influence on Holmes—is

²⁷⁵ ZELIZER, BOCZKOWSKI, & ANDERSON, *supra* note 6, at 36.

²⁷⁶ *Id.*

²⁷⁷ KOVACH & ROSENSTIEL, *supra* note 5, at 198.

²⁷⁸ See, e.g., *The Origin of the LAPD Motto*, LAPD, <https://www.lapdonline.org/lapd-motto/> (describing the origin of the Los Angeles Police Department’s motto, dating back to 1955, “To Protect and to Serve”).

²⁷⁹ Pippa Norris, *Watchdog Journalism*, in *THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY* 526 (Mark Bovens et al. eds., 2014).

²⁸⁰ KOVACH & ROSENSTIEL, *supra* note 5, at 199.

²⁸¹ Potter Stewart, “*Or of the Press*,” 26 *HASTINGS L.J.* 631, 634 (1975).

²⁸² See *id.*

²⁸³ See Fredric L. Cheyette, *Feudalism, European*, *NEW DICTIONARY OF THE HISTORY OF IDEAS* 828 (Maryanne Cline Horowitz ed., 2005) (explaining that the original understanding of feudal concerned “the legal rules, rights, and obligations that governed the holding of fiefs” or land).

²⁸⁴ Although “estate” doesn’t necessarily denote wealth, one common definition of it, according to the Oxford English Dictionary is “landed property; usually, one of considerable extent.” *Estate*, *OXFORD ENGLISH DICTIONARY*, oed.com (last visited Dec. 2, 2022).

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credited with popularizing the term “feudal system” as a result of *The Wealth of Nations*.²⁸⁵ In his work, Smith emphasized that violence was a constant within this system.²⁸⁶

That the fourth estate and watchdog are characterized by hierarchy, competition, power, and even violence is perhaps not surprising. They are intimately related to the marketplace of ideas. All spring from a libertarian conception of democracy and expression.²⁸⁷ This relationship is obvious from a classic 1950s journalism text, *Four Theories of the Press*, in which Fred Siebert summarized a “libertarian theory of the press” in words that could have been written by Milton, Mill, or Holmes to describe the marketplace:

Let all with something to say be free to express themselves. The true and sound will survive; the false and unsound will be vanquished. Government should keep out of the battle ... And even though the false may gain a temporary victory, that which is true, by drawing to its defense additional forces, will through the self-righting process ultimately survive.²⁸⁸

This passage also seems to allude to the press’s watchdog role. Siebert makes that link more explicit later in the chapter when he writes that the press’s function “as an extralegal check on government” (i.e., its watchdog role) is what separates the libertarian theory of the press from other theories (the authoritarian, social responsibility, and Soviet communist). That is, the watchdog function is libertarian press’s defining characteristic.

These ties between libertarian democracy and the libertarian theory of the press that then spawn the links between the marketplace of ideas and the watchdog function, result in these metaphors having tremendous power over how we think about speech and the press. As has been described, this means competition, power and violence loom large in our conceptions of both.

These qualities are not always undesirable. There is a place for friction and competition within speech, and the watchdog function is a vital one. Yet, as metaphor is adept at creating meaning and driving action, it can also block the same.²⁸⁹ When a metaphor conceptualizes speech and the press in one way, it is necessarily *not* conceptualizing them as something else.²⁹⁰ And because these metaphors—the marketplace and the watchdog—are so powerful and so mutually reinforcing, they can quite easily occupy the field of our thought on the issue of free speech and the institution of the press. For their part, journalism scholars Zelizer, Boczkowski, and Anderson, worry about the way elite journalism (tied to the watchdog role) has narrowed journalists’ thinking about their purpose. They write: “Other professions do not preach or talk down to their audiences ... Perhaps journalists ought to start thinking of themselves less like

²⁸⁵ Cheyette, *supra* note 283, at 828-29.

²⁸⁶ See Ingber, *supra* note 203, at 5, 5 n.14 (noting that “the imagery of the marketplace is rooted in laissez-faire economics” of which Smith was an intellectual driver) (citing Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (7th ed. London 1793)(1st ed. London 1776)); Barry R. Weingast, *Adam Smith’s Theory of Violence and the Political-Economics of Development* 4 (Jan. 2017), https://web.stanford.edu/group/mcnollgast/cgi-bin/wordpress/wp-content/uploads/2016/01/Weingast.ASM_.NBER-ver-4.00__17.0116.pdf (In this [feudal] system, land represented the means to power, wealth, and security. Violence, as Smith emphasizes, was a constant presence.”).

²⁸⁷ See Norris, *supra* note 280, at 526. (“Classical liberalism, ever skeptical about the trustworthiness of government and powerful leaders, advocates that journalists should be watchdogs of the public interest.”).

²⁸⁸ Fred S. Siebert, *The Libertarian Theory of the Press*, in *FOUR THEORIES OF THE PRESS* 45 (Fred S. Siebert, Theodore Peterson, & Wilbur Schramm eds., 1956).

²⁸⁹ LAKOFF & JOHNSON, *supra* note 8, at 13.

²⁹⁰ See SHELDRAKE, *supra* note 49, at 173; LAKOFF & JOHNSON, *supra* note 8, at 13.

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lawyers or doctors and more like jazz musicians, actors, dancers, or visual artists. No jazz musician would ever say that they do not take their audience into account when they perform.”²⁹¹ In other words, rather than looking down their noses at their audience, journalists need to see eye to eye with them. The watchdog metaphor may be getting in the way.

III. COMPOSING NEW METAPHORS

“The language we have ... is not large enough for the territory we’ve already entered.”
— David Whyte²⁹²

No metaphors as ensconced as the marketplace and the watchdog are easy to unseat. That is okay; again, competition, friction, and checking are valuable, even vital.²⁹³ And we are never going to rid the public sphere of violence. But there is an urgency to thinking about supplements. This is because metaphors that operate in the realm of politics and economics have particular potency, and so, capacity to harm. These types of metaphors, Lakoff and Johnson write, “matter more, because they constrain our lives. A metaphor in a political or economic system, by virtue of what it hides, can lead to human degradation.”²⁹⁴ The marketplace metaphor, as described, operates in the realm of politics. Plus, speech—which transcends categories like politics and economics—may have even more impact. We are also witnessing a rapid degradation of the quality of speech in our public sphere with loud and threatening voices sucking up disproportionate amounts of oxygen.

This Section first argues that the marketplace and watchdog metaphors need not be eliminated but supplemented. It then looks to biology and physics for metaphorical possibilities. It does this, in part, because for a metaphor to be sticky it needs to be grounded in experience and reality. These sciences specialize in understanding, at the deepest of levels, the world (and worlds) around us. I then brainstorm a few metaphors that could serve to supplement the marketplace and watchdog. Finally, this Section ends by trying out these metaphors in the press context; I try to sketch out how, if employed by judges in some potential press-related cases, these metaphors might help lay the foundation for a richer understanding of the free press and its function.

A. Multiple Metaphors: Supplementing the Marketplace

Coming up with the metaphor or metaphors that would supplant the marketplace would be a coup. But staging a coup—forcing change via violence—is neither in keeping with the themes of this article nor the way that metaphor operates. Metaphors as long-lasting as the marketplace tend not to be loners. That is, metaphors often act in concert, creating a web of interconnected concepts. As metaphors gain strength by spinning a web of related expressions, they can also be

²⁹¹ ZELIZER, BOCZKOWSKI, & ANDERSON, *supra* note 6, at 100.

²⁹² Interview by Krista Tippett with David Whyte, *Seeing Language Large Enough*, ON BEING (Apr. 7, 2016), <https://onbeing.org/programs/david-whyte-seeking-language-large-enough/>.

²⁹³ See Martin Luther King, Jr., *Letter from a Birmingham Jail*, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (last visited Jan. 15, 2023) (pointing to the difference between violence and tension and noting the importance of the latter in saying, that the aim of nonviolent direct action is to “establish such creative tension that a community that has consistently refused to negotiate is forced to confront the issue”),

²⁹⁴ LAKOFF & JOHNSON, *supra* note 8, at 236.

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reinforced via links to like metaphors. Just one example are the linked metaphorical concepts “time is money,” “time is a resource,” and “time is a valuable commodity.”²⁹⁵

Perhaps counterintuitively, metaphors within a single conceptual system will not always be internally consistent. This is especially true in an area that is nuanced.²⁹⁶ The First Amendment covers vast doctrinal and theoretical terrain. There are numerous “theories” of the First Amendment (e.g., individual autonomy, diversity, and self-government).²⁹⁷ Frederick Schauer has even argued that “we might in fact have several first amendments” to the extent that we want to protect a variety of different principles.²⁹⁸ If an area were ever vast and shifting enough for multiple metaphors, speech seems to qualify.

Other pragmatic reasons exist for having multiple metaphors in the speech arena. The marketplace metaphor is deeply entrenched and would be tough to budge. As discussed, humans have long linked speech and fighting. In Lakoff and Johnson’s *Metaphors We Live By*, the very first metaphor they focus on is “Argument is War” writing that as humans, “we in part conceptualize arguments in terms of battle.”²⁹⁹ Not all speech is argument, of course, but this metaphor is powerful nonetheless. And beyond just the metaphor, the process of seeking truth may be inextricably linked to power dynamics. As historian Sophia Rosenfeld writes, “truth is never fully divorced from politics or social conflict.”³⁰⁰

Moreover, the marketplace metaphor serves a purpose. Competition has value. Being able to use robust, vehement, and caustic language is important, even if we do not want it to be the foundation for our free speech environment.³⁰¹ The press’s watchdog role is an effective anti-corruption and good-government tool.³⁰² Thus, the marketplace and watchdog metaphors may be incomplete, and they may be tainted by their link to violence and hierarchy, but they remain important.

Plus, I do not seek to overturn the fundamental justifications for free speech and the press that are embedded in the marketplace and watchdog metaphors. With respect to free speech, Frederick Schauer has called these justifications the “argument from truth” and the “argument from democracy.”³⁰³ Per the argument from truth, “[o]pen discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize” are all fundamental to the process of arriving at truth.³⁰⁴ Per the argument from democracy, free speech provides citizens with the information they need “to engage in the deliberative process requisite to the intelligent use” of their sovereign power in a democracy and “freedom to criticize makes possible holding governmental officials,

²⁹⁵ *Id.* at 9.

²⁹⁶ *See id.* at 221

²⁹⁷ *See* Blasi, *The Checking Value in First Amendment Theory*, *supra* note 37, at 544.

²⁹⁸ Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1303-04 (1983); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xx (1993) (“Any simple or unitary theory of free speech value would be obtuse.”).

²⁹⁹ LAKOFF & JOHNSON, *supra* note 8, at 7.

³⁰⁰ ROSENFELD, *supra* note 191, at 20.

³⁰¹ *See* David H. Vernon, *The Free Marketplace of Ideas: Why Is It So Illusive*, 21 J. OF THE LEGAL PRO. 7, 13, 14 (1997) (suggesting the safety valve argument).

³⁰² *See* Gao, Lee, & Murphy, *supra* note 269.

³⁰³ FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15, 35 (1982).

³⁰⁴ *Id.* at 15.

as public servants, properly accountable to their masters, the population at large.”³⁰⁵ (This last point is, of course, tightly linked to the theory of watchdog journalism.)³⁰⁶

I don’t seek to replace these rationales; I believe in them. As literary critic Michiko Kakutani has recognized, “Truth is a cornerstone of our democracy.”³⁰⁷ We could argue about whether “truth” is the best word to use. (Schauer also uses “knowledge.”) Regardless, I am invested in processes that have truth or knowledge as an end goal. I also believe in deliberation inherent to democracy and the importance of curbing official wrongdoing. My concern is that the path to truth is too often defined in hierarchical, competitive, and violent terms. The marketplace and watchdog metaphors, along with the rhetoric that has sprung up around them, suggest that hierarchy, competition, and violence are endemic (even necessary) to the pursuit of truth and democratic government. By suggesting this, it makes it more likely that it will be so.

But turning to violence is a choice, and it is not one that we have to make.³⁰⁸ It is not new to argue that collaboration and symbiosis are necessary for the pursuit of truth and for governing. As historian Rosenfeld argues, there is a “cooperative epistemic dream at the heart of the democratic idea”—one that requires “forms of collaboration” to achieve.³⁰⁹ I hope new metaphors can help to bring this collaborative aspect of democracy to the forefront of our consciousness and remind us of less violent means for acquiring knowledge and self-governing.

B. Sources for New Metaphors

Coming up with supplemental speech metaphors is daunting. Starting normatively with objectives and goals about how we want our speech environment to be is logical but difficult. Luckily, science gives us a bit of a way out. This is because over the last century, various scientific disciplines are arriving at some strikingly similar realizations about the ways in which resilience, survival, and flourishing are not solely the product of competition, hierarchy, and violence. Rather, scientists are learning that collaboration (both human and non) is not simply beneficial but necessary. Below, I explain some ways in which biology and physics can help us rethink our free speech and press metaphors.

i. Biology: Symbiosis and Entanglement

The Darwinian “survival of the fittest” concept influenced Holmes and has had enormous influence generally, but scientists have expanded their understanding of evolution significantly in the last century. A prime example of this expansion relates to discoveries about a humble and miraculous creature: the lichen. (Yes, you are reading about a lichen in a law review article. Stay with me.) As a creature, the lichen blows up understandings of competition, categorization, power, and violence that are fundamental to the way in which Darwin’s theory of evolution has been understood and fundamental as well to the marketplace of ideas metaphor.

³⁰⁵ *Id.* at 36.

³⁰⁶ Journalists understand the watchdog role as serving as a monitor of government power. See KOVACH & ROSENSTIEL, *supra* note 5, at 198-201.

³⁰⁷ MICHIKO KAKUTANI, THE DEATH OF TRUTH, 19 (2018).

³⁰⁸ See YASCHA MOUNK, THE GREAT EXPERIMENT: WHY DIVERSE DEMOCRACIES FALL APART AND HOW THEY CAN ENDURE 48 (2022) (“There is nothing inevitable about how people identify, or whether they choose violent means to settle their differences.”).

³⁰⁹ ROSENFELD, *supra* note 191, at 72, 130, 174.

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The lichen—which can look like a dry, leafy growth on rocks and bark—is comprised of an alga and a fungus that embrace one another to thrive.³¹⁰ The alga uses photosynthesis to generate food. But alone it cannot produce the minerals it needs. Meanwhile, the fungus cannot make food, but it can dissolve materials so that minerals are freed up for consumption. By the process of symbiosis, the alga and fungus nourish one another. The resulting organism, the lichen, operates as if it were one, integrated life form.³¹¹

Darwin’s theory of evolution led biologists to understand that species were diverging and branching as they evolved.³¹² But lichens upended this model. As described by ecologist Merlin Sheldrake, lichens are doing “something entirely unexpected: *converging*.”³¹³ Lichens have demonstrated, that “evolution could no longer be thought of solely in terms of competition and conflict.”³¹⁴ Rather, they are, “a type case of inter-kingdom collaboration.”³¹⁵

Lichens have helped scientists to understand that symbiosis—a term actually coined to describe how lichens function³¹⁶—was integral to the beginnings of life on Earth. Lichens are able to colonize even the harshest terrain.³¹⁷ They have been dubbed “polyextremeophiles,” meaning that they can survive in a host of challenging conditions.³¹⁸ After a volcano erupts, for example, they will be the first living thing to colonize the cooled lava.³¹⁹ As biologist Robin Wall Kimmerer writes, “when conditions are harsh and life is tenuous, it takes a team sworn to reciprocity to keep life going forward. In a world of scarcity, interconnection and mutual aid become critical for survival. So say the lichens.”³²⁰ It is this ability, to thrive when little to nothing else can, that we as humans have to thank for our very existence. This is because, in fact, lichens are near the head of an evolutionary chain that eventually leads to humans. Appropriately, lichens’ scientific name includes the Latin *umbilicaria*, or navel.³²¹

Another related, and perhaps well-known example of how our understandings of evolution and ecology are being transformed, is what has been dubbed the “wood wide web.” In the last several generations, biologists have begun to understand the ways in which trees are intricately interconnected and how this leads to their flourishing. Forest ecologists, including Suzanne Simard, helped to uncover that a dense tangle of fungi or mycorrhiza (a word that literally links the Greek words for fungus—*mykós*—and root—*riza*) links trees to one another.³²² Simard and other forest ecologists and mycologists have shown that through fungal connections, organisms are able to communicate with, nourish, and protect one another. For example, if aphids are attacking one plant in a network, another plant in the network is able to learn that and

³¹⁰ ROBIN WALL KIMMERER, BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHING OF PLANTS 269, 272 (2013) at 269, 272; SHELDRAKE, *supra* note 49, at 74.

³¹¹ KIMMERER, *supra* note 310, at 270

³¹² SHELDRAKE, *supra* note 49, at 72 (emphasis in original).

³¹³ *Id.* (emphasis in original).

³¹⁴ *Id.* at 73.

³¹⁵ *Id.*; KIMMERER, *supra* note 310, at 275 (“Some of earth’s oldest beings, lichens are born from reciprocity.”).

³¹⁶ SHELDRAKE, *supra* note 49, at 73.

³¹⁷ KIMMERER, *supra* note 310, at 275.

³¹⁸ SHELDRAKE, *supra* note 49, at 79, 85; KIMMERER, *supra* note 310, at 272.

³¹⁹ David J. Flaspohler, *A Delicate Web of Life that Started with Lava*, N.Y. TIMES (June 12, 2012), <https://archive.nytimes.com/scientistatwork.blogs.nytimes.com/2012/06/12/a-delicate-web-of-life-that-started-with-lava/>.

³²⁰ KIMMERER, *supra* note 310, at 272.

³²¹ *Id.* at 270.

³²² JAMES BRIDLE, WAYS OF BEING: ANIMALS, PLANTS, MACHINES: THE SEARCH FOR PLANETARY INTELLIGENCE 60 (2022).

prepare a defense.³²³ Simard has called the connections beneath the forest floor an “underground social network” and a “bustling community.”³²⁴

As with the discoveries about lichens, revelations involving mycorrhizal fungi have upturned conventional scientific wisdom. Technologist and artist James Bridle writes that the revelations “stood in opposition to classical forest ecology, which prioritized competition and individual success in measuring the health of the forest.”³²⁵ Given these revelations, according to journalist and naturalist Robert Macfarlane, nature “seems increasingly better understood in fungal terms...as an assemblage of entanglements of which we are messily part.”³²⁶

Lichens and the wood wide web represent just two of the examples that biologists could now give of interspecies collaboration. Biologists are discovering that symbiosis and cooperation are so prevalent that the entire conception of an “individual” person, animal, or plant is called into question.³²⁷ As biologists Scott Gilbert and Jan Sapp and philosopher Alfred Tauber write, the zoological sciences are discovering that what we once thought of as autonomous animals are actually “composites of many species living, developing, and evolving together.”³²⁸ For example, it is estimated that approximately 90 percent of the cells that comprise the human body are bacterial.³²⁹ Vital life functions, like immunity, would cease to work were it not for other organisms living in our bodies.³³⁰ As Gilbert, Sapp, and Tauber write, “we have never been individuals.”³³¹ Certain microbiologists even refer to the human body as a “partnership,” which, political theorist Elisabeth Anker says is “the same language indigenous studies scholars have long used to describe living relationships among people, animals, plants, and the land.”³³²

The potential impact of these discoveries is broad. Looking beyond science to politics and economics, the ecologist Sheldrake notes that “[t]he dominant narrative in the United States and western Europe since the development of evolutionary theory in the late nineteenth century was one of conflict and competition, and it mirrored views of human social progress within an industrial capitalist system.”³³³ Today, science is eroding this and poised to shift the narrative. In reference to lichens, Sheldrake writes that it makes his “head spin to think of how many ideas had to be revisited, not least our culturally treasured notions of identity, autonomy, and independence.”³³⁴ And, I would add, free speech.

ii. *Physics: Connectivity and Collaboration*

The last century of work in physics has been similarly cataclysmic, and in certain ways it parallels that in the life sciences. In this time, physicists have been focused on interconnectivity both within and between the vastest of realms (astrophysics and cosmology) and the tiniest (quantum physics). In one basic sense, this means connecting the building blocks of our bodies

³²³ ROBERT MACFARLANE, UNDERLAND: A DEEP TIME JOURNEY 98 (2019).

³²⁴ *Id.* at 89.

³²⁵ BRIDLE, *supra* note 322, at 80

³²⁶ *Id.*

³²⁷ Scott Gilbert, Jan Sapp, & Alfred I. Tauber, *A Symbiotic View of Life: We Have Never Been Individuals*, 87 Q. REV. OF BIOLOGY 325, 325 (2012).

³²⁸ *Id.* at 325.

³²⁹ *Id.* at 327.

³³⁰ *Id.* at 330-31.

³³¹ *Id.* at 325; *see also* ANKER, *supra* note 166, at 162-63.

³³² ANKER, *supra* note 166, at 161.

³³³ SHELDRAKE, *supra* note 49, at 210.

³³⁴ *Id.* at 18.

and the cosmos.³³⁵ As Nobel Prize winning physicist Frank Wilczek writes: “Detailed study of matter reveals that our body and our brain—the physical platform of our ‘self’—is, against all intuition, built from the same stuff as ‘not-self,’ and appears to be continuous with it.”³³⁶ This discovery is not entirely new. It has been known since at least 400 B.C. when Democritus said, “in truth there are only atoms and the void.”³³⁷ Yet, in the past several generations, physicists have learned exponentially more about “world-building ingredients” at the sub-atomic level.³³⁸ They have discovered particles like quarks and gluons.³³⁹ (Quarks—which come in six flavors: up, down, charm, strange, top, and bottom—got their name from a line in James Joyce’s *Finnegans Wake*, “Three quarks for Muster Mark!”³⁴⁰ Given this alone, how could we not look to physics for naming inspiration?)

Wondrously, in physics, knowledge about the smallest of things helps to explain what is happening at the vast scale of the cosmos. One example of this is spectroscopy. As theoretical physicist and cosmologist Chanda Prescod-Weinstein describes, “[l]ooking at the frequency of light that we observe, or the frequency of light that is missing from a spectrum, can tell us what the radiating source is made of.”³⁴¹ This is because atoms, have a particular fingerprint that corresponds with color on the spectrum.³⁴² So, by being attuned to color, physicists “can discern the identity and study the behavior of atoms that are far removed from us in space and time.”³⁴³ Because of this, spectroscopy is a “mainstay of astrophysics and cosmology.”³⁴⁴ What spectroscopy shows us is that understanding tiny particles also helps us to piece together the very origins of the universe.

Although the term “ecology” is used most often in biology to describe a web of organisms interacting in an environment, physicists employ the same terminology to describe interconnection at a broader level.³⁴⁵ For example, astronomer Paul Murdin, in his book *The Universe: A Biography*, describes our solar system as an ecosystem that stretches from the sun and to the reaches of “a solar wind that extends out beyond Pluto.”³⁴⁶ Within this system, materials are shared. The sun, of course, bathes the planets and everything else in our solar system with its light, making life on Earth possible. Not life giving, but planets also exchange rocky material in the form of meteoroids, which are hunks of planets and asteroids.³⁴⁷ Beyond this, at the galactic level, stars and nebulae cycle gases, and galaxies—with their stars, gas, and dark matter—interact and exchange energy with one another.³⁴⁸ And so, some of the same types of interconnection and collaboration happening between living beings on Earth is happening much farther afield.

³³⁵ FRANK WILCZEK, *FUNDAMENTALS: TEN KEYS TO REALITY* 15 (2021).

³³⁶ *Id.* at xviii; MURDIN, *supra* note 10, at 135

³³⁷ WILCZEK, *supra* note 335, at 72.

³³⁸ *Id.* at 87.

³³⁹ *Id.* at 78.

³⁴⁰ CHANDA PRESCOD-WEINSTEIN, *THE DISORDERED COSMOS: A JOURNEY INTO DARK MATTER, SPACETIME, & DREAMS DEFERRED* 79-81 (2021).

³⁴¹ *Id.* at 81.

³⁴² WILCZEK, *supra* note 335, at 109.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ MURDIN, *supra* note 10, at 119.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

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Physicist Albert Einstein summed up beautifully these connections between humans, all living beings, and the universe when he said:

A human being is part of a whole, called the Universe, a part limited in time and space. He experiences himself, his thoughts and feelings as something separated from the rest, a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest us. Our task must be to free ourselves from this prison by widening our circles of compassion to embrace all living creatures and the whole of nature and its beauty.³⁴⁹

Thus, in Einstein's view—just as for the lichen—the path forward is through the embrace.

So what do these discoveries in biology and physics mean for free expression? And what specifically do they mean for the marketplace of ideas and the watchdog metaphors? They help us recognize that these speech and press metaphors are incomplete. That is, if hierarchy, competition and violence are *not* the only path to survival (not to mention resilience and flourishing) in the natural world, if the universe is demonstrating to us the interconnectivity of all things, then perhaps the marketplace and the watchdog metaphors should not be so dominant in freedom of expression doctrine and culture. If, as science indicates, collaboration and symbiosis are fundamental to life, especially at the bleakest of times, these qualities should figure into how we conceptualize free speech and the press. How best to do this is far from clear, but the next part offers up some possibilities.

C. *Proposals for New Speech Metaphors*

Collaboration, symbiosis, cooperation, and accretion. Biology and physics reveal that these qualities are as fundamental—maybe even more so—to our survival and resilience than competition and combat. Science also provides us with some options for metaphors that embody these characteristics. The possibilities—a forest and a universe—are described in some detail here. Although these examples may seem banal or hackneyed, that is, in a sense, the point. I've sought out metaphors that feel quotidian, are comprehensible, and exemplify key characteristics like collaboration and cooperation. Plus, there is also still much we don't understand about forests and the universe, leaving room for the metaphors to stretch and grow.

i. Forest Metaphors

The first set of metaphors to consider as an alternative to the marketplace is one based on the forest. It could be formulated as: *the idea forest, the forest of ideas, the conversation forest, the forest of conversation, the deliberative forest.*

The forest of ideas is a spatial metaphor, like the marketplace, but rather being dominated by competition, hierarchy, and violence, we can understand the forest as a space where mutuality and collaboration are also a norm. In the forest, there is simultaneously individuality and inter-connection. Above ground, the forest is, of course, full of individual trees, but as forest ecologists have demonstrated, these trees are intricately connected beneath our feet. And so, the forest, is analogous, in a sense, to a gathering of humans, in communication within one another.

³⁴⁹ WILCZEK, *supra* note 335, at 227-28.

This forest, is also committed to communal thriving. As biologist Kimmerer writes, “If we are looking for models of self-sustaining communities, we need look no further than an old-growth forest.”³⁵⁰ So while communication is potentially inexpert or imperfect or unsuccessful, the intention is toward flourishing beyond the individual “speaker.”

One advantage of this metaphor beyond supplementing the competition and hierarchy of the market with collaboration and symbiosis, is also that it might make it easier, within First Amendment doctrine, to theorize both speaker and listener rights. This has been a burgeoning area within First Amendment thought with scholars investigating the basis for listener rights as a means of distributing power in our public sphere. The examples that include the words “conversation” (i.e., the *conversation forest*) and “deliberation (i.e., the *deliberative forest*) aim to get at this quality of exchange, and I attempted to choose words that indicated the exchange was measured, thoughtful, and without obvious hierarchies.

The forest metaphor might even be stretchy enough to accommodate new forms of communication and knowledge-building that could become commonplace in the near term. As it stands, First Amendment law is largely anthropocentric in the way that it thinks about speakers and listeners. With the notable exception of corporations, speakers and listeners are human beings. But a forest may allow us to think about communication and knowledge-building between entities and even beyond. For example, the work of the mathematician Alan Turing suggests intelligence may not be something that rests solely in our brains or in machines but in the dynamic between the two.³⁵¹ So beyond biology and physics, mathematics and other sciences suggest that collaboration between all kinds of life and non-life (e.g., machines) can lead us to new forms of truth and knowledge.

A key question about the forest metaphors is whether they would catch on. That is, do they have the potential to be sticky? Is the “forest of ideas” the “great quote” that Blasi describes?³⁵² It may be, for several reasons. First, most (although maybe not all) of us have experienced being in a forest.³⁵³ We can conceptualize the space—both the separateness of individual trees and the community that is formed by the conglomeration of them.

We cannot see through the soil to the mycorrhizal fungal networks that connect all the trees, but the fact of those connections is becoming more widely known. Numerous, recent, best-selling books discuss the connections between trees. These include the non-fiction *The Hidden Life of Trees* by Peter Wohlleben and *Entangled Life* by Merlin Sheldrake as well as the Pulitzer Prize winning novel *The Overstory* by Richard Powers, which includes a character based on forest ecologist Suzanne Simard. In an episode of the popular TV show *Ted Lasso*, a soccer coach is reading *Entangled Life* and discusses it with another coach.³⁵⁴ The poet Ross Gay’s bestseller, *The Book of Delights*, contains an essay about root and mycelium connections in

³⁵⁰ KIMMERER, *supra* note 310, at 284.

³⁵¹ See BRIDLE, *supra* note 322, at 31.

³⁵² See Blasi, *The Checking Value in First Amendment Theory*, *supra* note 37, at 648.

³⁵³ A study by University of Colorado researchers found that about 54% of Americans live within five kilometers of a forest. Clay Bonnyman Evans, *Worldwide, 1.6 Billion Rural People Live Within 5km of a Forest*, COLO. ARTS & SCIS. MAG. (Sept. 17, 2020), <https://www.colorado.edu/asmagazine/2020/09/17/worldwide-16-billion-rural-people-live-within-5-km-forest>.

³⁵⁴ Gabriel Popkin, *Are Trees Talking Underground? For Scientists, It's in Dispute*, N.Y. TIMES (Nov. 7, 2022), <https://www.nytimes.com/2022/11/07/science/trees-fungi-talking.html>.

forests and how they foster communication, sustenance, and even joy.³⁵⁵ Fungal networks even inspired a collection at Paris Haute Couture Week.³⁵⁶

Popular culture is catching on to what indigenous peoples, along with some scientists, naturalists, and others have long understood: that interconnection and symbiosis are a key to flourishing. Law and courts, as a conservative discipline and institution respectively, are often the last to shift or innovate. Moving away from a metaphor that emphasizes competition is particularly fraught. Interestingly, Harvard Law's dean from 1916 to 1936, Roscoe Pound, was also a botanist and lambasted some of the earliest findings about symbiosis between fungi and trees saying, "we can never be sure that the other would not have been well off, if left to itself."³⁵⁷ But now, nearly a century later, and after a scientific and cultural sea change, perhaps law is ready to welcome these developments.

A forest metaphor has shortcomings. If the goal is to tamp down the hierarchy and competition that characterize the marketplace, the forest is not wholly successful. Forests undoubtedly also foster violence. But we are not looking for a pure metaphor, and we are not wedded to binaries.³⁵⁸ Competition and cooperation need not exclude one other. In fact, as ecologist Sheldrake writes, "collaboration is always an alloy of competition and cooperation."³⁵⁹ As a result, there is actually a danger of a metaphor being too inflexible. But this danger is minimal with a forest metaphor. As Sheldrake describes, "The forest is always more complicated than we can ever dream of."³⁶⁰ A complex ecosystem seems a good fit for conceptualizing speech.

If we are lucky, a forest, in all its complication, can help us to reimagine our speech environment as we move into the future. That so much about a forest's functioning remains mysterious is something to embrace. As recent scientific "discoveries" have taught us, sometimes the insight or realization has been with us all along, but our positionality or perspective didn't allow us to see it. After all, in 1911, almost a decade prior to Holmes's *Abrams* dissent, the naturalist John Muir wrote of an epiphany he had while hiking Yosemite's Cathedral Peak: "When we try to pick out anything by itself, we find it hitched to everything else in the Universe."³⁶¹ Muir was echoing understandings that indigenous cultures have held for far longer. As biologist Kimmerer, who is an enrolled member of the Citizen Potawatomi Nation, writes, "In the old times, our elders say, the trees talked to each other. ... But scientists decided long ago that plants were deaf and mute, locked in isolation without communication. The

³⁵⁵ ROSS GAY, *THE BOOK OF DELIGHTS* 163 (2019).

³⁵⁶ *Roots of Rebirth*, IRIS VAN HERPEN, <https://www.irisvanherpen.com/collections/roots-of-rebirth/roots-of-rebirth-by-molly-sj-lowee>.

³⁵⁷ SHELDRAKE, *supra* note 49, at 263 n. 129; *Roscoe Pound of Harvard Dies; Headed Law School 20 Years; His "Social Interests" Theory Influenced the New Deal—Scholar in Many Fields*, N.Y. TIMES (July 2, 1964), <https://www.nytimes.com/1964/07/02/archives/roscoe-pound-of-harvard-dies-headed-law-school-20-years-his-social.html> (noting the years during which Pound was dean).

³⁵⁸ Striving for a too-pure metaphor could be counterproductive. See ANKER, *supra* note 166, at 76 ("[N]o act of freedom is universally desirable or pure ... Desires for purity and perfection produce violence and pollution in their wake.").

³⁵⁹ SHELDRAKE, *supra* note 49, at 162.

³⁶⁰ MACFARLANE, *supra* note 323, at 110.

³⁶¹ BRIDLE, *supra* note 322, at 12 (quoting JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* (1911), https://vault.sierraclub.org/john_muir_exhibit/writings/my_first_summer_in_the_sierra/chapter_6.aspx); Maria Popova, *The Universe as an Infinite Storm of Beauty: John Muir on the Transcendent Interconnectedness of Nature*, THE MARGINALIAN, <https://www.themarginalian.org/2018/05/10/john-muir-nature-writings/>.

possibility of conversation was summarily dismissed.”³⁶² What else might a forest metaphor teach us about what we want and need from free expression and the free press?

ii. Universe Metaphors

Looking to physics, some possible metaphors include: *the universe of ideas*, *the ideas universe*, *the cosmos of ideas*, *the ideas cosmos*, *the galaxy of ideas*, or *the ideas galaxy*. These possibilities—also based on spaces—work for some of the same reasons that the forest does. As described, physicists are developing their understanding of how everything from atomic particles to humans to galaxies are intertwined and dependent.

Another way this can be described, and one helpful to thinking about how to supplement the marketplace metaphor, is as “accretion.” This is the word that astronomer Paul Murdin uses to refer to the merging and growth of celestial bodies.³⁶³ According to Murdin, our cosmos has been built through a process of accretion. Solar systems, galaxies, and black holes are coming together and moving apart continually. Our sun was created from the merging of galaxies,³⁶⁴ and our galaxy was created via a process of merging with and separating from other like bodies.³⁶⁵ Even now, stars, star clusters, and small galaxies fall into ours forming “stellar streams.”³⁶⁶ About a quarter of the clusters of stars in our galaxy are “immigrants” to it from farther reaches.³⁶⁷

On a literally smaller scale, interconnection is also fundamental to quantum physics. Take Niels Bohr’s theory of complementarity—which is at the core of quantum theory. At its most basic, complementarity “is the concept that one single thing, when considered from different perspectives, can seem to have very different or even contradictory properties.”³⁶⁸ According to Wilczek, two key points flow from complementarity: 1) “to measure something’s properties, you must interact with it” and 2) “precise measurements require strong interactions.”³⁶⁹ Or, as physicist Karen Barad writes, what Bohr understood to be the lesson of quantum physics is “we are a part of that nature we seek to understand.”³⁷⁰

Notably, the way that physics, and specifically its understanding of our universe, has developed in the last century, could also be viewed as a collaborative process. Theoretical physicist and cosmologist Prescod-Weinstein writes, “Physics is an intensely social phenomenon, and that has only become truer with time.” She adds, “The ideas that come to populate physics, especially the ones that stick, are rarely the product of one person’s ideas but rather the result of community effort.”³⁷¹ One crude measure of this is the Nobel Prize in physics itself. The last time it had a sole winner was thirty years ago.³⁷²

³⁶² KIMMERER, *supra* note 310, at 19.

³⁶³ MURDIN, *supra* note 10, at 105.

³⁶⁴ *Id.* at 106.

³⁶⁵ *Id.* at 99.

³⁶⁶ *Id.* at 105

³⁶⁷ *Id.* at 99.

³⁶⁸ WILCZEK, *supra* note 335, at 206.

³⁶⁹ *Id.* at 210.

³⁷⁰ KAREN BARAD, MEETING THE UNIVERSE HALFWAY: QUANTUM PHYSICS AND THE ENTANGLEMENT OF MATTER AND MEANING 26 (2007).

³⁷¹ PRESCOD-WEINSTEIN, *supra* note 340, at 55

³⁷² *All Nobel Prizes*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/lists/all-nobel-prizes/> (last visited Dec. 2, 2022).

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This collaborative process is a very different model of building knowledge than that embodied by the marketplace. While knowledge is won in the marketplace through battle, knowledge is gained in the universe as physics knows it through accumulation and cooperation. Yes, this is an oversimplification. Undoubtedly there is all sorts of nastiness and competition in science. And yet, huge discoveries in physics are rarely the result of a lone actor. As physicist Wilczek writes, “science builds. The most advanced, adventurous experiments and technologies rely on tangled webs of underlying theories.”³⁷³

A physics-based universe metaphor has other things that recommend it. Physics is concerned with how the physical world works.³⁷⁴ It ventures beyond human perception and considers this question at both the smallest and grandest levels about which humans can even conceive. It does not concern itself explicitly with speech, but it still seems that it might have something to say about it. Moreover, even if physics seems jaw-droppingly complex—and it is³⁷⁵—we have lived experience of it. Hopefully every inhabitant of Earth has experienced the wonder of looking at the night sky. Many of us have been transfixed by photographs that came from the Hubble Space Telescope and more recently the James Webb Space Telescope.³⁷⁶ That familiarity might make the metaphor stickier.

Were courts to adopt the universe as a speech metaphor, all of the universe’s component building blocks and all of the theories from physics and astronomy relevant to the universe’s operation could also be at our disposal for describing speech. That is, if we think of our speech metaphors as nodes in a wider web, what other nodes and points would they connect to? What web of meaning could be spun around free speech and the free press? As has occurred with the marketplace metaphor, judges and others using new speech metaphors will strive to make them thick by finding all the ways in which speech is like a forest or a universe. The forest and universe team with possibility.³⁷⁷

D. *New Press Metaphors in Action*

If our free expression environment is a forest, what happens if we envision the press as a tree or, better yet, interspersed trees throughout the forest? If free expression is the universe, what if the press is represented by different, scattered stars? These conceptions of the press could help broaden thinking about the press’s constitutional, political, and cultural value. These metaphors would not preclude the press acting as a watchdog, but they would make other possibilities—like collaborator, listener, and facilitator—more self-evident.

In a sign that the time is ripe for a new metaphor, this collaborative and facilitative work is already the direction in which the press is headed. In remaking itself as it tries to emerge from

³⁷³ WILCZEK, *supra* note 335, at 19.

³⁷⁴ *Id.* at xi.

³⁷⁵ See Sean Carroll, *Even Physicists Don’t Understand Quantum Mechanics*, N.Y. TIMES (Sept. 7 2019), <https://www.nytimes.com/2019/09/07/opinion/sunday/quantum-physics.html> (quoting physicist and Nobel laureate Richard Feynman saying “I think I can safely say that nobody really understands quantum mechanics”).

³⁷⁶ See Dennis Overbye, *Webb Telescope Captures New View of “Pillars of Creation,”* N.Y. TIMES (Oct. 19, 2022), <https://www.nytimes.com/2022/10/19/science/webb-pillars-of-creation-image.html>.

³⁷⁷ As for theories of physics that account for interconnection, we could add the theory of quantum entanglement that was the subject of the 2022 Nobel Prize for Physics. See Lee Billings, *Explorers of Quantum Entanglement Win 2022 Nobel Prize in Physics*, SCI. AM. (Oct. 4, 2022), <https://www.scientificamerican.com/article/explorers-of-quantum-entanglement-win-2022-nobel-prize-in-physics1/>. Quantum entanglement concerns the “curious phenomenon” when “an action taken on one of the particles [in an entangled state] can instantaneously ripple through the entire entangled assemblage, predicting the other particles’ behavior, even if they are far apart.” *Id.*

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an economic crisis and a crisis of audience trust, the press is leaning in to cooperation and collaboration. For example, some journalists have adopted a practice dubbed “radical sharing.”³⁷⁸ This is the method that the International Consortium of Investigative Journalists used to sift and publish stories about the Panama Papers.³⁷⁹ Other newsrooms have joined together to pool reporting power in the face of authoritarianism. This was a reason for the launch of Redacción Regional, a collaboration of newsrooms in Central America aimed at covering growing “authoritarianism, corruption, and militarism” in the region.³⁸⁰ Harvard’s Nieman Reports, which covers the journalism industry, wrote in 2022 that collaborative journalism was growing and that it had identified forty “permanent collaboratives” in the United States alone.

Journalists are also building ways to collaborate with audiences. In the last decade, a movement alternately called “community-centered journalism,” “social journalism,” and “engaged journalism” has gained prominence. It seeks to bring citizens into the news making process—from deciding what to cover, to assisting with information gathering, to providing post-publication feedback—thereby minimizing the power differential between journalists and citizens. Instead, engaged journalism aims to create what Tom Rosenstiel has called a “virtuous circle of learning” (another non-hierarchical metaphor).³⁸¹ Some community-centered journalists have gone as far as to say that the movement’s primary aim is not necessarily the creation of news; it is building trusting and healthy communities. News is a byproduct.

If courts were to employ new press metaphors, they would reinforce this shift.³⁸² This occurred when the Supreme Court’s celebrated the press’s watchdog role. The press’s heyday of watchdog reporting (e.g., Watergate and the Pentagon Papers) more or less coincides with the press’s “Glory Days” in the Supreme Court when the Court heralded the press’s checking function as a democratic necessity.³⁸³

³⁷⁸ Pierre Romera & Cecile S. Gallego, *How ICIJ Deals with Massive Data Leaks Like the Panama Papers and Paradise Papers*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (July 3, 2018), <https://www.icij.org/inside-icij/2018/07/how-icij-deals-with-massive-data-leaks-like-the-panama-papers-and-paradise-papers>.

³⁷⁹ See Luke Harding, *What Are the Panama Papers? A Guide to History’s Biggest Data Leak*, GUARDIAN (Apr. 5, 2016, 5:42 AM EDT), <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers>.

³⁸⁰ Hanaa’ Tameez, *Redacción Regional Launches to Cover Common Threads of Corruption and Authoritarianism Across Central America*, NIEMAN LAB (Apr. 18, 2022), <https://www.niemanlab.org/2022/04/redaccion-regional-launches-to-cover-common-threads-of-corruption-and-authoritarianism-across-central-america/>.

³⁸¹ Mónica Guzmán, *What Exactly Is Engagement and What Difference Does It Make?*, AM. PRESS INST. (May 2, 2016), <https://www.americanpressinstitute.org/publications/reports/strategy-studies/what-is-engagement/> (quoting Tom Rosenstiel, *News As Collaborative Intelligence: Correcting the Myths About News in the Digital Age*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS 3 (June 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/rosenstiel.pdf>).

³⁸² This shift could be described as one from communication scholar James Carey’s “transmission view” to his “ritual view” of communication. Carey wrote that “if the archetypal case of communication under a transmission view is the extension of messages across geography for the purpose of control, the archetypal case under a ritual view is the sacred ceremony that draws persons together in fellowship and commonality.” *Id.* at 88. In other words, the transmission view is characterized by power and hierarchy and the ritual view by collaboration and cooperation. A cutting edge of journalism today is moving away from an extractive and hierarchical practice to journalism that is closer to this ritual practice. In this form, journalism views its role not simply as a paternalistic one—attacking government on behalf of citizens and bestowing information on its audiences, but collaborating on story generation. *Id.* (“Thus, from a ritual view, knowledge about audiences would be less about what certain patterns in metrics reveal about the media’s agenda-setting power and more about how audiences make meaning of the news from everyday conversations that build and sustain shared collective projects.”).

³⁸³ See Jones, *supra* note 4, 255-56 (referring to the “Glory Days” of the press).

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What might this look like in practice today? New metaphors could impact how the courts, including the Supreme Court, view the press and its role in a variety of cases that foreseeably could come before them in the short term. These include: a revisiting of the *New York Times v. Sullivan* defamation standard, a case alleging illegal data scraping in violation of the Computer Fraud and Abuse Act, and a criminal case against a journalist for violating the Espionage Act. Of course, the outcome of any particular case is going to be (and should be) highly fact dependent. The press and journalists are not always in the right, and the examples that follow are not intended to suggest a court would need to find for the press in a given case. Rather, they aim to show that new metaphors would be fodder for courts to consider broader press roles and to promote these press roles should they choose to do so.

With respect to metaphor in a potential defamation case—press defenders are concerned by calls from jurists and politicians (including Justices Neil Gorsuch and Clarence Thomas and former President Donald J. Trump) to revisit *New York Times v. Sullivan*.³⁸⁴ This is the 1964 Supreme Court case that establishes the “actual malice” standard for a public figure to prove defamation.³⁸⁵ Press supporters have long viewed the case as one of the most, if not the most, important Supreme Court opinions protecting press freedom.³⁸⁶ The *Sullivan* Court does not use the word marketplace, but the Court captures its essence when it describes, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes, unpleasantly sharp attacks on government and public officials.”³⁸⁷

You might imagine the Court instead (or in addition) pointing out that, in the forest of ideas, the press collaborates with the public to build knowledge on topics of vital community interest. At issue in *Sullivan* was not a news item written by a journalist, but a full-page advertisement supporting the civil rights movement and signed by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South.”³⁸⁸ Although an advertisement is not the type of audience-journalist collaboration discussed earlier in this Article, *Sullivan* provides a different example of the way the press and citizens can come together to create fora for conversation and knowledge-building on the most pressing of social issues. The *Times* literally created a space for a message and sparked conversation about it. It was not (or was not only) acting as a watchdog. Rather, it was serving as a tree in a forest connecting numerous others so that there might be conversation or collaboration on understanding the scourge of racism and working to erode it.

We could imagine the metaphor gaining even more traction in a modern-day defamation case in which evidence existed of collaborative practices between journalists and citizens, such as those of the engaged journalism movement. What might happen if a politician, influencer, or business leader sued a media outlet for defamation and the outlet could demonstrate the way in which it had worked with its audience to generate and develop the story in question? In such a

³⁸⁴ See *Revisiting New York Times v. Sullivan in the Age of Disinformation*, FIRST AMENDMENT WATCH AT NEW YORK UNIVERSITY (July 30, 2021), <https://firstamendmentwatch.org/revisiting-new-york-times-v-sullivan-in-the-age-of-disinformation/>.

³⁸⁵ 376 U.S. at 279-80.

³⁸⁶ See, e.g., Andrew Cohen, *Today is the 50th Anniversary of the (Re-)Birth of the First Amendment*, THE ATLANTIC (March 9, 2014), <https://www.theatlantic.com/national/archive/2014/03/today-is-the-50th-anniversary-of-the-re-birth-of-the-first-amendment/284311/> (arguing that journalists and others “ought to bow ... in a silent moment of gratitude” for the *Sullivan* decision).

³⁸⁷ *Id.* at 270.

³⁸⁸ *Id.* at 257.

case, courts could recognize the way in which the press and citizens were acting as a forest, together building connections to try to make sense of the world around them.

Perhaps these connections are even easier to conceptualize if we imagine a case brought against a journalist or news organization under the Computer Fraud and Abuse Act. Journalists have been concerned about the possibility of a criminal prosecution under the Act, which prohibits intentionally “exceed[ing] authorized access” to a computer system.³⁸⁹ Although this concern has softened with the Supreme Court’s 2021 decision in *Van Buren v. United States*,³⁹⁰ which rejected the government’s most expansive reading of this language, concerns still exist.³⁹¹ Potentially, a prosecution could occur for the increasingly-routine journalistic practice of scraping a website for data. In other words, tracking the language of the statute, the government would charge that the journalist’s scraping—a computerized process of gathering information—from a website hosted by “any protected computer” intentionally “exceed[ed] authorized access” to that computer.³⁹² Data scraping has been used, for example, in *The Atlantic*’s Covid Tracking Project and news stories about bias in Google’s top search results and Amazon’s algorithm.³⁹³ And journalists do not always work alone. When faced with troves of data, it is becoming more common for journalists to collaborate with citizens in gathering and sifting it. It is relatively easy to imagine a scenario in which journalists and citizens were working together either to scrape or analyze scraped data as the basis for news stories.

What if a criminal prosecution were to result? The watchdog metaphor may or may not be relevant depending on the nature of the data being amassed and the stories on which the journalists and their collaborators were working. The forest and universe metaphors, however, would be relevant regardless. They would help to make sense of the democracy-enhancing role the press was playing here in facilitating collaboration between the media and citizens. As trees or stars, the press might be acting as a resource or a guide among a field of other metaphorical living things or celestial bodies trying to build knowledge about an issue.

Finally, the forest or universe metaphors might shift the way in which courts would consider an Espionage Act case against a journalist. As with the Computer Fraud and Abuse Act, no American journalist has been charged under the Espionage Act. Yet, the indictment of Wikileaks founder Julian Assange alarmed press advocates given that certain counts of the indictment criminalize “pure publication.” As Gabe Rottman of the Reporters Committee for Freedom of the Press wrote of the indictment, “This goes beyond just a threat to sources or newsgathering; it’s a direct threat to news reporting.”³⁹⁴

We might imagine a future in which the United States takes a more autocratic turn and prosecutes journalists for perceived interference with foreign policy. Or, the government could choose to prosecute an American journalist who raised questions about delicate U.S. policy situations, for example, with respect to Russia and Ukraine or China. We could envision a journalist disclosing, à la the Pentagon Papers, secret policy documents regarding a military

³⁸⁹ 18 U.S.C. § 1030(a)(2).

³⁹⁰ 141 S. Ct. 1648 (2021).

³⁹¹ See *Knight Institute Comments on Supreme Court Decision in Van Buren v. United States*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (June 3, 2021), <https://knightcolumbia.org/content/knight-institute-comments-on-supreme-court-decision-in-van-buren-v-united-states>.

³⁹² See 18 U.S.C. § 1030(a)(2).

³⁹³ The Markup (@themarkup), TWITTER (Nov. 30, 2020, 1:50 PM), <https://twitter.com/themarkup/status/1333483635262038016?lang=en>.

³⁹⁴ Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, LAWFARE (May 24, 2019), <https://www.lawfareblog.com/assange-indictment-seeks-punish-pure-publication>.

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conflict. In the Supreme Court case that freed the press to publish the Pentagon Papers, the Court celebrated the press's watchdog role.³⁹⁵ Justice Black, in his *New York Times Co. v. United States* concurrence, wrote, "Only a free and unrestrained press can effectively expose deception in government."³⁹⁶ In a modern iteration of this case, with new metaphors to mine, the Court could also celebrate the way in which the press, acting as a well-rooted tree in the forest or a star in the cosmos is a beacon for conversation and knowledge-building on an issue of the utmost importance.

In this way, the press is so much more than an institution that attacks government and paternalistically protects the public. Rather, the press could be recognized as an entity collaborating with citizens to build knowledge. By envisioning the press not just as a watchdog, but as part of a forest or a cosmos, we get to a richer version of the freedom promised by the First Amendment.

More than three decades ago, critical race theorists Richard Delgado and Jean Stefancic noted that "some scholars are questioning whether free expression can perform the lofty functions of community-building and consensus-formation that society assigns to it."³⁹⁷ We are still asking this. The question likely will not go away. I, for one, am not certain that free expression, and the press as one of its emissaries, can carry the weight of community-building and consensus-formation that I want to put on it. But what is the alternative? It seems imperative to continue to reimagine free expression and the press so that they might better enable us to arrive at a place where our exchanges and even our lives are more collaborative and less violent.

CONCLUSION

I fear I have been unfair to Charles Darwin, but I am far from the only one. In the past century-and-a-half his name has become synonymous with a kind of ruthless and amoral competition.³⁹⁸ But this is not the whole story, according to *New Yorker* journalist Larissa MacFarquhar.³⁹⁹ In her book, *Strangers Drowning*, MacFarquhar writes that Darwin actually believed cooperation was not just desirable, but necessary. Darwin thought that "self-sacrificing behavior was a basic part of human nature that had come about through natural selection, because human survival was better ensured by a group of people prepared to sacrifice for one another," MacFarquhar writes.⁴⁰⁰ "Groups that cooperated could defeat groups that did not."⁴⁰¹ But this thread of Darwin's theory didn't stick. It "sounded contrived and unconvincing" to many who subscribed to Darwin's survival of the fittest scheme.⁴⁰² As a result, it was basically "banished from respectable biological discourse."⁴⁰³

But what if this had not happened? What if the whole of Darwin's thinking—even if it had seemed messy or contradictory in some ways—had been appreciated earlier on? What if

³⁹⁵ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); see KOVACH & ROSENSTIEL, *supra* note 5, at 199-200 (indicating journalists read this case as a celebration of the watchdog role).

³⁹⁶ *Id.*

³⁹⁷ Delgado & Stefancic, *supra* note 56, at 1258.

³⁹⁸ See *Darwinian*, OXFORD ENGLISH DICTIONARY, oed.com (last visited Dec. 2, 2022).

³⁹⁹ LARISSA MACFARQUHAR, STRANGERS DROWNING: GRAPPLING WITH IMPOSSIBLE IDEALISM, DRASTIC CHOICES, AND THE OVERPOWERING URGE TO HELP 107 (2015).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.* at 114.

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species, including humans, can be both competitive and collaborative? What if wisdom and knowledge are found in moving between the two rather than running a bloody gauntlet and surviving? What if things are complicated, but complication is a strength? As Octavia E. Butler put it in her science-fiction novel *Parable of the Sower*, “All successful life is adaptable, opportunistic, tenacious, interconnected, and fecund. Understand this. Use it.”⁴⁰⁴ In other words, our ability both to compete *and* connect make us resilient and abundant.

In this Article, I have attempted to respond to the questions the poet and novelist Ocean Vuong sets out in the Article’s epigraph: “What happens to our imagination when we can only celebrate ourselves through vanquishing?” The marketplace of ideas metaphor is one way in which our law and our courts honor vanquishing—defined as “defeat ... in conflict or battle.”⁴⁰⁵ The marketplace has helped to normalize violent speech. It prioritizes *not* the truest or wisest speech, but the most powerful. Real-world injury results. The voices and the words that convey this powerful speech cannot always contain it. It metastasizes, and it can animate fists and weapons.

By normalizing violence, the marketplace metaphor performs a type of gaslighting. We are numbed. The metaphor has tempered our expectations and our will to create something better—better ways of communicating, gaining knowledge, and maybe even self-governing.

The metaphor has also constrained how we conceive of our most vital free speech institution, the press. The press’s watchdog role is vital, but it is not the only important role the press can play. The press might also serve as a force for collaboration—facilitating conversation and building community fabric. American democracy needs this desperately.

In addition to exposing the violence at the root of the marketplace metaphor, I have attempted to take on Vuong’s more hopeful questions: “What happens if we alter our language? Where would our future be? Where will we grow towards, if we start to think differently about how the world is?” Science can help us answer these questions. My hope is that because we all share the natural world, metaphors based in it might prove successful. Plus, astounding realizations in biology and physics make clear that resiliency and flourishing are bound up in collaboration, symbiosis, and interconnection and not only combat and bloodshed. Forests and the universe are complex referents. They are metaphors by which our understanding of expression and the rights tied up with it might become more nuanced and grow.

As an array of legal scholars are arguing, we need to understand the violence at the core of so many of our doctrines and concepts in property, federal Indian law, immigration, criminal law, and other areas.⁴⁰⁶ Speech is no exception. My hope is that by examining how violence inhabits and shapes our expressive environment, it will prompt us to enrich our vocabulary about speech and press rights. Changing our words could change so much more.

⁴⁰⁴ See OCTAVIA E. BUTLER, *PARABLE OF THE SOWER* 124-25 (1993).

⁴⁰⁵ *Vanquish*, OXFORD ENGLISH DICTIONARY, oed.com (last visited Dec. 14, 2022).

⁴⁰⁶ See K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L. J., 1062, 1066 (2022); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1801-02 (2019); Allegra McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1413-14 (2014).