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Re-Embodying Law

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by Steven L. Winter*

It was fun to watch the audience of mostly first-year students during Mark Johnson's presentation. Seven weeks into their first semester of law school, this was clearly the most fun they had had so far. And it was easy to see why: law school takes place "from the neck up," so to speak. It is so relentlessly about reason abstracted from the ordinary interests, passions, and other embodied considerations of everyday (not to mention college) life. This deracination of law is ritualized metaphorically in the black robes that enshroud our judges' bodies as if to say, "See, it *is* all from the neck up." And that is one of the most wonderful things about the work that Mark Johnson and George Lakoff have been doing: it reconnects us to ourselves in our embodied wholeness—as not just minds, but as embodied human beings.

This classic Western opposition between mind and body—and its correlates, such as reason and the passion, logic and rhetoric, etc.—is mirrored in twentieth-century legal theory's absorption with the problem of meaningful constraints on judicial decisionmaking and the consequent danger of unchecked subjectivity. The fear, conventionally identified with the Supreme Court's infamous decision in *Lochner v. New York*,[1] is that without constraints, judges and other powerful legal actors will be free to impose their personal values. On this view, law operates *as* law only if there is some disciplining, external constraint on the discretion of the legal decisionmaker. In Frank Michelman's words, law is "an autonomous force" that provides "an external untouchable rule of the game."[2] This constraint may be an objective quality of the legal

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1. 198 U.S. 45 (1905).

2. Frank Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV STUDIES IN LAW 287 (1988).

materials—that is, of the facts and holdings of the cases—or a higher-order reason grounded in general concepts or rules, the intent of the Framers, political theory, moral philosophy, or as is current today, the utilitarian rationality of microeconomics and rational choice theory. But, in each of these cases, the structure of legal reasoning is essentially the same: it strives to reduce a complex problem to a policy, principle, propositional rule, or some other set of necessary and sufficient criteria. In theory, these definitional criteria will allow professionals to delineate legal categories with greater precision, draw appropriate distinctions, and then make correct decisions.

Now, as Mark Johnson points out in his paper, one obvious problem with this approach is that it makes it more difficult to explain how the law changes and adapts to new social circumstances. This observation is part of a larger point about the development of rationality: human intelligence, including the capacity to categorize, arose as a successful evolutionary adaptation. In the words of the Nobel-winning biologist Gerald Edelman, "evolution teaches us that the selection of animals formed to carry out functions that increase their fitness is at the very heart of the matter."[3] We know from evolutionary biology that rigid systems rarely survive because they are maladaptive. It only makes sense, therefore, that as an evolutionary development, human rationality would be flexible and adaptive rather than rigidly propositional and truth-conditional. Metaphoric thought is one of the principal (but not exclusive) forms of an adaptive human intelligence.

So far, so good. But notice that this account also creates a problem. One way to make a propositional legal category—say, the rule that once required personal presence within the state as a prerequisite to the exercise of state court jurisdiction—adaptable to new circumstances is to extend it via metaphor. Thus, under the regime of *Pennoyer v. Neff*,[4] a court could exercise jurisdiction over an out-of-state corporation if it did sufficient business in the state that "the corporation shall have come into the state."[5] The legal realists decried such metaphors and legal fictions as "transcendental nonsense" that afflicted formalist legal reasoning. As Felix Cohen caustically observed:

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3. GERALD M. EDELMAN, THE REMEMBERED PRESENT: A BIOLOGICAL THEORY OF CONSCIOUSNESS 31 (1989).

4. 95 U.S. 714 (1877).

5. Tauza v. Susquehanna Coal Co., 115 N.E. 915, 918 (N.Y. 1917).

> Clearly the question of where a corporation is, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation.
>
> . . .
>
> Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels? To be sure some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc.). But this does not give us the right to hypostatize, to "thingify," the corporation, and to assume that it travels about from State to State as mortal men travel.[6]

Within the classic Western oppositions, metaphor has historically been understood as subjective and a matter of mere rhetoric. Thus, Locke condemned metaphor and other figurative speech as "perfect cheat" and insisted upon literal prose "if we would speak of Things as they are."[7] In their critique of legal metaphor, the realists were relying on this classic conception. In his famous article on fundamental legal conceptions, Hohfeld complained: "Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional."[8] In much the same vein, Cohen objected: "When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices . . ., then [one] . . . is apt to forget the social forces which mold the law. . . ."[9] On the bench, judges as distinguished as Benjamin Cardozo and Charles Evan Hughes warned against the distortions caused by metaphors in law.[10]

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6. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810-11 (1935) (emphasis omitted).

7. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 508 (Peter H. Nidditch ed., 1975) (1690).

8. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913) (footnote omitted).

9. Cohen, *supra* note 6, at 812.

10. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."); BENJAMIN N. CARDOZO, *What Medicine Can Do for Law*, *in* LAW AND LITERATURE 100 (1931) ("A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death."); Liverpool & London & Globe Ins. Co. v. Bd. of Assessors, 221 U.S. 346, 354 (1911) (Hughes, C.J.) ("When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs."); New York *ex rel.* Whitney v. Graves, 299 U.S. 366, 372 (1937) (Hughes, C.J.) ("When we speak of a 'business situs' of intangible property in the taxing State we are indulging in a metaphor.").

Legal metaphor, in other words, is a double-edged sword. On one hand, metaphorical thought makes possible the flexibility that law needs if it is to accommodate the complexities of social life. On the other hand, if a putatively propositional law changes via metaphor, then this transformation vitiates the constraint supposedly provided by the law's criterial logic.

This is the kind of conundrum that drives conventional scholars into paroxyms of platitudes about maintaining stability in the face of change. But we can do better. To do so, we need to understand first, that human rationality is not linear and criterial to begin with, but imaginative and adaptive (that is, involving metaphor, image-schemas, metonymies, and radial categories); second, that imaginative thought (including metaphor) is systematic and regular rather than arbitrary and unconstrained; and third, that innovation (whether via metaphor or otherwise) is itself a contingent and, therefore, highly constrained phenomenon. Legal metaphor presents neither the problems perceived by the realists nor those feared by conventional scholars. That is because, as I hope to demonstrate, successful legal metaphor derives its force from the very discipline of constraint that defines its conditions of possibility.

In the next two sections, I will walk you through two familiar examples of innovative argument in constitutional law. The first is the landmark case of *NLRB v. Jones & Laughlin Steel Corp.*,[11] in which the Supreme Court made what is widely understood as a radical break with prior Commerce Clause[12] doctrine. The second is Holmes's introduction of the "marketplace of ideas" as the organizing metaphor for modern free speech doctrine. In the third section, I examine the restrictive implications of the market metaphor and its relation to the much troubled but still oft-invoked speech/conduct distinction. In each of these cases, we will closely observe the constitutive relationship between imagination and constraint, innovation, and contingency.

I. STREAMLINING COMMERCE

The U.S. Supreme Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*[13] upheld the constitutionality of the National Labor Relations Act.[14] The case marked a watershed in Commerce Clause analysis and, as one of the two "switch in time that saved nine" cases, reflected a major shift in the legal/social consensus on the constitutional

11. 301 U.S. 1 (1937).
12. U.S. CONST. art. 1, § 8, cl. 3.
13. 301 U.S. 1 (1937).
14. *Id.* at 30.

status of the regulatory programs of the New Deal.[15] Hughes's landmark opinion is often read as rejecting the "stream of commerce" metaphor in favor of a realistic assessment of congressional power over commerce. But a closer reading of Hughes's opinion shows him refashioning, rather than refusing, the stream of commerce metaphor. Though Hughes radically reorganized Commerce Clause doctrine, he did not operate free-form. Rather, he worked with the metaphorical material already in the cases to refashion the doctrine in a manner that was simultaneously constrained and enabled by the very precedents he was rejecting.

The National Labor Relations Board had found that the Jones & Laughlin company coerced, intimidated, and discriminated against its employees in an effort to prevent unionization.[16] As the case came to the Supreme Court, the primary question was jurisdictional: could the federal government exercise its Commerce Clause power to regulate labor relations in manufacturing?[17]

The steel manufacturer relied on the Court's decision in *United States v. E.C. Knight Co.*,[18] which declared that manufacturing is not commerce.[19] Although the distinction seems tendentious today, this position is firmly rooted in a rationalist, criterial logic that distinguishes manufacturing and commerce according to the rigors of a P-or-not-P categorization. This rationalist paradigm was also mirrored in the categorical approach to the federalism question taken by Justice McReynolds in his dissent:

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, . . . has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships . . . the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.[20]

The use of the CONTAINER schema for categorization fit well with the geopolitical structure of federalism: since manufacturing "is purely

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15. *See* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 6-11 (1984); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053-57 (1984).

16. *Jones & Laughlin*, 301 U.S. at 22.

17. *See id.* at 29.

18. 156 U.S. 1 (1895).

19. *Jones & Laughlin*, 301 U.S. at 39.

20. *Id.* at 79 (McReynolds, J., dissenting).

local," it "is subject only to regulation by the state."[21] Thus, everything had only a single essence: either commerce or manufacture; either federal or state; either P-or-not-P; either in the container (manufacturing = within state borders) or across its boundaries (commerce = federal power). The dissent in *Jones & Laughlin* relied, as well, on the traditional distinction between "direct" and "indirect" effects on commerce,[22] a fuzzy distinction that the dissent defended with an ironic quote from a previous Hughes opinion: "'The precise line can be drawn only as individual cases arise, but the distinction is clear in principle.'"[23]

The Board and the Solicitor General, on the other hand, invoked the Court's stream of commerce precedents.[24] In its opinion finding an unfair labor practice, the Board invoked the conventional personification metaphor for a corporation and elaborated on its fluid entailment, held in common with the stream of commerce metaphor, by using a cardiovascular analogy.[25] As quoted in Hughes's opinion, the Board had argued that the steel plant

> might be likened to the *heart* of a self-contained, highly integrated *body*. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through *arteries* and by means controlled by the respondent; they transform the materials and then *pump them out* to all parts of the nation through the vast *mechanism* which the respondent has elaborated.[26]

Similarly, the Solicitor argued that the company's "activities constitute a 'stream' or 'flow' of commerce, of which the . . . manufacturing plant is the focal point."[27]

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21. *Id.*

22. *Id.* at 96; *see also* Carter v. Carter Coal Co., 298 U.S. 238, 307-08 (1936); Swift & Co. v. United States, 196 U.S. 375, 397 (1905).

23. *Jones & Laughlin*, 301 U.S. at 96 (McReynolds, J., dissenting) (quoting Schecter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935)). The notion of a "precise line" implicates rationalist assumptions about categorization. In contrast, the characterization of the distinction as only "clear in principle" can be taken to reflect the fact that "direct" and "indirect" are structured radially with relatively clear central cases and relatively indeterminate peripheries.

24. *Jones & Laughlin*, 301 U.S. at 35 (majority opinion); *see* Stafford v. Wallace, 258 U.S. 495 (1922); *Swift*, 196 U.S. at 399.

25. *Jones & Laughlin*, 301 U.S. at 27. On the conventional use of the personification metaphor to structure our understanding of a "corporation," see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1163-65 (1989).

26. *Jones & Laughlin*, 301 U.S. at 27 (emphasis added).

27. *Id.* at 35.

Hughes's response was overtly self-conscious of the metaphoric characterization of commerce, designating with quotation marks the references to the "stream," "flow," and "throat" of commerce. But Hughes was neither solicitous of the company's criterial argument nor disdainful of the government's metaphors. Rather, his classic response elaborated and extended those metaphors:

> We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" . . . "and it is primarily for Congress to consider and decide the fact of the danger and meet it."[28]

It is conventional to read this passage as dismissing the relevance of the stream of commerce metaphor and adopting, instead, a broader and more pragmatic view of Congress's power over commerce. But a careful reading suggests otherwise. What Hughes rejected was the criterial distinction between manufacturing and commerce—finding it unnecessary "to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce' cases."[29] Hughes then rejected the essentialism of the prior doctrine: Congress's authority, he remarked, "is not limited to transactions which can be deemed to be an *essential part* of the 'flow' of . . . commerce."[30] Manufacturing may be different than commerce, Hughes seems to be saying, but that way of thinking about the question is simply beside the point.

Rather than rejecting the conventional stream of commerce metaphor, Hughes sliced through to its underlying conceptualization; he treated the metaphor as "but [a] particular, and not exclusive, illustration[]."[31] *What* it illustrates is an underlying image-schema: the stream of commerce image is merely one metaphorical elaboration of the SOURCE-

28. *Id.* at 36-37 (quoting The Daniel Ball, 77 U.S. 557, 564 (1871)).
29. *Id.* at 36.
30. *Id.* (emphasis added).
31. *Id.*

PATH-GOAL schema. Turning to this more basic level of cognitive operation, Hughes elaborated other metaphorical entailments: suppose commerce is conceptualized not as a stream but, in the government's metaphor, as "a great movement of iron ore, coal and limestone *along well-defined paths*."[32] If commerce is a movement along a path, it can be personified as a traveler. In that case, we would not want to slow it down by undue *burdens* or allow its progress to be impeded by *obstructions*. Most important of all, we would not want it to be waylaid by attacks from ambush by the side of the road—that is, harms "due to *injurious action springing from other sources*."[33] And, at the very least, we would want to see that it got off to a safe start on its journey: as Hughes asked rhetorically, "of what avail is it to protect the facilit[ies] of transportation, if interstate commerce is *throttled* with respect to the commodities to be transported!"[34]

By this point in his opinion, Hughes has thoroughly reorganized the conceptual model for the commerce power from one premised on a STREAM metaphor to one premised on the much richer JOURNEY metaphor. By reconceptualizing commerce in this way, Hughes changed the question in a way that structured a new constitutional answer; for these different metaphors entail different conceptions of the federal role. If commerce is a stream, then Congress's job is to regulate the flow and keep it free of obstructions. If, however, commerce is a traveler on a journey, then it would be absurd to exclude from consideration matters outside the "flow" of commerce; it is precisely there that danger is most likely to lurk. The concern becomes not just obstructions, but harms of all sorts—"throttling," "danger," "injurious action springing from other sources."[35] The correlative congressional power shifts from "regulation" to "protection." Congress no longer monitors the sluice gates of commerce; it becomes the interstate police protecting the always-vulnerable traveler. "The fundamental principle" is now that Congress is charged with the "protection and advancement" of commerce, "and it is primarily for Congress to consider . . . the danger and [to] meet it."[36] In the end, Hughes made his point not by a rigorous propositional argument from policy or principle but by a cognitive and metaphorical *tour de force*.

Still, for the argument to have been persuasive, something more was required. Without doubt, the social and political pressure on the Court

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32. *Id.* at 34-35 (emphasis added).
33. *Id.* at 36 (emphasis added).
34. *Id.* at 42 (emphasis added).
35. *Id.* at 36, 37, 42.
36. *Id.* at 37.

to abandon its opposition to the New Deal—which reached a highwater mark with Roosevelt's infamous court-packing plan[37]—was a crucial factor. But this crisis did not occur in a vacuum. It was, in part, a reflection of decades of industrialization and change that had fueled a more general jurisprudential crisis. In his intellectual history of the period, Edward Purcell observes:

> The state of American law invited and even necessitated the devastating attacks of the realists. The inconsistencies between the practices of a rapidly changing industrial nation and the claims of a mechanical juristic system had grown so acute by the 1920s that, in the minds of many, the orthodox jurisprudence could no longer justify and explain contemporary practice.[38]

Perhaps nowhere was this more clear than in Commerce Clause doctrine, which was in a state of advanced category breakdown.

The stream of commerce metaphor dates to Holmes's 1905 opinion in *Swift & Co. v. United States*,[39] which used the phrase "current of commerce."[40] Before the advent of the railroads, the streams referred to in Commerce Clause cases were quite literal. Thus, in 1824, Justice Marshall wrote: "The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising" the right to engage in foreign commerce.[41] Even so, commerce was sufficiently underdeveloped so that it would be another twenty-five years before the Court asserted admiralty jurisdiction over interior waterways above the tidewaters.[42]

As long as transportation remained difficult, expensive, or slow—and prior to the development of refrigeration—one could identify what

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37. Although the origins of the court-packing plan are unknown, the idea had been suggested by Llewellyn as early as 1934. *See* Karl N. Llewellyn, *The Constitution As an Institution*, 34 COLUM. L. REV. 1, 23 n.33, 39 n.45 (1934).

38. EDWARD PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 79 (1973).

39. 196 U.S. 375 (1905).

40. *Id.* at 399.

41. Gibbons v. Ogden, 22 U.S. 1, 195 (1824). The "stream of commerce" metaphor thus had a grounding in historical experience.

42. As the Court subsequently explained:

> From the organization of the government until the era of steamboat navigation, it is not strange that no question of this kind came before this court. The commerce carried on upon the inland waters prior to that time was so small, that cases were not likely to arise requiring the aid of admiralty courts.

The Hine v. Trevor, 71 U.S. 555, 562 (1866) (discussing The Genesee Chief, 53 U.S. 443 (1851)) (overruling The Thomas Jefferson, 21 U.S. 428 (1825)).

seemed like more or less local markets in which goods (especially perishables) were created, sold, and consumed without actually crossing state boundaries.[43] But the advent of the steamboat, the railroad, and the automobile successively transformed American commerce. By the late nineteenth century, it was increasingly difficult to distinguish between interstate commerce subject to regulation by the national government and those economic transactions that were strictly intrastate.[44]

The increasing blurring of these lines spawned a series of ultimately untenable distinctions. Early on, in *E.C. Knight,* the Court distinguished between manufacturing that was local and commerce that, when interstate, could be regulated by Congress.[45] In *Swift* Holmes avoided the force of this precedent by distinguishing between cases where the effects on commerce are "accidental, secondary, remote or merely probable" and those where the effects on commerce are the "direct object," a "necessary consequence" or "primary end."[46] In distinguishing a monopoly over sugar production from monopoly control over stockyards, Holmes used a metaphor to characterize the difference between the cases:

> [C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State [to] another . . . with only the interruption necessary to find a purchaser at the stock yards, . . . the current thus existing is *a current of commerce* among the States, and the purchase of the cattle is a part and incident of such commerce.[47]

Before *Jones & Laughlin*, the Court used Holmes's metaphorical conception to distinguish between goods passing through "the current or flow of interstate commerce" and those same goods once they had come

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43. Whether such markets were truly "local," rather than connected and economically interdependent, is open to question. The point, however, is that one could *conceive* of such local markets containing only local goods.

44. As early as 1870, Justice Field remarked that

> we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State.

The Daniel Ball, 77 U.S. at 566.

45. *E.C. Knight*, 156 U.S. at 15; Kidd v. Pearson, 128 U.S. 1, 21 (1888); *Carter Coal*, 298 U.S. at 299-303.

46. *Swift*, 196 U.S. at 397.

47. *Id.* at 398-99 (emphasis added).

to rest in "a place of final destination." In *Schechter Poultry Corp. v. United States*,[48] for example, Hughes reasoned:

> The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State.[49]

The increasingly tenuous nature of the Court's distinctions reflected the obvious difficulty of trying to harmonize a nineteenth-century concept of federalism with a twentieth-century industrialized economy. Ultimately, this project could not be maintained given the substantial changes in the relevant social practices. As Edward Levi observed, changes in the method of commerce made it hard to distinguish between transactions "previously remote and local" and those more extensive and intertwined dealings that comprise the modern interstate economy: "Since the difference could no longer be felt, it fell away."[50]

II. "FIRE" IN A CROWDED MARKET

As in other areas of constitutional law, we tend anachronistically to assume that the First Amendment we know is, if not the same, then at least continuous with that of the Framers. But the social distance between the eighteenth and twentieth centuries is simply too vast for that degree of continuity to be plausible. Not only are there significant doctrinal differences between the two periods, but the metaphorical conceptions of free speech and the social circumstances and understandings that supported them are radically different.

At its inception, the First Amendment was understood narrowly to guard only against prior restraints of speech. After the fact, false, or unpopular speech could be punished with a variety of coercive governmental sanctions. As Leonard Levy reports of the pre-Revolutionary period: "Everywhere unlimited liberty existed to praise the American cause; . . . 'liberty of speech,' as Arthur M. Schlesinger so aptly said, 'belonged solely to those who spoke the speech of liberty.'"[51] Even after the adoption of the First Amendment, a Federalist-dominated Congress

48. 295 U.S. 495 (1935).
49. *Id.* at 543; *accord Carter Coal*, 298 U.S. at 305-06.
50. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 103 (1949).
51. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 173 (1985).

enacted the Alien and Sedition Acts of 1798, making it a crime falsely to defame the government.[52]

It is easy to dismiss this partisan attitude toward speech as narrow and hypocritical. But there is more here than meets the eye, for this attitude reflects a coherent view of free speech with substantial historical roots. The *Areopagitica*, John Milton's famous seventeenth-century polemic against licensing of the press, framed the free speech argument as an argument for truth: "Truth is compar'd in Scripture to a streaming fountain; if her waters flow not in a perpetuall progression, they sick'n into a muddy pool of conformity and tradition."[53] The biblical metaphor invoked by Milton—which we can represent with the mnemonic KNOWLEDGE IS WATER—provides a systematic set of entailments: water (in its various forms) maps onto knowledge; the current (as in a river or stream) maps onto intellectual progress; the experience of stagnant and, therefore, unhealthy waters maps onto the kind of conventional wisdom that amounts to nothing more than the build-up of prejudice and error; and the water's source maps onto God. (See Figure A) These entailments, moreover, have specific substantive implications: if truth is a "streaming fountain," the evil to be avoided is the blockage that would interrupt "the free flow of ideas" and thus impede progress toward "truth." The objection to licensing was that it might stifle that progress by stopping or constricting the emergence of new ideas.

Figure A
Knowledge is Water

Source Domain		*Target Domain*
Physical	>>>	Mental
water	>>>	knowledge
current	>>>	intellectual progress
stagnant waters	>>>	conventional wisdom (cliché)
water's source	>>>	God (source of truth)
stoppage of water's flow	>>>	prior restraint (licensing)

52. *See* An Act Concerning Aliens, 1 Stat. 596 (1798).

53. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), *reprinted in* THE PROSE OF JOHN MILTON 265, 310 (J.M. Patrick ed., 1967) (all spellings as in original) (footnotes omitted).

Consistent with its religious origins, the commitment to unrestrained speech was bound to a strong concept of truth. This is what explains the apparent hypocrisy of the founding period's partisan attitude toward speech: belief in the importance of free speech could go hand-in-hand with the notion of subsequent punishment because a strong belief in truth provided the necessary theoretical assurance that after-the-fact judgments could meaningfully distinguish the true from the false and unprotected. And this was the case not only for Milton, (who knew "Truth as strong next to the Almighty"), but also for his Enlightenment successors ("We hold these truths to be self-evident").[54] Indeed, the important innovation of the founding period—carried forward in Section 3 of the Sedition Act—was the notion that truth was a defense to seditious libel.[55] Under English law, the truth of the libel was an *aggravating* factor because a slanderous statement about the King that was in fact true was even more likely to undermine his authority than a false one.[56]

This truth-based conception of free speech, organized around the "free flow" and "open encounter" metaphors, provided only a limited, relatively primitive model for First Amendment doctrine; indeed, the history of First Amendment law before the twentieth century is remarkably thin. A truly modern First Amendment had to await a more productive conceptual model—one whose compositional structure transcended the limitations of the earlier truth-based conception. That model emerged from Holmes's World War I opinions.

It took a while, however. Initially, Holmes affirmed the traditional view. In 1919 Holmes wrote three opinions for a unanimous Court affirming convictions under the Espionage Act of 1917[57] for urging resistance to the World War I draft.[58] The lead case was that of Charles Schenck, the general secretary of the Socialist Party, who had published leaflets counseling resistance.[59] Holmes clumsily allowed that: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them

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54. *Id.* at 328; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

55. 1 Stat. 570 (1798); An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," 1 Stat. 596 (July 14, 1798).

56. *See* Paul Finkelman, *Politics, The Press and the Law: An Introduction to the Trial of John Peter Zenger* in A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WAKING JOURNAL 11-13 (Paul Finkelman ed., 1997).

57. 40 Stat. 217 (1917).

58. *See generally* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

59. *Schenck*, 249 U.S. at 49-50.

may have been the main purpose."[60] Yet, the bottom line remained the same. As Holmes famously put it: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[61] More than a hundred years after the Sedition Act, it was still the case that, once spoken, false or potentially injurious speech remained amenable to repressive governmental sanctions.

In just eight months, however, Holmes would change his position dramatically. According to the conventional account, Holmes's sudden emergence as a free speech champion was due primarily to the influence of Zacharia Chafee.[62] But there was something more profound at work in Holmes's thought; otherwise, he would neither have found Chafee's arguments persuasive nor would he have changed position so quickly. With hindsight, moreover, we can find clues to Holmes's sudden transition in his *Schenck* opinion.

Consider the problems posed by Holmes's analogy in *Schenck*. The analogy consists of a mapping from the source domain of a person falsely shouting fire in a crowded theater to the target domain of a political activist advocating resistance to the draft.[63] The analogy maps the immediate and catastrophic effect of creating a panic in a crowded theater onto the harm to the war effort that might ensue if many young men took up the call to resistance. (See Figure B) The analogy works *only* to the extent that the call to resistance is likely to motivate immediate and widespread action; that, precisely, is the burden of the "clear and present danger" test that Holmes first proposed in *Schenck*.[64] But even were the exigency real, the analogy would nevertheless be incomplete because it presupposes that opposition to the war is, in some crucial sense, *false*. One need only consider our reaction to the person who, upon seeing the first lick of the flames at the theater curtains, quietly exits without alerting his or her fellow patrons. *Falsely* shouting "Fire" in a crowded theater is one thing. But crying "Fire" in a *burning* theater is something else again.

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60. *Id.* at 51-52.

61. *Id.* at 52.

62. *See, e.g.*, G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 427-30 (1993) (noting, too, the influence of Frankfurter, Laski, and Hand).

63. *Schenck*, 249 U.S. at 52.

64. *Id.* ("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").

Figure B

Source Domain		*Target Domain*
shouting fire	>>>	advocating resistance to the draft
in a crowded theater	>>>	during wartime
causing a panic	>>>	"clear and present danger" to the war effort
falsely	>>>	thus making the world unsafe for democracy, etc.

To say that advocating resistance to the draft is like falsely shouting fire in a crowded theater, one must first be confident that the war is something like the noble cause claimed—making the world safe for democracy, the war to end all wars—and not itself an incendiary evil. For it is one thing to obstruct the war effort in times of genuine national peril, but it is quite another matter to oppose the country's involvement in a bloody foreign conflict that, like the war in Iraq, will prove a tragic mistake. In other words, to equate Schenck's acts with those of the person who falsely shouts "Fire" in a crowded theater, one must be prepared to say that it is the conventional wisdom about the country's participation in the war which represents the truth.

But that is precisely what Holmes would *not* have been prepared to say. Holmes was a Social Darwinist and, on his own report, a life-long cynic. As he wrote in 1918: "I used to say, when I was young, that truth was the majority vote of that nation that could lick all others."[65] It was this recognition of the contingency of truth that lay behind his famous dissent in *Lochner* insisting on judicial deference to legislative action: in that case Holmes affirmed "the right of a majority to embody their opinions in law" and, accordingly, was skeptical of the Court's attempt "to prevent the natural outcome of a dominant opinion."[66] Yet, as Holmes soon came to realize, the same skepticism was in order when the attempt to forestall change came from the dominant majority itself. As he later wrote in dissent in *Gitlow v. New York*:[67] "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."[68]

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65. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).
66. Lochner v. New York, 198 U.S. 45, 75, 76 (1905) (Holmes, J., dissenting).
67. 268 U.S. 652 (1925).
68. *Id.* at 673 (Holmes, J., dissenting).

It was this more skeptical, evolutionary view that ultimately won Holmes over. Just eight months after *Schenck*, in *Abrams v. United States*,[69] Holmes dissented from the Court's affirmance of yet another Espionage Act conviction.[70] "Persecution for the expression of opinions," he said:

> seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is 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.[71]

This passage has provided the critical metaphor for the twentieth-century First Amendment: "the marketplace of ideas."

Because it represents a distinct break from the immediate past, it is easy to misconceive Holmes's metaphor as a creative *tour de force*.[72] But one of the fascinating things about Holmes's metaphor is that it is actually derived from the most conventional metaphors for mind and ideas. (See Figure C) Commonly referred to as the CONDUIT metaphor system,[73] these conceptual metaphors include:

- THE MIND IS A CONTAINER;
- IDEAS ARE OBJECTS;
- WORDS ARE CONTAINERS;
- COMMUNICATION IS SENDING;
- UNDERSTANDING IS GRASPING.

These general conceptual metaphors can be used to generate additional metaphors by specifying the source domain entity with a related kind of entity that provides a different set of entailments. Thus, we have the conventional conceptual metaphors:

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69. 250 U.S. 616 (1919).

70. *Id.* at 624-31 (Holmes, J., dissenting).

71. *Id.* at 630.

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

73. *See* Michael J. Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language About Language*, *in* METAPHOR AND THOUGHT 284 (Andrew Ortony ed., 2d ed. 1993). Reddy provides a "partial listing" of 141 examples. *Id.* at 286-306.

THE MIND IS A MACHINE—she just *grinds out* those papers; I got a lot of writing done this morning but then I *ran out of steam*; he had a nervous *breakdown*;

IDEAS ARE PRODUCTS—that's a good hypothesis, but we need to *refine* it; she is our most *productive* writer;

IDEAS ARE COMMODITIES—her idea is *valuable*, but yours is *worthless*; it just won't *sell*.[74]

Holmes's marketplace of ideas metaphor combines these basic metaphors for mind and ideas with the economic experience of the market to create a novel conception of free speech. The metaphor expresses a new idea, but only by means of entirely conventional conceptual metaphors.

Figure C
CONDUIT metaphor: Mapping

Source Domain		*Target Domain*
Physical	>>>	Mental
object	>>>	ideas
seeing	>>>	knowing
container (vehicle)	>>>	words
content	>>>	ideational content
sending	>>>	communicating
grasping (receiving)	>>>	understanding
container (receptacle)	>>>	mind

What is this new view of free speech, and how is it dependent on the market metaphor? The metaphor of a "market" for speech carries over to the domain of expression a systematic set of entailments that supersedes the limitations of the older model. (See Figure D) With respect to entities and relations, the entailments are that ideas are commodities, persuasion is selling, speakers are vendors, the audience members are potential purchasers, acceptance is buying, intellectual value is monetary value, and the struggle for recognition in the domain of public opinion is like competition in the market. At the conceptual level, the metaphor carries over the notion that truth-value like economic value can be measured by "the power of the thought to get itself accepted."[75] Finally, at the normative level, the metaphor carries over from the source domain of economic activity to the target domain

74. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 27-28, 47-48 (2d ed. 2001).

75. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

of speech the contingent cultural values of freedom and individual autonomy that constitute our modern notion of "free trade."

This last point is easily taken for granted today, but this conception only became possible as a result of unrelated historical and cultural changes in economic practices. In an earlier time, the market metaphor bore a nearly opposite meaning. Thus, in the *Areopagitica*, Milton invoked the market metaphor to *deride* the notion of licensed printing: "Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all knowledge in the Land, to mark and licence it like our broad cloath, and our wooll packs."[76] Milton wrote in an era of imperial mercantilism when the market was tightly regulated by the Crown and by the guilds. Holmes, in contrast, wrote in a period of *laissez-faire* capitalism (which, ironically, is conventionally identified with the majority opinion in *Lochner*). If Holmes was skeptical of the notion of truth as the inexorable outcome of the forward motion of ideas, the concept of the market provided a meaningful alternative model for the notion that truth—like economic well-being—could be the product of human competition. In short, the marketplace of ideas makes sense as a metaphor for free speech only after the advent of the economic developments of the eighteenth and nineteenth centuries.

Figure D
"Marketplace of Ideas" Mapping

Source Domain		*Target Domain*
economic markets	>>>	speech
commodities	>>>	ideas
selling	>>>	persuasion
vendors	>>>	speakers
customers	>>>	audience
buying	>>>	acceptance
economic value	>>>	intellectual or truth value
market competition	>>>	competition for public opinion
free trade	>>>	free speech

This, moreover, was not the only cultural shift that stood between Milton and the Framers, on one hand, and Holmes and the twentieth-century First Amendment, on the other. As long as truth was under-

76. Milton, *supra* note 53, at 303-04.

stood in strong objectivist terms, a First Amendment that prohibits only censorship made some sense. After-the-fact judgments could be trusted to sort out the true from the false and unprotected. The rise of classical liberalism in the nineteenth century undermined this view because it brought with it the notion that there could be more than one truth.[77] As Leonard Levy observes: "Neither freedom of speech nor freedom of the press could become a civil liberty until people believed that the truth of their opinions, especially their religious opinions, was relative rather than absolute."[78] Recognition of the relativity of value, in turn, subverts faith in the power of truth to sustain itself against all comers. Thus, the discontinuity between the Framers' First Amendment, with its focus on the prohibition of prior restraints and the introduction of truth as a defense to charges of seditious libel, and the modern First Amendment, with its more libertarian emphasis, is a function of the radically different social contexts and the distinctive concepts they each make possible. Modern free speech doctrine simply was not possible before the development of the modern practices and beliefs that give it meaning.

In both these ways, Holmes did not act free-form in fashioning the marketplace of ideas metaphor. Rather, he drew upon conventional metaphors and general cultural experience to formulate a new conception of free speech. Even so, Holmes's innovation was not immediately successful: it would be another decade before a First Amendment plaintiff actually prevailed[79] and a full fifty years before Holmes's "clear and present danger" test would actually command a majority of the Court.[80]

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77. A first step along this road was the realization of human fallibility. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 21-22 (C.V. Shields ed., 1956) (1859) ("To refuse a hearing to an opinion because they are sure that it is false is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.").

78. LEVY, *supra* note 51, at 5.

79. Stromberg v. California, 283 U.S. 359, 369 (1931) (voiding state statute prohibiting display of red flag); Near v. Minnesota, 283 U.S. 697, 722 (1931) (striking down state infringement on freedom of the press). The expansion of First Amendment freedoms picked up steam in the late New Deal and post-War periods. *See generally* Terminiello v. Chicago, 337 U.S. 1 (1949); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Schneiderman v. United States, 320 U.S. 118 (1943); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936).

80. *Compare* Brandenburg v. Ohio, 395 U.S. 444 (1969), *with* Dennis v. United States, 341 U.S. 494 (1951) (upholding Smith Act prosecutions of communist party leaders).

III. SPEECH ACTS OR SEX ACTS?

We saw how the metaphor of truth as a "streaming fountain" was neither subjective nor mere rhetoric, but, in fact, structured a different and more limited conception of free speech than that which prevails today. By the same token, Holmes's market metaphor both makes possible and limits the scope of First Amendment expansion. The modern First Amendment, in other words, forms a radial category that—both for good and ill—is structured by the market model and its underlying conceptual metaphors.

The heart of modern free speech law consists, in Justice Brennan's oft-quoted words, in the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[81] But this commitment makes little sense outside the normative cultural assumptions encompassed by the market metaphor. As Holmes observed, competition is hardly appreciated when "you have no doubt of your premises."[82] One might just as well invite submissions for a contest to define the proper shape of a square. Vigorous competition becomes desirable, even indispensable, once one accepts the relativist notion that "there is no such thing as a false idea."[83] Thus, Justice Brennan's majority opinion in *New York Times v. Sullivan*[84] affirmed that First Amendment "protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[85] Just as the economic market knows no test of product "validity," but allows demand to drive supply (relying on the market to distinguish between viable and shoddy products), the constitutional regime of free speech works best when it "secure[s] 'the widest possible dissemination of information from diverse and antagonistic sources.'"[86]

Yet this otherwise expansive concept of free speech can at times be surprisingly narrow. Speech is expected to be "uninhibited, robust, and wide-open" in the freewheeling space of the public forum; but in more circumscribed contexts, there is more limited space for speech. Thus, in striking down a statute prohibiting picketing on its grounds, the Supreme Court emphasized that the "sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other

81. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
82. Abrams v. United States, 250 U.S. 616, 630 (1919).
83. Gertz v. Welch, 418 U.S. 323, 339 (1974).
84. 376 U.S. 254 (1964).
85. *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 455 (1963)).
86. *Id.* at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

sidewalks in Washington, D.C."[87] An earlier decision upholding restrictions on anti-war protests in the public areas of Fort Dix was different because "the streets and sidewalks at issue were located within an enclosed military reservation . . . and were thus separated from the streets and sidewalks of any municipality."[88] Under the quasi-public forum doctrine, the government may restrict the content of speech in institutional settings as long as it does not discriminate amongst viewpoints.[89] In practice, this means that a government employer can ban (or punish as insubordinate) communications about work-related grievances or union activities.[90] As Robert Post says, "the legally established *boundaries of public discourse* mark the point at which our commitments shift from values like autonomous self-determination to competing values like . . . managerial efficiency."[91]

The overt *spatialization* of free speech is not the only way in which our understanding of the First Amendment is shaped by the market metaphor. Equally important is the distinction between speech and conduct, which continues to play a role in contemporary free speech law notwithstanding its rejection by leading constitutional law scholars such as Larry Tribe and John Hart Ely.[92] As they have argued, the distinc-

87. United States v. Grace, 461 U.S. 171, 179 (1983).

88. *Id.*

89. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 52-53 (1983) ("The Court of Appeals would have been correct if a public forum were involved here. But the internal mail system is not a public forum."); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) ("[W]hen . . . a pig has entered the parlor, the exercise of . . . regulatory power does not depend on proof that the pig is obscene."); Greer v. Spock, 424 U.S, 828, 838 (1976) ("The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false."); *see also* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 544-45 (1980) ("Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.'") (Stevens, J., concurring) (quoting majority opinion).

90. Connick v. Myers, 461 U.S. 138, 142 (1983); *see Perry*, 460 U.S. at 52-53.

91. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1278 (1995) (emphasis added) (internal quotes omitted).

92. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 598 (1st ed. 1978); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975). For an earlier articulation of this point, see Louis Henkin, *The 1967 Supreme Court Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968) ("A constitutional distinction between speech and conduct is specious . . . . [The] meaningful constitutional distinction is . . . between conduct that speaks, communicates, and other kinds of conduct.").

tion between "speech" and "conduct" is incoherent because, on one hand, all speech involves action of some sort (talking, writing, printing, etc.) and, on the other, many forms of conduct (wearing an armband, displaying or defacing a flag, participating in a sit-in or demonstration) are primarily expressive. Not only is the distinction indefensible on rational grounds, but it is deeply problematic as a legal matter: solicitation to commit a crime or the libel of a private person can be prohibited even though they are undoubtedly speech; but symbolic actions, like flag burning, are treated as speech for First Amendment purposes notwithstanding the fact that they are unquestionably conduct.

Nevertheless, progressive scholars who support regulation of hate speech and pornography regularly invoke the 1942 "fighting words" doctrine of *Chaplinsky v. New Hampshire*,[93] which recognized

> certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those *which by their very utterance inflict injury* or tend to incite an immediate breach of the peace.[94]

The argument for prohibitions on racist speech is that it is a form of harrassment or "words that wound." Similarly, Cass Sunstein has relied on *Chaplinsky* to argue that pornography is "low value" speech that can be prohibited consistent with the First Amendment because it harms women by encouraging violence toward them.[95] The essential idea in both cases is that some forms of speech are subject to regulation because they are tantamount to conduct.

The continued invocation of and reliance on *Chaplinsky* and its speech/conduct distinction is, thus, doubly paradoxical. On one hand, the persistence of the distinction in the face of such an eminent and seemingly powerful critique suggests that it must be an entrenched part of our conceptual system. On the other hand, the ineffectiveness of legal arguments premised on that entrenched distinction would seem to indicate that the mere conventionality of a legal metaphor is not sufficient to make it persuasive.

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93. 315 U.S. 568, 572 (1942) (permitting regulation of certain categories of speech because, in part, "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth").

94. *Id.* at 571-72 (emphasis added) (footnotes omitted).

95. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606-07 [hereinafter Sunstein, *Pornography*]. In a subsequent treatment of this issue, Sunstein abandoned the argument that pornography is more like conduct than speech. *See* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 808 (1993).

We can get some purchase on this paradox by examining the way in which Sunstein dances with the very distinction he purports to reject. In response to criticism of an early version of his argument for the regulation of pornography, Sunstein specifically disclaimed any reliance on the "discredited and untenable distinction between 'speech' and 'conduct.'"[96] But, in point of fact, he employed just that notion: "[P]ornography does not have the special properties that single out speech for special protection; *it is more akin to a sexual aid than a communicative expression.*"[97] Although Sunstein maintains that "pornography and obscenity are obviously 'speech,'"[98] his argument nevertheless reduces to the claim that pornography is nothing more than a physical stimulus: "What makes pornography different," he says, "is that people 'get off on it.'"[99]

For the conventional legal scholar given to criterial logic, the idea is to take the things-in-the-world called speech and conduct and try to identify the distinguishing features that differentiate one from the other. When these scholars find that all forms of speech present the properties of conduct and some forms of conduct are characterized by the same properties that identify speech as such, they are forced to conclude that the categories speech and conduct are not useful as concepts. But the distinction between speech and conduct persists nevertheless because this literal and propositional approach misses the point. The concepts speech and conduct are not literal, but metaphorical and socially motivated. The distinction persists because there are fundamental structural links between the CONDUIT metaphor and the general conceptual metaphor ACTIONS ARE MOTIONS. In this metaphor, the experience of physical motion is mapped onto abstract social or intellectual actions. The mapping is systematic, which means that each of the entailments from the domain of physical mobility—the experience of blockage, containment, and movement through space toward desired objects—is also carried over to the target domain of abstract social action. This mapping thus yields a series of correlative metaphors, in which:

- CONSTRAINTS ON ACTION ARE CONSTRAINTS ON MOTION;
- PURPOSES ARE DESTINATIONS;
- IMPEDIMENTS TO PURPOSES ARE OBSTACLES TO MOTION.

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96. Cass R. Sunstein, *The First Amendment and Cognition: A Response*, 1989 DUKE L.J. 433, 436.

97. Sunstein, *Pornography*, *supra* note 95, at 606 (emphasis added).

98. *Id.* at 603 n.84.

99. Sunstein, *supra* note 96, at 434.

In a corollary of these metaphors, life is conceptualized as a purposive journey. This yields expression like "it's time to *get on* with your life" and "I *overcame* my problem with alcohol."[100]

Since speech too is an activity, it is also conceptualized by means of the ACTIONS ARE MOTIONS metaphor (hence, such colloquialisms as "he talks a mile a minute" or "he talks a blue streak."). Even more importantly, several of the metaphorical mappings that constitute the CONDUIT metaphor-system are themselves premised on the ACTIONS ARE MOTIONS metaphor. The metaphors UNDERSTANDING IS GRASPING, COMMUNICATION IS SENDING, and AN ARGUMENT IS A JOURNEY each represent a different aspect of the communicative process as a kind of action.

Because speech is conceptualized metaphorically in this way, there is a sense in which, *for us*, all speech *is* action: just as any word that signifies physical acquisition can be used to signify intellectual understanding, any speech act can be represented as conduct. Thus, it is perfectly conventional to refer to an unkind word as "a cutting remark" and to say that a presentation was "powerful," "forceful," or that it "bowled me over."[101] In legal debate, this conventional metaphorical notion of SPEECH AS ACTION is manifested in the arguments that hate speech is a matter of *words that wound* or the *Chaplinsky* notion that "fighting words" are *words which by their very utterance inflict injury*.

It does not follow that, as Tribe says, any particular course of behavior can arbitrarily be characterized as either speech or conduct. Concepts like speech and conduct are not simply categories of things-as-they-exist-in-the-world; they are categorizations of social experience that reflect our speech-community's particular social understandings and purposes—the way we live, the things we value, the norms we obey. They are an essential part of "what everybody knows" about the social world. For example, in his dissent in *Cohen v. California*,[102] Justice Blackmun characterized Cohen's "Fuck the Draft" as "mainly conduct and little speech."[103] By today's post-MTV, post-rap standards, Justice Blackmun's categorization seems remarkably quaint—if not, in fact, absurd. For this categorization to succeed, it must appeal to generally accepted

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100. *See* LAKOFF & JOHNSON, *supra* note 74, at 41-44; GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR 4-7, 11-12 (1989).

101. In the same vein, a joke or a story is said to have a "punchline." Consider, too, the philosopher Richard Rorty's remark that "tossing a metaphor into a conversation is like suddenly . . . slapping your interlocutor's face, or kissing him." RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 18 (1989).

102. 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

103. *Id.*

understandings and beliefs. And Blackmun's argument does not persuade precisely because it relies on genteel, largely old-fashioned sensibilities that few today share. Conversely, murder will readily and reliably be characterized as conduct no matter how earnest the intended message of hatred or how obvious the political motivation, as in the Oklahoma City bombings. It is not that we cannot imagine a society where assassination is a mode of political expression: there have been cultures in which assassination was a regular means of determining succession. It is just that we are not (and do not particularly want to be) that kind of society. The categories speech and conduct are not infinitely manipulable because they are grounded in existing social practices and, as such, are reflections of cultural values and pragmatic social purposes.

Whether a speech act will be perceived as conduct or a course of conduct understood as speech depends upon its congruence with an idealized cognitive model structured in terms of the CONDUIT metaphor. A speech act that uses words or "symbolic conduct" to transmit a message to an audience—that is, one that instantiates the metaphors IDEAS ARE OBJECTS; WORDS (AND SYMBOLS) ARE CONTAINERS; COMMUNICATION IS SENDING; UNDERSTANDING IS GRASPING—will be understood as speech. Thus, in 1968 the Court held that conduct is to be protected as "symbolic speech" when there is "[a]n intent to convey a particularized message . . ., and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[104]

Conversely, a speech act that in social context and use is little more than a metaphorical OBJECT hurled at another like a brickbat[105] will always be open to characterization as conduct that should be excluded from the protections of the First Amendment. Speech acts that do not fit the ICM will be characterized based on their proximity to one or the other of these prototypical cases. Thus, as Post points out, there are instances of speech such as music and nonrepresentational art that all would agree are core cases of protected expression even if no one can say exactly what the message might be.[106] We can observe the Court stumbling on just this point in its decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[107] Struggling to explain why a St. Patrick's Day Parade with no identifiable message was

104. Spence v. Washington, 418 U.S. 405, 410-11 (1968); *see also* Texas v. Johnson, 491 U.S. 397, 403-04 (1989) (the first flag burning case).

105. Hence the derivation of "brickbat"—literally a piece of a brick used as a missile—as an unkind or caustic criticism.

106. Post, *supra* note 91, at 1252-53.

107. 515 U.S. 557 (1995).

nevertheless protected speech, the Court proclaimed: "Parades are . . . a form of expression, not just motion, and the *inherent expressiveness* of marching to make a point explains our cases involving protest marches."[108]

Speech, in other words, is a radial category whose central case is characterized by the CONDUIT metaphor-system and its cognate, the marketplace of ideas.[109] Speaking, writing, and publishing are the prototypical cases. First-tier extensions include the protest march and the demonstration, relatively early additions that differ from the central case because they involve conduct implicating pragmatic concerns (traffic, congestion) that justify reasonable time, place, and manner restrictions. Second-tier extensions include the nonprint media and symbolic and commercial speech. Thus, the broadcast media are subject to legal mandates—the fairness doctrine, the regulation of indecent, but nonobscene language—that would not be tolerated for more prototypical media.[110] Symbolic speech (e.g., draftcard burning) may be restricted under a more relaxed standard that permits the government to pursue "important" interests unrelated to speech.[111] So, too, the protection of commercial speech allows for regulation of false and misleading

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108. *Id.* at 568 (emphasis added).

109. Thus, when Sunstein finally abandons the speech/conduct distinction in his argument for the regulation of pornography, *see* Sunstein, *Words, Conduct, Caste*, *supra* note 95 at 808, he inevitably (and unwittingly) replaces it with the conventional CONDUIT metaphor. The speech/conduct distinction, he says, is merely an heuristic: On one hand, "'speech' refers to something that we should consider a term of art" covering "all symbols that are intended and received as messages." *Id.* at 833. On the other, "the treatment of some words as 'conduct' provides a shorthand, if misleading, description of a more extended argument that the speech at issue does not promote First Amendment values and creates sufficient harms to be regulable under the appropriate standards." *Id.* at 837. But, in characterizing "speech" as a "term of art," Sunstein implies that the concept has a specifically *legal* meaning when, in fact, there is no meaning to the concept "speech" that is not governed by the social understandings comprised by the CONDUIT metaphor: In his own words, the term "speech . . . covers all symbols that are intended and *received* as messages." *Id.* at 833 (emphasis added). As we have seen, moreover, this purportedly legal definition does not in fact explain why music, nonrepresentational art, or cases like *Hurley* should count as "speech."

110. *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), *with* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 260 (1974) (newspaper cannot be required to publish retraction of erroneous story). *Red Lion* is particularly problematic when one considers the now-conventional point that cable has rendered irrelevant the traditional justification about the scarcity of the airwaves. For the Court's more recent treatment of the cable system, see Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment"). On indecency, see FCC v. Pacifica Found., 438 U.S. 726 (1978) (the "seven dirty words" case).

111. United States v. O'Brien, 391 U.S. 367, 376 (1968).

advertising.[112] On the other hand, an event like the St. Patrick's Day parade may not have a discrete message; but as an expression of identity or ethnic solidarity, it is more like a manifesto than a brickbat.

As one moves further yet from the core, First Amendment protections progressively weaken. Novel forms of political protest and nonprototypical instances of the traditional media receive little or no protection. When, for example, those protesting the plight of the homeless wanted to sleep overnight in a tent city set up across from the White House in Lafayette Park, the Court sustained the application of an Interior Department anticamping regulation as a reasonable "time, place, or manner" restriction.[113] By the same token, student newspapers are not treated as core cases of speech, but are subject to regulation as part of the core curriculum.[114] Many of these cases are difficult to square in conventional terms of doctrine and principle. Mark Tushnet, for example, has complained that the Court's decisions appear to imply that "we are to determine the degree of protection that a category of speech gets by considering paradigmatic examples of speech in that category, not by considering unusual or merely possible examples."[115] But these outcomes are quite understandable as prototype effects—that is, as the predictable products of radial categorization.

The point is that the questions of whether parades, pornography, or works of art are speech are difficult only in the abstract. Law, as illustrated by all of these examples, is contingent on the larger social practices and forms of life. This was what Llewellyn meant when he argued that the Constitution "is in first instance a set of ways of living and doing."[116] Robert Post makes much the same point with respect to the First Amendment when he says that the constitutional values it serves "inhere not in speech as such, but rather in particular social

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112. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977).

113. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289 (1984). For another explanation that relates the Court's reasoning to our historical conceptions of the park, see Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991).

114. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988). Of course, one can question the Court's characterization of the school paper as part of the core curriculum. But, in relating the student paper to an alternative ICM, the Court's characterization seems a rather clear example of what, in chapter 6 of *A Clearing in the Forest, supra* note *, I identify as an assimilation-to-prototype effect.

115. MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF AMERICAN CONSTITUTIONAL LAW 307 (1987). Characteristically, he proclaims this approach "analytically unsatisfying" and "likely to be manipulated." *Id.* at 309.

116. Llewellyn, *supra* note 37, at 17.

practices."[117] If today we find "in" the First Amendment such values as liberty, democracy, autonomy, tolerance, and self-expression, it is because those are the values that we enact in diverse and pervasive contemporary practices.

With this in mind, it should be easy enough to see why pornography is speech. Ours is a society that uses sex to sell *everything*: not just toothpaste and tabloids, but also Charles Dickens's *Great Expectations* "in which Gwyneth Paltrow can be seen wearing—surprise—no clothes."[118] In a culture with a voracious appetite for "news" of the former President's dalliances—an obsession which dominated the halls of government no less than the headlines[119]—it is little wonder that sexually explicit material is seen as a subject of constitutional protection.

IV. CONCLUSION

The standard Western oppositions—mind and body, reason and the passions, logic and rhetoric, objective and subjective—are central to both our understanding and *misunderstanding* of law. They are basic to our understanding of law as a set of rules intended to govern the behavior of legal subjects. But, ironically, it is these very oppositions that structure the modern preoccupation—if not, indeed, puzzlement—over whether there are any meaningful constraints on judicial subjectivity. Just as objectivism (specifically, a correspondence view of meaning) introduces the problem of skepticism (How do we know that our perceptions accurately "reflect" the external world? Perhaps, as in Hillary Putnam's wry hypothetical,[120] we are just brains in a vat fed input by a giant computer?), the preoccupation with reason (more precisely, the subject/object dichotomy) creates the problem of indeterminacy: if decisionmaking is not constrained by the objective logic of the law, then it follows that judges will be free to decide subjectively according to their personal desires, politics, or value-preferences. After all, without the constraint of a rationalizing principle or some set of necessary and sufficient criteria, any two cases can be made to seem alike or different in any number of ways.

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117. Post, *supra* note 91, at 1250.

118. Terry Teachout, Op-Ed., *Classics That Sizzle*, N.Y. TIMES, Dec. 20, 1997, at A13 (noting that "the film industry's latest fling with the classics is being driven by [the] equation: Famous Title + Naked Babes - Author's Original Dialogue = Box Office Smash").

119. James Bennet, *In Washington, There's Still Only One Topic of Conversation*, N.Y. TIMES, Mar. 19, 1998, at A1 ("[I]t is the sexual content of the accusations now that is sustaining press and public attention at fever pitch, in the view of White House advisers and other political experts here.") (emphasis ommitted).

120. HILLARY PUTNAM, REASON, TRUTH AND HISTORY 5-8 (1981).

It is, of course, these same oppositions that underlie the conventional distrust of legal metaphor as subjective, rhetorical, imprecise, and unreliable. Only precise principles and criteria can anchor objective decisionmaking; metaphor, in contrast, is fancy talk that—though sometimes useful and evocative—must be cashed out in the hard currency of fact lest it obscure reason and mask subjective decision-making.[121]

But here, too, the conventional wisdom is the ironic source of its own undoing. The supposed subjectivity and unreliability of legal metaphor is an artifact of the very opposition between objective and subjective, logic and rhetoric, mind and body in whose name metaphor is decried. Actual examination of legal metaphors—how they work, how they come to be, how they come to be meaningful and persuasive to us as embodied, socially-situated human beings—shows that just the contrary is true: metaphor is both the product and embodiment of constraint. The import of our examination of the "stream of commerce" and "marketplace of ideas" metaphors is: *first*, that metaphorical thought is actually orderly and systematic in operation; *second*, that metaphorical legal concepts (like all concepts) depend for their coherence and persuasiveness on the motivating social contexts that ground meaning; and, *third*, that legal change (no less than stability) is contingent on—and, therefore, constrained by—the social practices and forms of life that give the law its shape and meaning.

In short, what our examination of these legal metaphors shows is that legal imagination and constraint are not the opposed qualities they are thought to be, but a single human process. Metaphor, in other words, reintegrates us with ourselves. An appreciation of metaphorical reason paradoxically (and, from the perspective of Western philosophy, "metaphorical thought" is already paradoxical) reconciles freedom and constraint as mutually constitutive. Indeed, as Merleau-Ponty puts it, "without the roots which it thrusts into the world, it would not be freedom at all."[122]

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121. *See* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1157 (2005); David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214-15 (1991) (metaphor "is useful because it is evocative, but it may evoke different ideas in different readers. It liberates the author from some of the rigidity of exposition, but also from the demands of precision and clarity."); *Cf.* LON FULLER, LEGAL FICTIONS viii (1967) ("When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions.").

122. MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 456 (Colin Smith trans., 1962).