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JUSTICE FRANKFURTER'S CONTEXTUAL MARKETPLACE

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ABSTRACT

Justice Frankfurter is not known for foundational First Amendment opinions, like his mentors, Justices Holmes and Brandeis. He also is not known for helping to lay the groundwork for the modern First Amendment, like his rivals and contemporaries on the Court, Justices Black and Douglas. His lengthy, complex, and nuanced free-expression opinions, however, provide an alternative theoretical framework for how the marketplace of ideas can be conceptualized in the networked

era. Drawing from his opinions, this article examines the historical development of marketplace theory, contending the theory has never had a monolithic meaning, and analyzes Justice Frankfurter's First Amendment opinions, ultimately constructing the contextual marketplace. The contextual approach provides a more inclusive, malleable, and protective foundation for the marketplace in the twenty-first century, finding substantial support from Justices Holmes's and Brandeis's writings, modern Supreme Court decisions, and legal scholarship.

I. INTRODUCTION

Marketplace theory should not be thought of as static and monolithic. The theory's journey from a passing, somewhat undeveloped idea in Justice Oliver Wendell Holmes's dissent in *Abrams v. United States* in 1919[1] to its contemporary conceptualization as a primarily Enlightenment–funded assumption that truth will succeed and falsity will fail in a generally unregulated information system has been characterized by a range of interpretations.[2] In fact, the theory's century-long journey to its present interpretation has been defined more by persistent change than enduring consistency. As emergent technologies, such as social media, artificial intelligence, and virtual reality, continue to fundamentally alter how people communicate and understand themselves and others in the twenty-first century, conceptualizing marketplace theory as dynamic, rather than static, is crucial.[3] Such an approach allows for change and adjustment to a metaphor that has become the Court's dominant rationale for expansive

1. Justice Holmes did not provide any references or footnotes regarding his intended meaning in his dissent. *See* Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). Justice Holmes also never mentioned the marketplace again, despite the Court having heard several cases that were similar to *Abrams* while he was on the Court. *See infra* Section II.B.

2. *Compare* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969), Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring), United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J. concurring), *and* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting), *with Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting).

3. *See* Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 894–95 (2019); Jared Schroeder, *Marketplace Theory in the Age of AI Communicators*, 17 FIRST AMEND. L. REV. 22, 62–64 (2018); Jeong-Nam Kim & Homero Gil de Zúñiga, *Pseudo-Information, Media, Publics, and the Failing Marketplace of Ideas: Theory*, 65 AM. BEHAV. SCIENTIST 163, 167–68 (2021).

freedom of expression rights.[4] Characterizing the metaphor as a liquid, rather than a solid, becomes particularly important during a time of increasing extremism, fragmentation, and violence, all of which are in many ways being facilitated by the unique nature of networked technologies and the algorithms that drive them.[5]

These emergent communication tools have fundamentally transformed the conceptual, open marketplace justices conjured into existence in their opinions in the twentieth century into a multiverse of separate, identity-based marketplaces.[6] These generally fragmented spaces, with their often-high walls of ideological division from other communities, more resemble a honeycomb than an open forum. They offer only certain products—or ideas—generally limiting the information sources people encounter.[7] In other words, algorithms and people's choices of information sources are preempting the battle between truth and falsity Enlightenment thinker John Milton prescribed in the seventeenth century and justices, over time, associated with the marketplace of ideas.[8] While legal scholars have long questioned the Enlightenment-era truth and human rationality assumptions justices gradually installed into the marketplace concept's foundations, networked technologies have worsened their problems and deepened

4. Metaphors, by their nature, have dynamic meanings. See GEORGE LAKOFF & MARK JOHNSEN, METAPHORS WE LIVE BY 4 (1980) and Donna L. Dickerson, *<Freedom of Expression> and Cultural Meaning: An Analysis of Metaphors in Selected Supreme Court Texts*, 1 COMMC'N L. & POL'Y 367, 375–76 (1996) for a discussion of metaphors and metaphors used by courts, respectively.

5. *See* MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE 6–7 (2d ed. 2015); CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 69–71 (2017); Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1153–54 (2018).

6. Pieces of the multiverse concept are drawn from different sources. Journalism scholar Brian McNair referred to the twenty-first-century public sphere as "a virtual, cognitive multiverse of spheres within spheres" in BRIAN MCNAIR, CULTURAL CHAOS: JOURNALISM AND POWER IN A GLOBALISED WORLD 137 (2006). Sociologist Manuel Castells's discussion of networked communication and the reconstruction of personal identity also contributed. *See* MANUEL CASTELLS, THE POWER OF IDENTITY 68–69 (2d ed. 2010). Finally, Justice Brennan's concurring opinion in *Lamont* lamented a "barren marketplace of ideas that had only sellers and no buyers." *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

7. *See* Itai Himelboim, Stephen McCreery & Marc Smith, *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUT.–MEDIATED COMMC'N 154, 167, 171 (2013) (discussing the tendency toward echo-chambers, or, as the authors call them, "clusters"); SUNSTEIN, *supra* note 5, at 69–75 (discussing the isolation and closing off of ideas in online spaces).

8. JOHN MILTON, AREOPAGITICA AND OTHER PROSE WORKS 50 (George H. Sabine ed., 1951). For examples of the marketplace approach's increasing association with Enlightenment ideas, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969), and First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783–86 (1978).

their cracks and fissures.[9] Importantly, the free exchange of ideas is not only algorithmically pre-determined in the choice-rich, fragmented environment. People have become less likely to entertain ideas that conflict with their pre–existing conclusions about the world.[10] Thus, when people live in algorithmically and personally determined online communities and realities, they are more likely to become radicalized by extreme views, ultimately hampering the potential for rational discourse and a play between truth and falsity as envisioned by the Court in its marketplace-based rationales for free expression.[11] Such concerns are the outcome of a pre-sorted information system where growing misinformation and disinformation lead to extremism and violence, as was perhaps most clearly on display during the deadly attack on the U.S. Capitol on January 6, 2021.[12]

The attack was prefaced by threats and encouragements for violence on social media, and by President Trump.[13] These messages, with the aid of social media firms' algorithms, were channeled directly into the fragmented, walled-off, limited-marketplace communities that are most likely to accept and take action on them.[14] While social media firms, as

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

10. *See* MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 3 (2d ed. 2010); SUNSTEIN, *supra* note 5, at ix ("Members of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens . . . or if they see one another as enemies or adversaries in some kind of war.").

11. CASTELLS, *supra* note 10, at 3 ("[W]hen communication breaks down, when it does not exist any longer . . . social groups and individuals become alienated from each other, and see the other as a stranger, eventually as a threat.").

12. Michael Kunzelman & Amanda Seitz, *Dozens Charged in Capitol Riots Spewed Extremist Rhetoric*, ASSOCIATED PRESS (Feb. 16, 2021), https://apnews.com/article/capitol-riots-extremist-rhetoric-a5db204fa5b07ffca694a8d96323ae15; Ben Collins & Brandy Zadrozny, *Extremists Made Little Secret of Ambitions to 'Occupy' Capitol in Weeks Before Attack*, NBC NEWS (Jan. 8, 2021, 12:36 PM), https://www.nbcnews.com/tech/internet/extremists-made-little-secret-ambitions-occupy-capital-weeks-attack-n1253499; Tina Nguyen & Mark Scott, *'Hashtags Come to Life': How Online Extremists Fueled Wednesday's Capitol Hill Insurrection*, POLITICO (Jan. 7, 2021, 6:36 PM), https://www.politico.com/news/2021/01/07/right-wing-extremism-capitol-hill-insurrection-456184.

13. Ben Leonard, *Former Defense Secretary Miller Blames Trumps Speech for Jan. 6 Insurrection*, POLITICO (Mar. 11, 2021, 3:52 PM), https://www.politico.com/news/2021/03/11/chris-miller-trump-capitol-riot-475404; Collins & Zadrozny, *supra* note 12.

14. *See generally* Molly Wood, *How Fake Twitter Accounts Spread Misinformation and Distort Conversation*, MARKETPLACE (Aug. 19, 2019), https://www.marketplace.org/shows/marketplace-tech/how-fake-twitter-accounts-spread-misinformation-and-distort-conversation/; Samuel Woolley, *We're Fighting Fake News AI Bots by Using More AI. That's*

well as site hosts, responded by banning speakers and removing groups, the increasing use of networked spaces to radicalize individuals and inspire physical violence raises questions about how the marketplace concept should be understood in the networked era.[15] The attack on the Capitol was not the first physical manifestation of online misinformation and radicalization. Trump supporters attempted to run then-candidate Joe Biden's campaign bus off the road in Texas before the 2020 election.[16] In the 2016 "Pizzagate" attack, an armed man entered Comet Ping Pong in Washington, D.C., because he believed conspiracy theories about the Clintons using the space to traffic children.[17] As threats, inciting messages, and extremism increase in virtual spaces, can it still be assumed that truth will win and falsity fail in the algorithm-funded, choice-rich twenty-first-century marketplace? Can the assumption that truth will vanquish falsity in an open exchange of ideas persist in the fragmented networked era? Can the marketplace approach, as it has been understood by the Court, remain a viable rationale for free expression rights?

In examining the future of the marketplace approach, this article explores Justice Felix Frankfurter's conceptualization of the First Amendment. Justice Frankfurter is not known as a First Amendment champion like his mentors, Justices Oliver W. Holmes and Louis Brandeis, or his contemporaries on the Court, Justices Hugo Black and William Douglas. This article does not contend that Justice Frankfurter's free-expression rationales should be elevated above those of his mentors or peers, but identifies his generally overlooked body of opinions

a Mistake., MIT TECH. REV. (Jan. 8, 2020), https://www.technologyreview.com/2020/01/08/130983/were-fighting-fake-news-ai-bots-by-using-more-ai-thats-a-mistake/.

15. *See generally* Brian Fung, *Parler Has Now Been Booted by Amazon, Apple and Google*, CNN (Jan. 11, 2021, 6:54 AM), https://www.cnn.com/2021/01/09/tech/parler-suspended-apple-app-store/index.html; Ian Carlos Campbell, *YouTube, Twitter, and Facebook Continue Bans over Trump Election Claims*, VERGE (Jan. 27, 2021), https://www.theverge.com/2021/1/27/22251338/twitter-facebook-youtube-election-misinformation-ban-trump; Poppy Noor, *Should We Celebrate Trump's Twitter Ban? Five Free Speech Experts Weigh In*, GUARDIAN (Jan. 17, 2021, 1:27 PM), https://www.theguardian.com/us-news/2021/jan/17/trump-twitter-ban-five-free-speech-experts-weigh-in.

16. Alexandra Villarreal, *FBI Investigating Trump Supporters Who Swarmed Campaign Bus*, GUARDIAN (Nov. 2, 2020, 12:23 AM), https://www.theguardian.com/us-news/2020/nov/01/biden-harris-bus-highway-texas-trump-train.

17. Kate Samuelson, *What to Know About Pizzagate, the Fake News Story with Real Consequences*, TIME (Dec. 5, 2016, 12:08 PM), https://time.com/4590255/pizzagate-fake-news-what-to-know/. The conspiracy theory persists, having reached a new generation on TikTok. *See* Cecilia Kang & Sheera Frenkel, *'PizzaGate' Conspiracy Theory Thrives Anew in the TikTok Era*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/06/27/technology/pizzagate-justin-bieber-qanon-tiktok.html.

regarding threats, sedition, and incitement as an important, and alternative, contribution to how the marketplace can be conceptualized. Justice Frankfurter's time on the Court, which spanned from 1939 to 1962, was characterized by questions regarding protest, incitement, and sedition as the Court wrestled with controversial cases related to World War II, McCarthyism, and labor unrest.[18] Thus, while Justice Frankfurter's free-expression-related conclusions were perhaps overshadowed by Justices Black's and Douglas's opinions, which played a crucial role in developing the contemporary, Enlightenment-based marketplace,[19] Justice Frankfurter's enigmatic, lengthy, and complex opinions left a nuanced, thought-provoking and, importantly, alternative legacy.

Justice Frankfurter, who helped found the ACLU in 1920, left his influential position at Harvard Law School to join a Court in transition in 1939.[20] Members of the Roosevelt Court, having observed the *Lochner* Court's overstep into judicial activism,[21] the Justices' rejection of early New-Deal policies,[22] and President Roosevelt's Court-packing threat in 1937,[23] sought to reorient the Court's place in society.[24] As a result, the Court, for the first time, focused on "the relationship between the

18. *See generally*, Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

19. Harry Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 41 UCLA L. REV. 428, 453 (1967) (surveying Justice Black's role in the development of expansive First Amendment protections); Thomas I. Emerson, *Justice Douglas' Contribution to the Law: The First Amendment*, 74 COLUM. L. REV. 353, 356 (1974) (contending that Justice Douglas's opinions broadened free-expression rationales, thereby widening the information available in the marketplace).

20. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 120–21 (Daniel J. Boorstin ed., 5th ed. 2010) ("It was necessary once more to reorient the Court's interests . . . .").

21. Lochner v. New York, 198 U.S. 45 (1905). See David A. Strauss, *Why* Lochner *Was Wrong*, 70 U. CHI. L. REV. 373 (2003) for an examination of the case's legacy.

22. The Supreme Court struck down the National Industrial Recovery Act and the Agricultural Adjustment Act, both crucial parts of the New Deal, in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and United States v. Butler, 297 U.S. 1 (1936). The decisions, among others, helped lead to Roosevelt's efforts to "pack" the Court. *See* Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1054–55 (2005).

23. President Roosevelt warned Frankfurter, who was still at Harvard, that the Court-packing plan was coming. *See* JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 61 (1975) ("Even if you do not agree, suspend final judgement and I will tell you the whole story.").

24. MCCLOSKEY, *supra* note 20, at 122 ("The judges had to rethink the question of the Court's place in the American polity . . . .").

individual and government,"[25] or, as Justice Frankfurter termed it, "the free play of the human spirit."[26] Justice Frankfurter was nominated by President Roosevelt, an old friend whom Justice Frankfurter had met when they were both young attorneys in New York.[27] Roosevelt told friends, "Felix has more ideas per minute than any man of my acquaintance. He has a brilliant mind. . . ."[28] His nomination by Roosevelt came a year and a half after Justice Black joined the Court and just months before Justice Douglas.[29] Before joining the Court, Justice Frankfurter had spent almost twenty-five years working to influence change from the sidelines of politics.[30] He had advised candidates for state and federal office, including Theodore Roosevelt; suggested nominees to the Supreme Court to presidents; filled sought-after clerkships for justices; and kept close connections with powerful thinkers, such as Justices Holmes and Brandeis, as well as political theorist Harold Laski and journalist Walter Lippmann.[31] Justice Holmes, who was not known for his warmth, once told a friend, Frankfurter "walked deep into my heart."[32] Justice Brandies referred to him as "half brother, half son."[33]

Justice Frankfurter's transition from esteemed professor, beloved mentee to the preceding generation's greatest legal minds, and influential political advisor to Supreme Court Justice did not go smoothly. His powers to influence and build political capital met their match on a Court filled with independent thinkers, such as Justice Black, and equally ambitious operators, such as Justice Douglas, whose attentions were often focused on vice presidential and presidential

25. *Id.* at 121.

26. Murdock v. Pennsylvania, 319 U.S. 105, 139 (1943) (Frankfurter, J., dissenting).

27. *Felix Frankfurter, 1939-1962*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-felix-frankfurter-1939-1962/ (last visited Feb. 20, 2022); *see also infra* note 28.

28. HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 23 (1960).

29. *See Hugo Black, 1937-1971*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-hugo-black-1937-1971/ (last visited Feb. 20, 2022); *see also William O. Douglas, 1939-1975*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-william-o-douglas-1939-1975/ (last visited Feb. 20, 2022).

30. Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 71 DUKE L.J. 71, 76–77 (1988).

31. LASH, *supra* note 23, at 30, 45, 234, 325; MELVIN UROFSKY, "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS AND FELIX FRANKFURTER 3 (Melvin I. Urofsky & David W. Levy eds., 1991).

32. UROFSKY, *supra* note 31, at 5.

33. *Id.* Justice Frankfurter and Justice Brandeis exchanged nearly 700 letters during a thirty-one-year friendship. *Id.* at 3.

nominations from the Democratic Party.[34] Once on the Court, Justice Frankfurter's previously warm friendship with Justice Douglas soured.[35] His working relationship with Justice Black fell apart.[36] All the while, the Court faced a confluence of difficult First Amendment cases regarding incitement, sedition, and violence, and an increasingly isolated Justice Frankfurter took care to differentiate his reasoning from that of his judicial nemeses. Taken together, Justice Frankfurter's opinions from this crucial period provide a generally underexplored and alternative perspective on free expression rationales during a time in which society struggled with social change and difficult free-expression questions.

This article examines Justice Frankfurter's conceptualization of the First Amendment, ultimately identifying a *contextual* marketplace, an alternative understanding of free expression and the flow of information, which contributes new insights into how we approach free expression and the growing problems of polarization, threats, and violence in the networked era. This article first explores the development of contemporary marketplace theory, beginning with Justice Holmes's understandings from the earliest First Amendment cases. The article then examines the historical context of Justice Frankfurter's time on the Court, as well as his personal development and judicial philosophy. Next, the article analyzes six of Justice Frankfurter's opinions from cases dealing with threats, incitement, and sedition. The article concludes by identifying conceptual building blocks from Justice Frankfurter's personal and judicial writings, examining them in light of traditional marketplace rationales and the emerging challenges to free expression in the networked era to formulate an alternative, contextual marketplace, which contributes to how the marketplace approach can be revised in the twenty-first century.

34. Concerning Justice Douglas's political ambitions, see JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 144 (2007) and LASH, *supra* note 23, at 154–56.

35. *See* LASH, *supra* note 23, at 309–38. Frankfurter's and Douglas's relationship fell apart while they were on the Court. *Id.* While friends, Douglas wrote enthusiastically about visiting with Frankfurter. *See* Letter from William O. Douglas to Felix Frankfurter (Apr. 1, 1937), *in* THE DOUGLAS LETTERS 81 (Melvin I. Urofsky ed., 1987). Both Urofsky's collection of Douglas's letters and Lash's collection of Frankfurter's diary entries include sections devoted to the justices' loathing of the other justice. *See id.* at 73–98; LASH, *supra* note 23, at 309–38.

36. Justice Stone, who would become chief justice two years after Justice Frankfurter joined the Court, asked Frankfurter, still a professor at Harvard, to tutor Justice Black when he first joined the Court. *Harlan Fiske Stone, 1925-1941, 1941-1946*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-harlan-fiske-stone-1941-1946/ (last visited Feb. 20, 2022); *see* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 275 (1994); *see also* LASH, *supra* note 23, at 67. By 1943, Justice Frankfurter expressed anger and distrust of Justice Black. *See* LASH, *supra* note 23, at 208–09.

II. THE UNFINISHED MARKETPLACE

Just days after hearing the *Abrams*[37] appeal in late October 1919, Justice Holmes wrote to Harold Laski, who was a professor at the London School of Economics and one of his dearest friends.[38] While Frankfurter was often a concern of their letters, their focus this time fell on free speech.[39] Justice Holmes never mentioned *Abrams* in the letter, but lamented he did not believe in free expression "as a theory."[40] He explained, "I hope I would die for it and I go as far as anyone whom I regard as competent to form an opinion . . . ."[41] He went on, however, to express ambivalence regarding free-speech concerns and a lack of a clear position on the concept.[42] Late in the letter, he attempted to clarify his views, writing, "[W]hen I say I don't believe in it as a theory I don't mean that I do believe in the opposite as a theory."[43] The letter, written as he considered the *Abrams* appeal, provides context regarding the strength and force of Justice Holmes's initial intent regarding marketplace theory. Rather than a stark, clear, and developed idea, the letter suggests Justice Holmes was far from a jurist who was awaiting an opportunity to write a First Amendment-defining rationale for free expression.

37. Abrams v. United States, 250 U.S. 616 (1919).

38. Letter from Oliver W. Holmes to Harold Laski (Oct. 26, 1919), *in* OLIVER WENDALL HOLMES, THE ESSENTIAL HOLMES 321 (Richard A. Posner ed., 1992). Laski lectured for a short time at Harvard and Yale, but his socialist ideas became increasingly unpopular in post-World War I America. *Laski Appointed Lecturer at Yale*, HARV. CRIMSON (Jan. 29, 1919), https://www.thecrimson.com/article/1919/1/29/laski-appointed-lecturer-at-yale-pharold/; *see* A.B. Mathur, *Harold Josephus Laski: The Man and His Thoughts*, 49 INDIAN J. POL. SCI. 453 (1988). This led to his departure to London. During his time in Cambridge, he became friends with Justice Holmes, as well as Frankfurter, Walter Lippmann, and Charles Beard. Justice Holmes and Laski often shared concern and pride in Frankfurter's challenges and successes. *See* Letter from Oliver W. Holmes to Harold Laski (June 1, 1919), *in* HOLMES, *supra*; Letter from Oliver W. Holmes to Harold Laski (July 1, 1927), *in* HOLMES, *supra*.

39. *See* Letter from Oliver W. Holmes to Harold Laski (Oct. 26, 1919), *in* HOLMES, *supra* note 38. The next two letters between Justice Holmes and Laski discussed Frankfurter's recent marriage to Marion Denman. *See* Letter from Oliver W. Holmes to Harold Laski (Nov. 3, 1919) (on file with Harvard Law School Digital Suite); Letter from Harold Laski to Oliver W. Holmes (Nov. 12, 1919) (on file with the Harvard Law School Digital Suite). Laski described Frankfurter as "like a radiant summer dawn" after his marriage. Letter from Harold Laski to Oliver W. Holmes (Nov. 12, 1919), *in* HOLMES, *supra* note 38.

40. Letter from Oliver W. Holmes to Harold Laski (Oct. 26, 1919), *in* HOLMES, *supra* note 38.

41. *Id.*

42. *Id.*

43. *Id.*

Despite Justice Holmes's unresolved conclusions, his dissent in *Abrams* changed the course of free expression in the United States.[44] Less than a month after writing his letter to Laski, Justice Holmes announced his *Abrams* dissent, which amounted to the first time a justice filed an opinion in support of free expression.[45] In the dissent, he concluded, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[46] He continued, "That at any rate is the theory of our Constitution."[47] In communicating these ideas, Justice Holmes introduced what would become the most influential rationale for free expression in the U.S. system.[48] At the same time, his dissent, much as was perhaps foreshadowed in his letter to Laski, did not outline a theory. Justice Holmes's reference to the marketplace does not include any citations or footnotes.[49] He does not explicitly connect the idea to any specific line of thinking.[50] Legal scholars almost immediately associated Justice Holmes's dissent with Enlightenment thought.[51] Frankfurter, who was a professor at Harvard Law School and still twenty years from joining the Court, sent a letter to Justice Holmes on Nov. 12, 1919, two days after the Court announced its decision in *Abrams*.[52] Frankfurter lauded Justice Holmes's dissent, writing "now I may tell you the gratitude and – may I say it – the pride I have in your dissent."[53] Two weeks later, he sent more praise to his mentor, writing to Justice Holmes, "I still read and rejoice over your dissents – and [Professor Roscoe] Pound has stolen from me when he says your paragraphs will live as long as the Areopagitica."[54] Frankfurter's

44. Blasi, *supra* note 9, at 2; Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2361 (2018); Frederick Schauer, *Oliver Wendell Holmes, the* Abrams *Case, and the Origins of the Harmless Speech Tradition*, 51 SETON HALL L. REV. 205, 205–06 (2020).

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

46. *Id.*

47. *Id.*

48. *See* Rodney A. Smolla, *The Meaning of the 'Marketplace of Ideas' in First Amendment Law*, 24 COMMC'N L. & POL'Y 437, 437–39 (2019); Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMMC'N 151, 151 (1999); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 342–43 (1997).

49. *Abrams*, 250 U.S. at 624–31.

50. *Id.*

51. G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 72 (1971).

52. Letter from Felix Frankfurter to Oliver W. Holmes (Nov. 12, 1919) (on file with Harvard Law School Digital Suite).

53. *Id.*

54. Letter from Felix Frankfurter to Oliver W. Holmes (Nov. 26, 1919) (on file with Harvard Law School Digital Suite).

correspondence identifies two important themes: first, Justice Holmes's dissent in *Abrams* was immediately seen as significant;[55] second, those who read the opinion made an automatic connection between it and Milton's *Areopagitica*, which occupies a central role as a primary work in Enlightenment thought.[56] The association between Justice Holmes's dissent and Enlightenment thought, however, faces two substantial hurdles. First, Justice Holmes was not an Enlightenment thinker.[57] He was a pragmatist.[58] He explicitly rejected foundational principals of Enlightenment thought.[59] Second, the Court's free-expression-related decisions, including Justice Holmes's, from the terms that followed the 1919 decisions do not associate the marketplace with Enlightenment ideas.[60] While justices ultimately wove Enlightenment assumptions regarding truth, human rationality, and the role of the individual in society into the marketplace's foundation, no such association is supported by Justice Holmes's personal or legal writings or the Court's decisions from that period.

A. Holmes the Pragmatist

Enlightenment thought generally assumes people are rational, truth is objective and universal, and society was created to benefit the individual.[61] These assumptions emerged in the seventeenth century

55. Letter from Felix Frankfurter to Oliver W. Holmes (Nov. 12, 1919) (on file with Harvard Law School Digital Suite).

56. MILTON, *supra* note 8, at 50.

57. *See* Jared Schroeder, *Fixing False Truths: Rethinking Truth Assumptions and Free-Expression Rationales in the Networked Era*, 29 WM. & MARY BILL RTS. J. 1097, 1107 (2021) ("Despite language that overlapped significantly with one of the Enlightenment's central thinkers regarding individual liberty and free expression, as well as his documented appreciation for [John Stuart] Mill, Justice Holmes *rejected Enlightenment assumptions* about truth in many of his legal and scholarly writings." (emphasis added)).

58. Paul L. Gregg, *Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 262, 262 (1943); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CALIF. L. REV. 1653, 1656, 1662, 1669 (1990); Jared Schroeder, *The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth*, 7 BRIT. J. AM. LEGAL STUD. 169, 177–80 (2018).

59. *See* Letter from Oliver W. Holmes to Harold Laski (Jan. 11, 1929), *in* HOLMES, *supra* note 38, at 107; Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), *in* HOLMES, *supra* note 38, at 107. For examples of when Justice Holmes explicitly rejected or questioned Enlightenment assumptions, see Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

60. Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); White, *supra* note 51, at 72.

61. *See* GERALD F. GAUS, CONTEMPORARY THEORIES OF LIBERALISM 2–3 (2003); Fred S. Siebert, *The Libertarian Theory*, *in* FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO 40 (Fred S. Siebert et al. eds., 1956); Peter J. Gade,

with thinkers such as Galileo, Francis Bacon, and Isaac Newton, who, in seeking to construct a dispassionate, rational scientific method, started an empirically based revolution.[62] They sought to part ways with speculative reasoning and fallible human senses and create objectively measurable systems for understanding the world.[63] Their efforts revolutionized knowledge and spilled from the sciences into political and philosophical theory, ultimately leading Milton to argue for the supremacy of truth over falsity in *Areopagitca*.[64] Milton, for example, concluded, "Truth be in a field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[65] Milton also argued, "Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making."[66] These ideas fueled Locke's famous contention for "life, liberty, and estate," as well as human equality and independence, forty years later, in 1689.[67] Locke's conclusions, which were particularly influential to the nation's founders, were incorporated by Thomas Jefferson into the Declaration of Independence.[68] Enlightenment thinkers' assumptions, however influential they were, are only possible when truth is understood as generally being universal and individuals are conceptualized as rational and capable of making sense of the world, particularly in their ability to discern truth from falsity.[69]

Postmodernism, Uncertainty, and Journalism, *in* CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES 64 (Wilson Lowrey & Peter J. Gade eds., 2011).

62. *See* R. Hooykaas, *The Rise of Modern Science: When and Why?*, 20 BRIT. J. FOR HIST. SCIENCE, 453, 453–56 (1987); Emilio Prospero et al., *Learning from Galileo: Ventilator-Associated Pneumonia Surveillance*, 186 AM. J. RESPIRATORY & CRITICAL CARE MED. 1308, 1309 (2012).

63. *See* HANNAH ARENDT, THE HUMAN CONDITION 259–63 (2d ed. 1998). Arendt contended that Galileo's invention of the telescope and the discoveries he made showed that human senses about the way the world and universe operated had been fundamentally wrong for centuries. *Id.* at 259. The discovery caused doubt in the human senses. *Id.* at 259–60. The result was to create systems to objectively measure phenomena. *Id.* at 262–63. Arendt wrote, "Galileo's discovery proved in demonstrable fact that both the worst fear and the most presumptuous hope of human speculation, the ancient fear that our senses, our very organs for reception of reality, might betray us . . . ." *Id.* at 262.

64. MILTON, *supra* note 8, at 50.

65. *Id.*

66. *Id.* at 45.

67. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 43 (J.W. Gough ed., 1689).

68. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

69. GAUS, *supra* note 61, at 2–3; Siebert, *supra* note 61, at 40; Gade, *supra* note 61, at 64.

Justice Holmes explicitly questioned these assumptions.[70] He consistently contended that truth, and a person's very understanding of the world around them, was substantially dictated by their experiences and the biases they develop.[71] In *Common Law*, a book he published in 1881, he explained, "The life of the law has not been logic: it has been experience."[72] The passage continues by outlining different factors that influence a person's interpretation of a law, including "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men . . . ."[73] Decades later, a year before he wrote the *Abrams* dissent, Justice Holmes rejected objective, empirical truth in *Natural Law*.[74] He defined truth as "the system of my (intellectual) limitations . . . ."[75] In a reference to his experience in the Civil War, during which he was shot on three occasions,[76] he continued, "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."[77] Within the passage, he lists where a person is from, their beliefs, experiences, and interests as matters that influence what they perceive to be true.[78] Later in the article, he concluded that "[m]en to a great extent believe what they want to . . . ."[79] These conclusions rejected the idea that truth is universal and awaits discovery. Justice Holmes continued, "[W]e all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief."[80] Justice Holmes's emphasis on personal experience, rather than universal truth, aligns

70. Holmes was not alone. Legal scholars have long questioned truth and rationality assumptions justices have woven into the marketplace approach's free expression rationales. *See infra* Part II.E.

71. Holmes rejected being labeled a pragmatist. He also often spoke negatively about James, the father of American pragmatism, though they grew up together and were friends in early adulthood. *See* Letter from Oliver W. Holmes to Harold Laski (Mar. 29, 1917), *in* HOLMES, *supra* note 38; LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 388 (1st ed. 2001).

72. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

73. *Id.*

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

75. *Id.*

76. Ben W. Heineman Jr., *Justice Oliver Wendell Holmes and Memorial Day*, ATLANTIC (May 30, 2011), https://www.theatlantic.com/national/archive/2011/05/justice-oliver-wendell-holmes-and-memorial-day/239637/.

77. Holmes, *supra* note 74, at 40; *see also* Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 536–37 (1951).

78. *See* Holmes, *supra* note 74, at 40–42.

79. *Id.* at 43.

80. *Id.* at 41.

with pragmatic assumptions. Truth is made, not found.[81] Ten years after *Abrams*, in 1929, he wrote to Laski that objective truth is "a mirage."[82] Later that year, in a letter to British jurist Frederick Pollock, he labeled himself a "bettabilitarian."[83] He wrote, "I believe that we can *bet* on the behavior of the universe in its contact with us. We bet we can know what it will be."[84] Justice Holmes used a similar metaphor in his dissent in *Abrams*.[85] He explained, "Every year if not every day we have to *wager* our salvation upon some prophecy based upon imperfect knowledge."[86] Taken together, Justice Holmes's ideas regarding truth and the power of an individual to step outside of their personal, experience-based, world-defining lenses, work in opposition to Enlightenment assumptions.

Justice Holmes's relationship with pragmatic thinking, though he did not label himself a pragmatist, goes back to his early adulthood.[87] Justice Holmes entered the Civil War an idealist who believed slavery should be abolished.[88] He left the war a realist.[89] Mark DeWolfe Howe, who clerked for Justice Holmes at the end of his time on the Supreme Court and became his biographer, explained that "he had learned from the War that personal taste in morals does not establish universal or objective truth in ethics."[90] Similarly, historian Louis Menand concluded, "The lesson Holmes took from the war can be put in a sentence. It is that certitude leads to violence."[91] These conclusions align with the next phase of Justice Holmes's life. As he started his practice as an attorney, Holmes

81. *See* WILLIAM JAMES, PRAGMATISM 37 (1978); Richard Rorty, *The Continuity Between the Enlightenment and Postmodernism*, *in* WHAT'S LEFT OF THE ENLIGHTENMENT 19, 29 (Keith Michael Baker & Peter Hanns Reill eds., 2001).

82. Letter from Oliver W. Holmes to Harold Laski (Jan. 11, 1929), *in* HOLMES, *supra* note 38, at 107. Laski lectured briefly at Harvard and Yale, but his Marxist ideas, which were unpopular in post-World War I America, led to his departure. *See generally Laski Appointed Lecturer at Yale*, *supra* note 38; Carroll Hawkins, *Harold J. Laski: A Preliminary Analysis*, 65 POL. SCI. Q. 376 (1950). During the time, however, he became friends with Justice Holmes, as well as then-law professor Felix Frankfurter, Walter Lippmann, and Charles Beard. *See generally* Leslie Lenkowsky, *Introduction* to Harold J. Laski, *The Limitations of the Expert*, 57 SOC'Y 371 (2020); Arthur A. Ekirch, Jr., *Harold J. Laski: The American Experience*, 24 AM. STUD. 53 (1983).

83. Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), *in* HOLMES, *supra* note 38, at 108.

84. *Id.*; *see also* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 474 n.78 (1994); Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 11, 12, 48 (1948).

85. Abrams v. United States, 250 U.S. 616, 625–31 (1919) (Holmes, J., dissenting).

86. *Id.* at 630 (emphasis added).

87. MENAND, *supra* note 71, at 204–05.

88. *Id.* at 38; *see also* Howe, *supra* note 77, at 535–37.

89. MENAND, *supra* note 71, at 61–64.

90. Howe, *supra* note 77, at 537.

91. MENAND, *supra* note 71, at 61.

was part of the short-lived "metaphysical club" in the early 1870s.[92] The club drew Holmes together with William James and Charles Sanders Peirce, the founders of American pragmatic thought.[93] Holmes never thought much of Peirce, writing to Laski that he found him "rather overrated," but he reserved a special loving disdain for James and his ideas.[94] For a time, during and after the Civil War, James and Holmes were close friends, often meeting to discuss philosophy, and shared a common interest in Fanny Bowditch Dixwell, whom Holmes eventually married.[95] Ultimately, Holmes and James grew apart, leaving their own indelible marks on American thought. James published *Pragmatism*, his masterwork and the canonical writing in American pragmatism, in 1907.[96] James contended, "The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events."[97] James continued, "Its verity is in fact an event, a process: the process namely of its verifying itself, its veri[]fication. Its validity is the process of its valid[]ation."[98] James sent his friend his book, as well as an article, "A Defence of Pragmatism," which appeared in *Popular Science Monthly* in 1907.[99] Justice Holmes thanked "Bill" warmly for the

92. *Id.* at 216, 226.

93. *See* JAMES, *supra* note 81, at vii; *Pragmatism*, STAN. ENCYC. OF PHIL. (Apr. 6, 2021), https://plato.stanford.edu/entries/pragmatism/. Holmes was acquainted with William James, who was nearly the same age, and James's younger brother Henry, who was two years younger. Allen Mendenhall, *Pragmatism on the Shoulders of Emerson: Oliver Wendell Holmes, Jr.'s Jurisprudence as a Synthesis of Emerson, Pierce, James, and Dewey*, 48 S.C. REV. 93, 99 (2015); G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1439 (1990) (describing Henry James as Holmes's "longtime friend"). Henry became a well-known American author for works such as *The Turn of the Screw*, *The American*, and *The Portrait of a Lady*. *Henry James*, LITERATURE NETWORK, http://www.online-literature.com/henry_james/ (last visited Mar. 1, 2022) (listing Henry James's bibliography).

94. *See* Letter from Oliver W. Holmes to Harold Laski (Nov. 29, 1923) (on file with Harvard Law School Digital Suite); Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 469 (1998) (stating that Holmes "criticize[d] James's tender-minded attitude . . ."); *id.* at 491 n.316 (quoting a letter from Holmes to Lewis Einstein written on September 27, 1909, in which Holmes states James "takes the wroug [sic] road").

95. MENAND, *supra* note 71, at 204; *see also* Letter from Oliver W. Holmes to William James (Dec. 15, 1867) (on file with Harvard Law School Digital Suite). Holmes wrote effusively of his affection for James. *See id.*

96. *William James*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/james/ (last visited Mar. 1, 2022).

97. JAMES, *supra* note 81, at 97.

98. *Id.*

99. Letter from Oliver W. Holmes to William James (Mar. 24, 1907) (on file with Harvard Law School Digital Suite); William James, *A Defence of Pragmatism*, 70 POPULAR SCI. MONTHLY 351 (1907).

materials, and outlined his understandings about truth.[100] Justice Holmes explained, "Truth then, as one, I agree with you, is only an ideal—an assumption that if everyone was as educated and clever as I he would feel the same compulsions that I do."[101] He continued, "[I]n fact there are as many truths as there are men."[102] James died three years after their exchange about truth. Justice Holmes's letters to his friend about truth and pragmatism include the "bet" or "wager" ideas found in *Abrams* and other writings, as well as the concept that people make "the kind of world [they] want[] to make."[103] Thus, while Justice Holmes generally rejected James's ideas after his friend's death, their exchange after Justice Holmes read James's *Pragmatism* appeared to be a testing ground for ideas the jurist ultimately wrote into his opinions and later legal writings.[104]

B. The Forgotten Marketplace

For many years after Justice Holmes's dissent in *Abrams*, it appeared his understandings of truth and rationality and the theoretical underpinnings of the marketplace approach would not matter—the marketplace concept was essentially forgotten by the Court until the 1940s.[105] Justices decided three cases similar to *Abrams* in 1920.[106] All three cases dealt with government limitations on anti-war expression, and the Court upheld the lower-courts' convictions in each instance.[107] Despite the similar facts and legal questions, neither Justice Holmes, nor his peers, took the opportunity to expand on or clarify the marketplace concept, which in the previous term Justice Holmes labeled the "theory of our Constitution."[108] Justice Brandeis used opinions in each case to contend for a narrower construction of the clear and present danger test

100. Letter from Oliver W. Holmes to William James (Mar. 24, 1907) (on file with the Harvard Law School Digital Suite).

101. *Id.*

102. *Id.*

103. *Id.*

104. *See* Letter from Oliver W. Holmes to Harold Laski (Mar. 29, 1917), *in* HOLMES, *supra* note 38, at 37; Letter from Oliver W. Holmes to Lewis Einstein (Sept. 27, 1909), *in* HOLMES, *supra* note 38, at 37.

105. W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMMC'N Q. 40, 42 (1996). The Court's first reference to the exact phrase "marketplace of ideas" did not occur until Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965).

106. Pierce v. United States, 252 U.S. 239, 271–72 (1920); Schaefer v. United States, 251 U.S. 466, 482–84 (1920); Gilbert v. Minnesota, 254 U.S. 325, 334–35 (1920).

107. *Pierce*, 252 U.S. at 253; *Schaefer*, 251 U.S. at 482; *Gilbert*, 254 U.S. at 333.

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

Justice Holmes outlined in *Schenck* the year before.[109] Justice Holmes joined him in two of the dissents.[110] Similarly, in 1921, Justices Brandeis and Holmes wrote separate dissents in *Milwaukee Social Democratic Publishing v. Burleson*, but did not address the marketplace or Enlightenment concepts.[111] In the case, the Court upheld the postmaster general's right to revoke second-class-mail privileges to a newspaper under the Espionage Act.[112] Justice Holmes, making his first statement about the First Amendment since his dissent in *Abrams*, rejected the Court's reasoning. He explained, "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."[113] Justice Holmes went no further in terms of the value of information, the nature of truth, or his theory of the First Amendment. He emphasized that the postmaster general has the power to stop unlawful material, not penalize or limit the circulation of a publication in general.[114]

The marketplace concept, and its relationship with Enlightenment thought, took its first major post-*Abrams* steps with Justice Holmes's dissent in *Gitlow v. New York* in 1925 and Justice Brandeis's concurring opinion in *Whitney v. California* two years later.[115] Importantly, neither case refers to the marketplace concept. In *Gitlow*, the Court upheld Benjamin Gitlow's conviction for publishing the "Left Wing Manifesto."[116] In his dissent, which Justice Brandeis joined, Justice Holmes famously reasoned, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[117] He continued, "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."[118] Justice Holmes's conclusions align with concerns he

109. *Pierce*, 252 U.S. at 253–73 (Brandeis, J., concurring); *Schaefer*, 251 U.S. at 482–501 (Brandeis, J., concurring); *Gilbert*, 254 U.S. at 334–43 (Brandeis, J., dissenting); Schenck v. United States, 249 U.S. 47, 51–53 (1919).

110. *Pierce*, 252 U.S. at 254; *Schaefer*, 251 U.S. at 253.

111. 255 U.S. 407, 417, 436 (1921).

112. *Id.* at 409.

113. *Id.* at 437 (Holmes, J., dissenting).

114. *Id.* at 437–38.

115. 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

116. *Gitlow*, 268 U.S. at 655, 672.

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

118. *Id.*

outlined in his 1907 exchange with William James.[119] To James, as he did in *Gitlow*, Justice Holmes questioned anyone's ability to discern absolute truth.[120] He explained to James, truth "stands on faith or a bet" and is "only guessed at."[121]

Justice Holmes's correspondence from 1925, when he wrote the *Gitlow* dissent, provides clarity regarding his meanings. In a letter to Lewis Einstein, the U.S. diplomat to Czechoslovakia, he wrote, "I had my whack on free speech some years ago in the case of one Abrams, and therefore did no more than lean to that and add that an idea is always an incitement."[122] He continued that "the usual notion is that you are free to say what you like if you don't shock *me*. Of course, the value of the constitutional right is only when you do shock people . . . [.]"[123] Justice Holmes's *Gitlow* dissent, as well as his correspondence, communicate that he understood truth as something no individual could absolutely grasp. Thus, if it is not possible to be certain and no one can lay claim on absolute truth, then ideas should generally be freely exchanged. Such a conclusion is different than an Enlightenment assumption that truth will outduel falsity in a free exchange of ideas. Justice Holmes communicated that free expression should be protected because human shortcomings and biases make it impossible to *see* or comprehend truth.[124] This is quite different than assuming truth is discovered, and that falsity is vanquished in a free exchange of ideas. These Enlightenment influences, however, received a substantial boost in Justice Brandeis's concurring opinion in *Whitney*.[125]

Less than two weeks after the Court announced its decision in *Abrams*, Anita Whitney was arrested after an address at the Women's Civic Center in Oakland in November 1919.[126] Her trial and appeal progressed at a snail's pace, with the Court agreeing to hear her case seven years after her conviction.[127] Frankfurter, still teaching at

119. Letter from Oliver W. Holmes to William James (Mar. 24, 1907) (on file with the Harvard Law School Digital Suite).

120. *Id.*

121. *Id.*

122. Letter from Oliver W. Holmes to Lewis Einstein (July 11, 1925), *in* THE ESSENTIAL HOLMES, *supra* note 38, at 322.

123. *Id.*

124. Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Letter from Oliver W. Holmes to William James (Mar. 24, 1907) (on file with Harvard Law School Digital Suite).

125. Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

126. *Id.* at 363–65; *see also* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 656–57 (1988).

127. *Whitney*, 274 U.S. at 359–60.

Harvard, was among many prominent voices who argued the Court should overturn her conviction.[128] Frankfurter's mentors on the Court, Justices Brandeis and Holmes, seemingly agreed, though Justice Brandeis chose to write a concurring opinion, rather than a dissent.[129] Justice Holmes joined his friend's opinion, following the pattern of Justice Brandeis generally taking the lead on free expression cases in the 1920s, after Justice Holmes's dissent in *Abrams*.[130] Justice Brandeis told Frankfurter in a 1923 letter he regretted joining Justice Holmes's opinions in *Schenck* and *Debs*.[131] He explained to Frankfurter that he started articulating his understandings about free expression in his *Schaefer* and *Pierce* dissents in 1920.[132] Justice Brandeis prepared his clearest statement on free expression for a dissent in *Ruthenberg v. Michigan*, which dealt with communist leader Charles Ruthenberg's conviction under Michigan's criminal syndicalism law.[133] Ruthenberg died unexpectedly in March 1927, making the case moot and Justice Brandeis's dissent unneeded.[134] Justices Brandeis and Holmes agreed to concur in the judgment in *Whitney*, and Justice Brandeis drafted a two-paragraph opinion.[135] After Ruthenberg's death, Justice Brandeis shifted a version of his dissent for *Ruthenberg* into the concurring opinion in *Whitney*.[136] The outcome was what one scholar called "arguably the most important essay ever written, on or off the bench, on the meaning of the [F]irst [A]mendment."[137]

Justice Brandeis's *Whitney* opinion departed from the more detached, technical tone in his previous First Amendment-related opinions.[138] He concluded that "[t]hose who won our independence believed that the final end of the [s]tate was to make men free to develop their faculties . . . ."[139] He continued, "They believed that freedom to think as you will and to

128. Other voices included those of Zechariah Chafee, Jane Addams, and Upton Sinclair. *See* Blasi, *supra* note 126, at 662; *see also* THOMAS, *supra* note 28, at 21 ("Felix Frankfurter did not formally leave Harvard until 1939.").

129. Ronald K. L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in* Whitney v. California, 2005 SUP. CT. REV. 333, 335–36 (2005).

130. RABBAN, *supra* note 48, at 364–69. Justice Holmes's dissent in *Gitlow*, which Justice Brandeis joined, is one of the lone exceptions. *See* Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

131. Letter from Louis Brandeis to Felix Frankfurter (Aug. 8, 1923), *in* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 323–24 (1985).

132. *Id.*

133. 273 U.S. 782 (1927); Collins & Skover, *supra* note 129, at 354–55.

134. *Ruthenberg*, 273 U.S. at 782.

135. Collins & Skover, *supra* note 129, at 372.

136. *Id.* at 372–73.

137. Blasi, *supra* note 126, at 668.

138. RABBAN, *supra* note 48, at 369; Blasi, *supra* note 126, at 667–68.

139. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

speak as you think are means indispensable to the discovery and spread of political truth . . . ."[140] Such conclusions are easily associated with Miltonian, Enlightenment assumptions regarding the objective, discoverable nature of truth and the rationality of individuals.[141] However, legal scholar Vincent Blasi contended it would be a mistake to understand Justice Brandeis as a naïve, Enlightenment thinker.[142] The scholar explained, "I do not detect in Brandeis's language the echo of John Milton . . . Brandeis knew plenty about vested interests, market distortions, and the siren songs of demagogues."[143] Similarly, historian Daniel Farber concluded that Justice Brandeis's ideas in *Whitney*, when taken with his other writings, align more with a classical concern for civic virtue than Enlightenment-era libertarianism.[144] Farber explained, "As opposed to self-seeking individual fulfillment, they urge the importance of civic virtue."[145] Legal scholar C. Edwin Baker came to a similar conclusion, finding that by placing human liberty as the goal of democracy, Justice Brandeis created a strong, more pragmatic rationale for free expression.[146] Finally, legal scholar David Rabban contended that Justice Brandeis's ideas in the opinion sound at times more related with American pragmatist John Dewey, a disciple of William James's thinking, than those of Enlightenment thinkers.[147] Thus, scholars who have analyzed Justice Brandeis's foundationally important *Whitney* opinion have concluded it was not a celebration of Enlightenment ideas, as it is easy to assume. Despite these conclusions, justices have used the opinion to construct a largely Enlightenment-funded set of rationales for free expression, as has been the case with Justice Holmes's dissent in *Abrams*.[148]

C. The Modern Marketplace

The marriage ceremony between the marketplace concept and Enlightenment ideas started four years after *Whitney* in *Near v. Minnesota*.[149] Once again, the marketplace of ideas went unmentioned. Chief Justice Hughes, seeking a framework on which to construct the

140. *Id.*
141. Blasi, *supra* note 126, at 671–76.
142. *Id.* at 676–77.
143. *Id.*
144. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 183 (1995).
145. *Id.* at 182.
146. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 30 (1989).
147. RABBAN, *supra* note 48, at 370–71.
148. Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).
149. 283 U.S. 697 (1931).

Court's first decision in which it struck down a law because it conflicted with the First Amendment, turned to history and the Enlightenment ideas the Framers wrote into colonial and early American documents.[150] Using a state public nuisance law, Minnesota officials had halted publication of Jay Near's *Saturday Press* in 1927, about a week after Anita Whitney's conviction was upheld by the Supreme Court.[151] The Court ruled 5-to-4 to overturn the Minnesota law, but the decision split Justices Brandeis and Holmes.[152] Justice Holmes voted to uphold the law, but neither of the usually free-expression-focused justices wrote an opinion. Chief Justice Hughes, writing for the Court, emphasized expression can be penalized, but reasoned the Minnesota law was a suppression rather than punishment.[153] He referenced freedom of the press's historical foundations in the colonies, explaining, "The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration."[154] Chief Justice Hughes also drew the full letter the Continental Congress wrote to Quebec in 1774 into the opinion.[155] The foundational ideas of the letter are based upon Enlightenment assumptions regarding truth and human rationality.[156] Regarding the free press, the letter contended that

> [i]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone . . . the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . . .[157]

The letter's primary author, John Dickinson, the former president of Pennsylvania and Delaware, a Quaker, a member of the Continental Congress, and the author of the "Olive Branch Petition," was a dedicated follower of Locke's ideas.[158] In the years before writing the letter to

150. *Id.* at 713–17.
151. *Id.* at 703.
152. *Id.* at 722–23.
153. *Id.* at 708–11.
154. *Id.* at 716–17.
155. For the complete letter, see Letter from John Dickinson to the Inhabitants of the Province of Quebec (1774) (on file with University of Alberta Libraries), https://archive.org/details/cihm_36354/page/n5/mode/2up.
156. *Near*, 283 U.S. at 718 (quoting Letter from John Dickinson to the Inhabitants of the Province of Quebec (1774) (on file with University of Alberta Libraries)).
157. *Id.*
158. 2 JOHN DICKINSON, THE POLITICAL WRITINGS OF JOHN DICKINSON 105 (1801).

Quebec, Dickinson explicitly quoted Locke's ideas in "Letters from a Farmer in Pennsylvania," a set of a dozen letters he published under a fictional name to argue against British taxes.[159] Thus, in constructing its first rationales for overturning a law that limited free expression, the Court drew Enlightenment-funded assumptions that were imbued upon the Framers into its discourse about free expression.

Justices began deepening the relationship between these Enlightenment ideas and marketplace-based reasoning in *Thornhill v. Alabama* and *Bridges v. California*, which were decided in 1940 and 1941, respectively.[160] Importantly, Justices Holmes and Brandeis were no longer on the Court, with Justice Brandeis retiring the term prior to *Thornhill* and Justice Holmes leaving the Court in 1932, a year after *Near*.[161] Justices Black, Douglas, and Frankfurter, all appointed by President Roosevelt between 1937 and 1939, started constructing their often-divergent understandings of free expression in *Bridges*, in which Justice Black wrote the Court's opinion and Justice Frankfurter dissented.[162] Before *Bridges*, all three joined the Court's decision to strike down a state law that criminalized picketing in *Thornhill*, concluding that censoring the expression provided "no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[163] The Court reasoned, "The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."[164]

In *Bridges*, union leader Harry Bridges, as well as a group of newspapers that included the *Los Angeles Times*, were held in contempt for comments made regarding pending court cases.[165] The Court heard arguments in October 1940 and, in conference, six justices voted to uphold the contempt charges.[166] Justices Black and Douglas, along with Justice Stanley Reed, made up the three-vote minority and Chief Justice

159. JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 53–54 (1774).

160. 310 U.S. 88 (1940); 314 U.S. 252 (1941).

161. *Justices 1789 to Present*, U.S. SUP. CT., https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 1, 2022). Justice Brandeis died in 1941. His seat was filled by William O. Douglas. Justice Holmes died in 1935. Benjamin Cardozo filled Justice Holmes's vacant seat, which, upon Justice Cardozo's death in 1939, was filled by Felix Frankfurter.

162. *See* NEWMAN, *supra* note 36, at 292–93 (regarding *Bridges*'s early role in identifying the diverging views and styles of the Roosevelt appointments).

163. *Thornhill*, 310 U.S. at 105.

164. *Id.* at 104.

165. *Bridges*, 314 U.S. at 258.

166. NEWMAN, *supra* note 36, at 290.

Hughes assigned the opinion to Justice Frankfurter.[167] Justice Black circulated a draft dissent that emphasized the absolute nature of the First Amendment's wording and rejected any fealty U.S. courts should have to traditional British law.[168] Justice Frankfurter circulated a history-based opinion for the Court, which was constructed upon traditional British law that sought to protect the judicial process.[169] He explained, "The civil liberties here invoked depend upon an untrammeled judiciary whose passions are not even unconsciously aroused."[170] The two draft opinions were circulated in summer 1941, as Justice McReynolds retired and Justice Murphy changed his vote.[171] The Court reheard the case in October, with two new Roosevelt appointees on the Court.[172] The changes in the Court led to a 5-to-4 majority for Justice Black's opinion, which he revised.[173] He did not refer to the marketplace concept or Enlightenment thought, generally contending the Framers intended to set apart free expression as an unqualified protection, and the contempt findings violated that intent.[174] Justice Black explained that "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced . . . ."[175] In a preview of First Amendment battles to come, Justice Frankfurter converted his draft opinion into a dissent, explicitly rejecting Justice Black's unnuanced free-speech absolutism.[176] He explained, "Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights."[177] Specifically, Justice Frankfurter contended, "A trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'"[178]

The *Thornhill* and *Bridges* decisions included elements of Enlightenment thought, particularly regarding rational individuals' access to information. They also included at least passing references to marketplace ideas.[179] *Bridges* provided a type of judicial Rorschach test,

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 291.
172. *Id.*
173. *Id.* at 291–92.
174. Bridges v. California, 314 U.S. 252, 264–65 (1941).
175. *Id.* at 265.
176. *Id.* at 279–80 (Frankfurter, J., dissenting).
177. *Id.* at 282.
178. *Id.* at 283.
179. *See id.* at 284; Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940).

as Justice Frankfurter directly qualified his mentor's metaphor by limiting the theory's scope and influence,[180] while Justice Black envisioned an expansive information environment, though he rationalized it using textual analysis of the First Amendment's wording and founders' intent, rather than the marketplace metaphor.[181] Justice Douglas's concurring opinion in *United States v. Rumely*, decided in 1953, made a brief connection between the marketplace concept and Enlightenment thought.[182] The case dealt with activist Edward Rumely, who refused to disclose the names of those who made bulk purchases of political books to the House Select Committee on Lobbying Activities.[183] The Court upheld Rumely's right to refuse to provide the information, with Justice Frankfurter writing for the Court and Justice Black joining Justice Douglas's more impassioned, free-expression-supporting concurring opinion.[184] Justice Douglas concluded,

> Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas. The aim of the historic struggle for a free press was "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government."[185]

Justice Douglas's opinion emphasized the Framers' intent to create a system in which a broad spectrum of ideas would be protected to create "a community where men's minds are free . . . ."[186] Cases such as *Thornhill*, *Bridges*, and *Rumely* were not constructed upon an Enlightenment-based marketplace rationale. But the expansive information environment the justices envisioned and rationalized, particularly Justices Black and Douglas, created a precedential framework that Justices later converted into explicit Enlightenment reasoning as a justification for free expression via the marketplace metaphor. This more explicit interweaving between Enlightenment thought and the marketplace concept primarily occurred in the 1960s, when the approach emerged as the Court's dominant rationale for free expression.[187] The marketplace came to have a clearer meaning, which

180. *Bridges*, 314 U.S. at 282 (Frankfurter, J. dissenting).
181. *Id.* at 264–65.
182. 345 U.S. 41, 56–58 (1953) (Douglas, J., concurring).
183. *Id.* at 42–43 (majority opinion).
184. *Id.* at 46.
185. *Id.* at 56 (Douglas, J., concurring).
186. *Id.* at 57.
187. Hopkins, *supra* note 105, at 42.

led to justices using the approach more often.[188] Justices cited the generally undeveloped marketplace concept fifteen times between 1919 and 1959, essentially from *Abrams* to *Rumely*.[189] That number leapt to a dozen references in the 1960s, thirty-five uses in the 1970s, and thirty-seven references in the 1980s.[190]

The Court's decisions in *New York Times Co. v. Sullivan*[191] in 1964 and *Lamont v. Postmaster General*[192] in 1965 were crucial in the transition of the marketplace from an abstract, nebulous, seldom-used term to a dominant, Enlightenment-based tool for rationalizing free expression. Justice William Brennan, who joined the Court in 1956, famously concluded, "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."[193] While his statement resonated through free-expression precedent for decades, it does not include explicit ties to Enlightenment thought or the marketplace concept.[194] Importantly, however, the passage was prefaced by three familiar rationales: a 150-word passage from Justice Brandeis's concurring opinion in *Whitney*,[195] a marketplace-like reference to the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[196] and references to Enlightenment thinkers John Milton and John Stuart Mill.[197] While it cannot be assumed that Justice Brandeis's reasoning in *Whitney* was Enlightenment-funded,[198] Justice Brennan's placement of the passage just after the call for an "unfettered interchange of ideas"[199] and before his conclusion that debate should be "uninhibited, robust, and wide-open,"[200] conveys an understanding that more information and less regulation is preferable because truth is discoverable and universal and people are rational and capable of discerning truth from falsity. Such a

188. *See id.*
189. *Id.*
190. *Id.*
191. 376 U.S. 254 (1964).
192. 381 U.S. 301 (1965).
193. *Sullivan*, 376 U.S. at 270; *see also* NEWMAN, *supra* note 36, at 533. Newman called Brennan's opinion for the Court in *Sullivan* "one of the enduring landmarks of constitutional law." NEWMAN, *supra* note 36, at 533.
194. *Sullivan*, 376 U.S. at 270.
195. *Id.* (quoting Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).
196. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
197. *Id.* at 279 n.19.
198. *See supra* Part II.B.
199. *Sullivan*, 376 U.S. at 269.
200. *Id.* at 270.

conclusion finds more support in Justice Brennan's decision to reference Milton and Mill in *Sullivan*.[201] In a note, he quoted Mill's *On Liberty*, explaining, "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[202] In the same note, Justice Brennan cited Milton's conclusion in *Areopagitica* that, "Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"[203] Thus, the landmark decision draws Enlightenment assumptions about truth and human rationality closer and deeper into the foundations of marketplace thought.

Importantly, Justices Black and Douglas, the Court's leading First Amendment thinkers, did not join the Court's opinion.[204] Justice Frankfurter retired in 1962 after suffering a stroke while in office.[205] When Justices Frankfurter, Black, and Brennan overlapped on the Court, Justice Black told a friend, "Bill [Brennan] will be just fine . . . Bill is as smart as anyone on the Court. Everything is fresh to him. But when Felix and I decide a case now it's just the last chapter of a book we've been writing."[206] When it came to *Sullivan*, Justice Frankfurter was not on the Court to distinguish his views from Justices Black and Douglas's more expansive understandings of free expression. Justice Black concurred in the *Sullivan* decision but congratulated Justice Brennan, writing to him, "You have done a great service to the freedoms of the First Amendment . . . ."[207] Justice Black, joined by Justice Douglas, concluded that the Court's decision did not go far enough to protect freedom of expression.[208] He explained how the "actual malice" standard still allowed for public officials, in the right conditions, to succeed in penalizing expression about them.[209] He concluded, "I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the

201. *See id.* at 279 n.19.
202. *Id.*
203. MILTON, *supra* note 8, at 50.
204. *Sullivan*, 376 U.S. at 256.
205. *See infra* Part III.B (regarding Justice Frankfurter's death and how Justice Black mourned him).
206. NEWMAN, *supra* note 36, at 483.
207. *Id.* at 535.
208. *Sullivan*, 376 U.S. at 293 (Black, J., concurring).
209. *Id.*

Times advertisement their criticisms of the Montgomery agencies and officials."[210]

Similar forces were at play in the less-heralded *Lamont*[211] decision the next term. The Court struck down a law that instructed the Postal Service to inspect and withhold unsealed mail from foreign countries that officials determined was communist propaganda.[212] Justice Douglas, joined by Justice Black and four others, wrote an expansive protection of free expression into the opinion, which is comparable to Justice Black's concurring opinion in *Sullivan*.[213] Justice Brennan concurred, calling upon the marketplace concept in distinguishing his reasoning from the Court's.[214] In doing so, he communicated a concern for the safety and flow of information.[215] He concluded, "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[216] Less than a year later, Justice Douglas drew marketplace and Enlightenment thoughts together, as well as a concern for the safety and flow of information in the marketplace, in his dissent in *Ginzburg v. United States*.[217] The Court, in a 5-to-4 decision, upheld a federal obscenity law that limited advertising for sex-related materials.[218] Remaining more moderate on free expression than Justices Black and Douglas, Justice Brennan wrote for the Court, concluding the limitations on expression in question were not a First Amendment concern, since obscenity is not protected.[219] Justices Black and Douglas wrote separate dissents. Justice Black's reasoning remained focused on an expansive, protected free-expression regime in which the government does not have the power to limit expression.[220] Justice Douglas, however, constructed an Enlightenment-based argument that each individual is rational enough to judge: "the First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the 'good' and the 'bad . . . .'"[221] He explained, "The theory is that people are mature enough to pick and choose, to recognize trash when they see it . . . and, hopefully, to move

210. *Id.*
211. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).
212. *Id.* at 306–07.
213. *See id.* at 305–07; *Sullivan*, 376 U.S. at 293–97 (Black, J., concurring).
214. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).
215. *Id.*
216. *Id.*
217. 383 U.S. 463, 482–92 (1966) (Douglas, J., dissenting).
218. *Id.* at 464.
219. *Id.* at 475.
220. *Id.* at 476 (Black, J., dissenting).
221. *Id.* at 491–92 (Douglas, J., dissenting).

from plateau to plateau and finally reach the world of enduring ideas."[222] Justices' concern for the safety and functionality of the marketplace, along with their continued references to Enlightenment ideas in *Lamont* and *Ginzburg*, reinforce the conclusion that the story of the marketplace theory has been characterized by change, rather than consistency.[223] The evolution, however, reached a key point three years after *Ginzburg* in *Red Lion Broadcasting Co. v. FCC*.[224]

The Court upheld the fairness doctrine in *Red Lion*, concluding that the FCC had the power to require broadcasters to provide air time for those who were attacked on the public airwaves.[225] In a unanimous decision, the Court constructed its most explicit definition of the marketplace concept as an Enlightenment-founded rationale for free expression.[226] Justices reasoned, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."[227] The Court's reasoning was supported by citations from Justice Holmes's original use of the marketplace concept in *Abrams*,[228] as well as the passage in *Sullivan* where the Court referred to an "unfettered interchange of ideas,"[229] referenced Justice Brandeis's concurring opinion in *Whitney*,[230] and concluded that criticism of public officials was part of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[231] Thus, the Court's reasoning in *Red Lion* represented a nexus point between ingredients that have come to characterize the marketplace of ideas. The decision explicitly associated the First Amendment's purpose with the marketplace and Enlightenment thought about the nature of truth.[232] Within the confluence of building blocks, the Court also communicated a

222. *Id.* at 492.

223. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Ginzburg*, 383 U.S. at 492 (Douglas, J., dissenting).

224. *See* 395 U.S. 367 (1969).

225. *Id.* at 400–01.

226. *Id.* at 390. The Court was unanimous, but Justice Douglas took no part in the case, and Justice Fortas resigned after Justices heard the case on April 2 and 3, but before the decision was announced on June 9. *Id.* at 401; Andrew Glass, *Abe Fortas Resigns from Supreme Court May 15, 1969*, POLITICO (May 15, 2008, 4:12 AM), https://www.politico.com/story/2008/05/abe-fortas-resigns-from-supreme-court-may-15-1969-010346.

227. *Red Lion*, 395 U.S. at 390.

228. *Id.* at 390–92 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

229. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

230. *Red Lion*, 395 U.S. at 381 n.9 (citing Hastings & D.R. Co. v. Whitney, 132 U.S. 357, 366 (1889)).

231. *Sullivan*, 376 U.S. at 270.

232. *See Red Lion*, 395 U.S. at 390.

concern for the public's access to information.[233] The opinion rationalizes compelling licensed broadcasters to provide air time to speakers they otherwise would not allow on air by emphasizing the importance of information to the public.[234] Such a concern leans into the assumption that people are rational and simply need access to information to discern truth.

D. The Expansive, Unprotected Marketplace

While *Red Lion* marked a crucial step in the formation of the modern marketplace approach, the Court's use of the theory continued to change. In particular, majorities on the Court eschewed concerns for access to the marketplace and the fair functioning of the conceptual space, ultimately using the theory to substantially broaden the boundaries of free expression.[235] The shift from a concern for the well-being and functionality of the marketplace to an expansive, open approach started in *CBS v. Democratic National Committee*[236] in 1973, four years after *Red Lion*. The Court reasoned that radio stations do not have to accept all political advertising requests, concluding it would create a "system so heavily weighted in favor of the financially affluent . . . ."[237] In other words, the Court sought to protect the marketplace from being dominated by those with more financial means than others. Justice Brennan, however, dissented, contending the Court's decision limited the spectrum of ideas audiences could receive in the marketplace of ideas.[238] He reasoned, "Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates."[239]

Soon, however, the concerns Justice Brennan communicated regarding an expansive marketplace in *CBS* became dominant. The Court squarely addressed the nature of the space in the *First National Bank of Boston v. Bellotti* and *Central Hudson Gas & Electric Corp. v. Public Service Commission* decisions in 1978 and 1980.[240] The two approaches were central to justices' divergent opinions in *Bellotti*, in which the Court struck down a Massachusetts law that limited

233. *See id.* at 390–91.

234. *See id.*

235. For examples of the Court's move to an expansive, rather than protected, marketplace, see First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Citizens United v. FEC, 558 U.S. 310 (2010); United States v. Alvarez, 567 U.S. 709 (2012).

236. 412 U.S. 94 (1973).

237. *Id.* at 123.

238. *Id.* at 172 (Brennan, J., dissenting).

239. *Id.* at 189.

240. 435 U.S. 765 (1978); 447 U.S. 557 (1980).

corporations' abilities to participate in referendums.[241] The commonwealth contended that limitations on corporate participation protected the marketplace from distortion, since these entities possess different characteristics than human communicators.[242] Justice White, who dissented, agreed with these concerns, concluding the law played an important role in "preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . . ."[243] He continued, "Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas."[244] The Court, however, adhered to an expansive marketplace approach, contending that the public would benefit from corporations' ideas.[245] The Court reasoned that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[246]

Similar divisions regarding the nature of the marketplace arose two years later in *Central Hudson*, where justices extended and clarified protections for commercial speech.[247] Justice Stevens, who was joined by Justice Brennan, again emphasized limitations on the entity that sought to communicate ideas, in this case a power provider, damaged the flow of ideas.[248] Ultimately, in striking down limits on the power provider's expression, the Court again outlined an expansive marketplace, where more ideas, regardless of the nature of the speaker, superseded protecting the marketplace from distortion. Chief Justice Rehnquist, who dissented in *Bellotti*, again disagreed with the Court's conceptualization of the interchange of ideas.[249] Citing Mill, Milton, and Justice Holmes's dissent in *Abrams*, Chief Justice Rehnquist concluded:

> While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no

241. *Bellotti*, 435 U.S. at 801–02.
242. *Id.* at 789–90.
243. *Id.* at 809 (White, J., dissenting).
244. *Id.* at 810.
245. *See, e.g.*, *id.* at 783–84 (majority opinion).
246. *Id.* at 777.
247. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 575–79 (1980).
248. *Id.* at 581 (Stevens, J., concurring).
249. *Id.* at 591–92 (Rehnquist, C.J., dissenting).

> reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.[250]

In questioning the assumptions of the marketplace, he rejected the theory's functionality and sought to limit the expansive interpretation the Court had constructed using the approach's rationales.

The expansive interpretation, despite dissents in these cases, has come to dominate the Court's construction of the marketplace of ideas. In 2010, the Court reinforced its decision in *Bellotti* when it struck down aspects of the Bipartisan Campaign Reform Act ("BCRA") in *Citizens United v. Federal Election Commission*.[251] The BCRA sought to limit the power of large donors in political campaigns, protecting the information marketplace from distortion.[252] The Court, however, found the law's efforts to limit corporate and labor union contributions violated the First Amendment, ultimately reinforcing an expansive, rather than protected, conceptualization of the marketplace approach.[253] Justice Kennedy, in writing for the Court, explained that free expression is an "essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government . . . ."[254] Two years later, in *United States v. Alvarez*, the Court struck down the Stolen Valor Act, which criminalized making false claims of having earned military honors.[255] Once again, the Court rejected an effort to protect the marketplace—this time from false factual statements—instead emphasizing individuals are rational and capable of separating truth from falsity.[256] The Court concluded, "Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the [g]overnment seeks to orchestrate public discussion through content-based mandates."[257] The Court's rejection of certain limitations on expression that would safeguard the marketplace, and its consequently enthusiastic embrace of the widest possible selection of information, reinforces the establishment of

250. *Id.* at 592.
251. 558 U.S. 310, 390–401 (2010).
252. *See id.* at 437–38 (Stevens, J., dissenting) (emphasizing a concern for a safeguarded marketplace of ideas).
253. *See id.* at 371–72.
254. *Id.* at 339.
255. 567 U.S. 709, 729–30 (2012).
256. *Id.* at 727–28.
257. *Id.* at 728.

Enlightenment ideals regarding truth and human rationality that have come to dominate the marketplace rationale for free expression. The Court's adoption of an expansive approach, particularly since the 1970s, reinforces the marketplace approach's evolution since its initial reference in *Abrams* in 1919.[258] These modern assumptions regarding the approach's meaning, however, have fundamental flaws, which are particularly concerning in the twenty-first century.

E. Fundamental Flaws

When Chief Justice Rehnquist questioned the modern marketplace's assumptions in his dissent in *Central Hudson*, he placed his concerns alongside references to crucial Enlightenment-era works, including Milton's *Areopagitica*, Mill's *On Liberty*, and Adam Smith's *Wealth of Nations*.[259] He also referenced First Amendment scholar Edwin Baker, who identified substantial, foundational problems with the marketplace approach's foundational assumptions regarding absolute, universal truth and human rationality.[260] Baker concluded that the marketplace's truth assumptions were inoperable, explaining, "truth is not objective."[261] He continued, "people individually and collectively choose or create rather than 'discover' their perspectives, understandings, and truths."[262] Baker was not alone in his concerns about the shaky foundational assumptions upon which the Court had constructed its most enduring tool for rationalizing free expression. Before Baker's first examination of these flaws in the late 1970s, legal scholar Jerome Barron had labeled the theory a "romantic conception of free expression."[263] Barron averred, "if ever there were a self-operating marketplace of ideas, it has long ceased to exist."[264]

As the Court increasingly turned to the marketplace metaphor to rationalize expanding understandings of free expression after the 1960s, legal scholars continued to identify problems with the theory's assumptions. Legal scholar Stanley Ingber contended that, "[i]n order to be discoverable, however, truth must be an objective rather than a

258. Abrams v. United States, 250 U.S. 616 (1919).

259. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 592–54 (1980) (Rehnquist, C.J., dissenting).

260. *Id.* (citing C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967–81 (1978)).

261. BAKER, *supra* note 146, at 12.

262. *Id.* at 13.

263. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

264. *Id.*

subjective, chosen concept."[265] Legal scholar Frederick Schauer identified similar problems, but associated them with concerns about human rationality. He wrote, "[O]ur increasing knowledge about the process of idea transmission, reception, and acceptance makes it more and more difficult to accept the notion that truth has some inherent power to prevail in the marketplace of ideas . . . ."[266] Law scholar Derek Bambauer explained how "cognitive psychology and behavioral economics shows that humans operate with significant, persistent perceptual biases that skew our interactions with information. These biases undercut the assumption that people reliably sift data to find truth."[267] Taken together, these critiques indict Enlightenment assumptions regarding truth and rationality for failing to account for variables that lead individuals and groups to understand the world differently than others. Historian David Hollinger classified these concerns as a matter of problematic assumptions regarding sameness.[268] He determined Enlightenment thinkers' propensity to boil human existence down into a limited, homogenous mass limited its value.[269] Hollinger concluded, "The Enlightenment, it seems, has led us to suppose that all people are pretty much alike . . . ."[270] He elaborated that it "blinded us to the uncertainties of knowledge by promoting an ideal of absolute scientific certainty."[271]

Thus, even as justices installed Enlightenment-based assumptions into the foundations for the marketplace concept, scholars were raising concerns about the building blocks the Court was using. These concerns regarding the truth and human rationality assumptions within the modern marketplace approach also predate Justice Holmes's first use of the marketplace metaphor in *Abrams* in 1919.[272] Justice Holmes and William James concluded that truth is constructed via personally sourced building blocks, such as life experience and culture, and is therefore subjective and dynamic, rather than universal and static.[273] James

265. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15 (1984).

266. Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 777 (1986).

267. Bambauer, *supra* note 9, at 651.

268. David A. Hollinger, *The Enlightenment and the Genealogy of Cultural Conflict in the United States*, *in* WHAT'S LEFT OF ENLIGHTENMENT?: A POSTMODERN QUESTION 7, 8–9 (Keith Michael Baker & Peter Hanns Reill eds., 2001).

269. *Id.* at 9.

270. *Id.*

271. *Id.* at 8.

272. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

273. *See, e.g.*, HOLMES, *supra* note 72, at 1; JAMES, *supra* note 81, at 104.

explained, "Truth is *made*, just as health, wealth, and strength are made, in the course of experience."[274] Justice Holmes concluded: "property, friendship, and truth have a common root in time. One cannot be wrenched from the rocky crevices into which one has grown for many years without feeling . . . attacked . . . ."[275] Together, contemporary legal scholarship, along with early twentieth century conclusions from Justices Holmes and James, raises concerns about the viability of the load-bearing building blocks the Court has attached to the foundations of marketplace thought.

F. Multiverse of Marketplaces

These longstanding concerns about the marketplace's foundational assumptions have only worsened in the networked era. The potential for a mass, conceptual marketplace where truth emerges and falsity fails fades as algorithms and the choice-rich online environment sort individuals into identity-based communities.[276] Sociologist Manuel Castells described the fragmentation process in online communities as a danger to democracy.[277] He explained that "social groups and individuals become alienated from each other, and see the other as a stranger, eventually as a threat."[278] He continued, "[I]n this process, social fragmentation spreads, as identities become more specific and increasingly difficult to share."[279] A part of Castells's concern arose from the fact that networked communication tools lead to a multiverse of smaller marketplaces.[280] These communities generally offer a severely limited selection of products—or ideas—from which individuals can choose, ultimately predetermining the truth and pre-empting the battle between truth and falsity in the generally wide-open exchange of ideas the Enlightenment marketplace assumed.[281] As First Amendment scholar Robert Kerr explained, the concern is "socially networked algorithms potentially replacing a marketplace in which falsity and truth

274. JAMES, *supra* note 81, at 104.

275. Holmes, *supra* note 74, at 40.

276. *See, e.g.*, Himelboim et al., *supra* note 7, at 166–71; W. Lance Bennett & Shanto Iyengar, *A New Era of Minimal Effects? The Changing Foundations of Political Communication*, 58 J. COMMC'N 707, 720 (2008); Jared Schroeder, *Saving the Marketplace from Market Failure: Reorienting Marketplace Theory in the Era of AI Communicators*, 28 WM. & MARY BILL RTS. J. 689, 697–701 (2020).

277. CASTELLS, *supra* note 10, at 3.

278. *Id.*

279. *Id.*

280. *See id.*

281. *See* SUNSTEIN, *supra* note 5, at 69–71; Balkin, *supra* note 5, at 1153–54; Schroeder, *supra* note 276, at 712.

compete with microtargeted bubbles, cocoons and silos . . . ."[282] As a result, each person's previous choices, including decisions about the information sources and individuals with which they choose to engage, determines the truth, rather than an exchange of ideas.[283] In this regard, the nature of truth skews more toward pragmatic assumptions put forth by Justices Holmes and James that truth is made, not discovered.[284] The fragmented nature of identity-based online communities allows "truth" to vary from group to group.[285] The "truth," for example, in many online communities, is that the 2020 presidential election was stolen from Donald Trump.[286] This "truth" persists alongside the opposite truth that the election was fair and legitimate. Similarly, the birther movement persisted throughout President Obama's presidency, with a sizable minority of Americans believing his birth certificate was forged.[287]

Both the election and birther conspiracy theories were bolstered by the flow of false and misleading information online. The identity-based natures of online communities make it far more likely that misinformation and disinformation that aligns with the group's pre-existing beliefs will be accepted as truth.[288] As two social media scholars concluded, "the marketplace metaphor falls apart in an online setting through the deployment of algorithms on social media, known for

282. Robert L. Kerr, *From Holmes to Zuckerberg: Keeping Marketplace-of-Ideas Theory Viable in the Age of Algorithms*, 24 COMMC'N L. & POL'Y 477, 511 (2019).

283. *Id*.

284. *See* Holmes, *supra* note 74, at 40; JAMES, *supra* note 81, at 104.

285. *See* Jessica Maddox & Jennifer Malson, *Guidelines Without Lines, Communities Without Borders: The Marketplace of Ideas and Digital Manifest Destiny in Social Media Platform Policies*, 6 SOC. MEDIA + SOC'Y 1, 8 (2020).

286. See Alex Hern, *Trump's Vote Fraud Claims Go Viral on Social Media Despite Curbs*, GUARDIAN (Nov. 10, 2020, 1:43 PM), https://www.theguardian.com/us-news/2020/nov/10/trumps-vote-claims-go-viral-on-social-media-despite-curbs and Elizabeth Culliford & Raphael Satter, *Facebook Group Pushing False Claim of Stolen U.S. Election Rapidly Gains 325,000 Members*, REUTERS (Nov. 5, 2020, 12:07 PM), https://www.reuters.com/article/idUSKBN27L2DA.

287. *See* Josh Clinton & Carrie Roush, *Poll: Partisan Divide over 'Birther' Question*, NBC NEWS (Aug. 10, 2016, 2:19 PM), https://www.nbcnews.com/politics/2016-election/poll-persistent-partisan-divide-over-birther-question-n627446; *see also* Ashley Jardina & Michael Traugott, *The Genesis of the Birther Rumor: Partisanship, Racial Attitudes, and Political Knowledge*, 4 J. RACE, ETHNICITY & POL. 60, 72–73 (2019).

288. Matthew Barnidge & Cynthia Peacock, *A Third Wave of Selective Exposure Research? The Challenges Posed by Hyperpartisan News on Social Media*, MEDIA & COMMC'N, July 2019, at 4, 5–6; Toby Hopp, Patrick Ferrucci & Chris J. Vargo, *Why Do People Share Ideologically Extreme, False, and Misleading Content on Social Media? A Self-Report and Trace Data-Based Analysis of Countermedia Content Dissemination on Facebook and Twitter*, 46 HUM. COMMC'N RSCH. 357, 377 (2020) (concluding that sharing false information is linked with in-group behavior and with "social and personal identity cues").

exalting sensational ideas by displacing the 'truth,' leading to issues of disinformation."[289] This dynamic represents a twenty-first-century version of legal scholars' concerns that Enlightenment-based rationality claims failed to account for the power of individual experiences and beliefs in shaping what is considered true.[290] The generally identity-based nature of online communities essentially primes people to accept information that is false or misleading.[291] The increasing presence of bots also undermines assumptions about the marketplace. Bots, as non-human communicators, have the power to flood the marketplace with a single idea, making it appear that the battle between truth and falsity has already been resolved and a single truth has emerged.[292] Similarly, bots, because they can post hundreds of messages at a time, can drown out human speakers, pushing them from taking part in the free exchange of ideas.[293] Finally, the emergence of deepfakes, manipulated or computer-generated audio and video clips that represent people saying or doing things they never said or did, carry the potential to further undermine rational individuals' abilities to evaluate ideas and discern truth from falsity in a free exchange of ideas.[294] Taken as a whole, these fundamental shifts in communication technology exacerbate longstanding problems with the foundational assumptions of marketplace theory.

III. FRANKFURTER GOES TO THE COURT

Nine days after President Franklin Roosevelt nominated Frankfurter to fill Justice Benjamin Cardozo's seat on the Supreme Court,[295] the *New*

289. Maddox & Malson, *supra* note 285, at 8 (citations omitted).

290. *See supra* Part II.E.

291. *See* Hopp et al., *supra* note 288, at 376–77.

292. See Helen Norton, *Robotic Speakers and Human Listeners*, 41 SEATTLE U.L. REV. 1145, 1147–48 (2018) and Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete, for discussions about the power of AI entities to shape and determine human discourse.

293. Wu, *supra* note 292.

294. Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War*, 98 FOREIGN AFFS. 147, 148 (2019); Jared Schroeder, *Free Expression Rationales and the Problem of Deepfakes Within the E.U. and U.S. Legal Systems*, 70 SYRACUSE L. REV. 1171, 1179–82 (2020). Chesney and Citron conclude that deepfakes threaten to become powerful political weapons. Chesney & Citron, *supra*, at 154–55. Schroeder contends that deepfakes further undermine the truth assumptions that uphold contemporary marketplace theory. Schroeder, *supra*, at 1200–02.

295. Cardozo, who was on the New York Court of Appeals, performed Frankfurter's marriage to Marian Denman in 1919 in Judge Learned Hand's chambers. *See* LASH, *supra* note 23, at 30. By replacing Justice Cardozo, who died in July 1938, Justice Frankfurter

York Times Magazine ran a full-page spread about him, lauding Frankfurter as "one of the keenest legal minds in the country . . . ."[296] The story on the next page of the January 15, 1939, issue was about the growing power of the Nazi propaganda machine.[297] Another story in the magazine focused on Vladimir Lenin's impact and Karl Marx's ideas.[298] The placements of these subjects in a single issue turned out to be fitting, as Justice Frankfurter's tenure on the Court, which ended in 1962, was characterized by difficult questions about incitement, protest, and sedition and their place, particularly during wartime, in the First Amendment, precedential foundations the Court had only just started to form.[299]

A. The Scholar Who Would Lead the Court

The magazine's story also communicated the immense optimism that came with Frankfurter's arrival on the Court.[300] Frankfurter was held in high esteem, almost as if he was a son, to Justices Holmes and Brandeis, the two most fervent supporters of civil liberties in the Court's history.[301] Frankfurter helped found the American Civil Liberties Union in 1920 and worked as a legal adviser to the NAACP.[302] In 1927, Frankfurter joined other civil libertarians in fighting for Nicola Sacco and Bartolomeo Vanzetti, who, under questionable conditions, were convicted of murder and eventually executed.[303] Frankfurter wrote an impassioned argument for a new trial for Sacco and Vanzetti in the *Atlantic*, specifically criticizing Judge Webster Thayer's handling of the appeal.[304] He

was taking the spot once held by his mentor, Justice Oliver W. Holmes. *Id.* at 63. Justice Cardozo replaced Justice Holmes in 1932. *See supra* note 161 and accompanying text.

296. R.L. Duffus, *Felix Frankfurter: The Man Behind the Legend*, N.Y. TIMES, Jan. 15, 1939, at 3.

297. Junius B. Wood, *Channeling the News for Nazis*, N.Y. TIMES, Jan. 15, 1939, at 4.

298. Harold Denny, *At the Tomb of Lenin in Russia's Red Square*, N.Y. TIMES, Jan. 15, 1939, at 9.

299. The Court's decision to overturn Minnesota's nuisance publication law in Near v. Minnesota, 283 U.S. 697 (1931), eight years before Justice Frankfurter joined the Court, marked the first time that Justices had struck down a law because it conflicted with the First Amendment. *See id.* at 722–23. During his time on the Court, the Justices decided cases such as West Virginia State Board v. Barnette, 319 U.S. 624 (1943); Terminiello v. Chicago, 337 U.S. 1 (1949); Dennis v. United States, 341 U.S. 494 (1951); and Beauharnais v. Illinois, 343 U.S. 250 (1952).

300. *See* Duffus, *supra* note 296, at 3.

301. *See* UROFSKY, *supra* note 31, at 5; Nathaniel L. Nathanson, *The Philosophy of Mr. Justice Brandeis and Civil Liberties Today*, 1979 U. ILL. L.F. 261, 300 (1979); Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343, 345 (1984).

302. THOMAS, *supra* note 28, at 21.

303. Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC, Mar. 1927, at 409.

304. *Id.* at 432.

concluded, "The opinion is literally honeycombed with demonstrable errors, and a spirit alien to judicial utterance permeates the whole."[305] While unsuccessful, public battles such as the one he waged for Sacco and Vanzetti gave Frankfurter a reputation as a champion for civil liberties.[306] This characterization, however, was tested when he joined the Court.

Frankfurter nearly became a judge in 1932.[307] With Justice Holmes's urging, he rejected a spot on the Massachusetts Superior Judicial Court.[308] During that time, and the following year, Frankfurter advised Franklin Roosevelt before he became governor of New York and worked through the various orbits of Washington politics on Roosevelt's behalf after the 1932 presidential election.[309] Still, when Roosevelt offered to make him solicitor general, which came during Frankfurter's visit to Washington to celebrate Justice Holmes's ninety-second birthday, he turned him down.[310] Roosevelt told Frankfurter being solicitor general could lead to a Supreme Court nomination, something he might not offer if he remained at Harvard Law.[311] But Frankfurter rejected the offer, telling Roosevelt, "I can do much more to be of use to you by staying in Cambridge . . . ."[312] Frankfurter's decision to stay at Harvard was not detrimental to his prospects for joining the Court. By the end of the 1930s, Justice Harlan Stone was advocating for Frankfurter's nomination to the Court.[313] Roosevelt nominated Alabama Senator Hugo Black with the first opening on the Court during his presidency, in 1937.[314] Roosevelt nominated Solicitor General Stanley Reed in 1938.[315] When Justice Cardozo died six months later, Frankfurter's name was at the top of the list.[316] Roosevelt considered others, such as Judge Hand, but after decades of friendship and a concerted campaign by many of

305. *Id.*

306. *See* Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 496, 519–20 (1976); Duffus, *supra* note 296, at 14; LASH, *supra* note 23, at 37–39.

307. THOMAS, *supra* note 28, at 25.

308. *Id.*; Letter from Oliver W. Holmes to Felix Frankfurter (Nov. 12, 1932) (on file with Harvard Law School Digital Suite). Justice Holmes ended the short letter with the postscript: "I am glad to believe from Brandeis that you are not likely to accept the Mass. judgeship. OWH." *Id.*

309. LASH, *supra* note 23, at 45–47.

310. *See id.* at 47.

311. *See id.*

312. *Id.*

313. THOMAS, *supra* note 28, at 32–33.

314. *Id.* at 32.

315. *Id.*

316. *Id.* at 33.

Frankfurter's supporters, he called the professor at home to tell him he would nominate him to the Court.[317]

Steeped in legal experience and knowledge, as well as a close understanding of Roosevelt's agenda, Justice Frankfurter was expected to lead the New Deal Court.[318] Instead, his time on the Court was characterized by internal bickering and battles with Justices Black and Douglas, who history has come to recognize as two of the crucial framers of free-expression rationales.[319] Historian Joseph Lash explained, "[t]he emotional intensity with which Frankfurter invests these episodes gives the . . . sense that the great marble blocks of the Court must have shaken with the vigor of the battle."[320] Initial inklings of the battles to come appeared in Justice Frankfurter's first opinion for the Court. In *Minersville School District v. Gobitis*, the Court upheld a state law that required students to participate in the pledge of allegiance.[321] Chief Justice Hughes assigned the opinion to Justice Frankfurter because he thought an immigrant would make a stronger argument.[322] Civil libertarians were confused by Justice Frankfurter's passionate rationalization of a school district's power to compel students to salute the flag.[323] Friends, such as Laski and Eleanor Roosevelt, questioned his reasoning.[324] Justices Black and Douglas verbally agreed to support Justice Frankfurter's opinion and, though they had misgivings, signed it.[325] Justices Black, Douglas, and Murphy, a bloc Justice Frankfurter later labeled "the Axis,"[326] immediately regretted their votes and planned to return to the issue as soon as a similar case arose.[327] They got their

317. *Id.*; LASH, *supra* note 23, at 63.

318. LASH, *supra* note 23, at 67; THE DOUGLAS LETTERS, *supra* note 35, at 73.

319. THE DOUGLAS LETTERS, *supra* note 35, at 74–75; LASH, *supra* note 23, at xi; ROSEN, *supra* note 34, at 148–49. In his collection of Justice Douglas's letters, Urofsky devoted a section to "Felix…[.]" THE DOUGLAS LETTERS, *supra* note 35, at 73–75.

320. LASH, *supra* note 23, at xi.

321. 310 U.S. 586 (1940).

322. The case's timing weighed on the Court. Justices heard arguments two weeks after Germany invaded Denmark and Norway. As the Court considered the case, Germany took Holland and Belgium. Justice Frankfurter's opinion was called the "Fall-of-France Opinion," as the ruling was announced at the same time as the Germans invaded France. Justices Black and Douglas, despite misgivings, were moved by Frankfurter's draft opinion and agreed to support it. NEWMAN, *supra* note 36, at 284.

323. LASH, *supra* note 23, at 69. Lash explained, "Liberals were shocked by the Frankfurter opinion." *Id.*

324. *Id.* at 69–71.

325. NEWMAN, *supra* note 36, at 284.

326. Justice Frankfurter attributed the label's origin to Chief Justice Hughes. LASH, *supra* note 23, at 197. Justice Frankfurter's account contends Chief Justice Hughes asked him for help because "the Axis" was a "solid block on any question that divides the Court . . . ." *Id.* Justice Frankfurter's account singles out Justice Black as the ringleader. *Id.*

327. NEWMAN, *supra* note 36, at 284.

chance three years later in *West Virginia State Board of Education v. Barnette*.[328]

In *Barnette*, the Court struck down West Virginia's law requiring students to salute the flag, with Justices Black and Douglas concurring and Justice Frankfurter dissenting.[329] Justice Frankfurter felt betrayed by the Court's sudden swing from an 8-to-1 vote in *Gobitis* to a 6-to-3 vote in *Barnette*.[330] After arguments in *Barnette*, Justice Frankfurter noted Justice Jackson's comments in his journal, "to have one man, Black, practically control three others, for I am afraid [Justice] Rutledge will join the Axis."[331] Later in the same entry, Justice Frankfurter showed no intention of backing down when he demonstrated that Justice Jackson's words had resonated with him. He recounted Justice Jackson's words that "it would be rather cowardly to leave the field to them. . . . [I]t is very sad business for me and it isn't any fun to be writing opinions to show up some of their performances."[332] Justice Black acknowledged his and Justice Douglas's shift between *Gobitis* and *Barnette* in his concurring opinion, explaining, "Long reflection convinced us that although the principle is sound, its application in the particular case was wrong."[333] Justice Frankfurter's lone dissent, which Justice Black historian Roger Newman labeled one of the most personal and anguished opinions in Supreme Court history, chided the Court for its fickleness.[334] Justice Frankfurter argued, "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution."[335] He continued, "But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution . . . ."[336]

B. Friendships and Animosities

The behind-the-scenes bickering and feelings of betrayal continued as nearly all of Justice Frankfurter's time on the Court overlapped with

328. 319 U.S. 624 (1943).
329. *Id.* at 643 (Black & Douglas, JJ., concurring); *id.* at 646 (Frankfurter, J., dissenting).
330. *See* NEWMAN, *supra* note 36, at 295–96.
331. LASH, *supra* note 23, at 208–09. The journal entry is dated March 12, 1943, the day after justices heard arguments in *Barnette*.
332. *Id.* at 209.
333. *Barnette*, 319 U.S. at 643 (Black, J., concurring).
334. NEWMAN, *supra* note 36, at 295–96.
335. *Barnette*, 319 U.S. at 646 (Frankfurter, J., dissenting).
336. *Id.* at 647.

Justices Black and Douglas.[337] Justices Douglas and Frankfurter were friends, writing regularly to one another before they joined the Court.[338] Douglas, who was working for the Securities and Exchange Commission, told Frankfurter in 1934 that he hoped to see him and "enjoy the rattle of [his] glass once again."[339] By 1941, after fewer than two years on the Court together, Justice Douglas blamed Justice Frankfurter's scheming and manipulating when Roosevelt did not nominate Justice Black to become chief justice.[340] Justice Douglas wrote to Justice Black, "I expressed my fear that Felix would make that move. I am sorry that it did not go to you."[341] The discord was mutual, as Justice Frankfurter devoted substantial attention to Justice Douglas in his personal diaries.[342] Justice Frankfurter disapproved of Douglas's political ambitions, including his interest in the Democratic Party's nomination for President, as well as his treatment of Justice Roberts, who Justice Frankfurter believed was being manipulated by Justices Douglas and Black.[343] Justices Douglas's and Frankfurter's relationship seemed most frayed in late 1960, when Justice Douglas wrote a memorandum, which he did not send, to the chief justice, seeking an end to Justice Frankfurter's "continuous violent outbursts against me in [c]onference

337. Justice Black was Roosevelt's first nomination to the Court, serving from August 1937 until September 1971. Justice Frankfurter joined the Court in January 1939, staying on until August 1962. Justice Douglas followed him in April 1939 and was with the Court until November 1975. Thus, Justice Frankfurter, in twenty-three years on the Court, never had a day without Justice Black. Justice Frankfurter had fewer than three months before Justice Douglas joined him. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 1, 2022).

338. For examples of correspondence showing their friendship before joining the Court, see Letter from William O. Douglas to Felix Frankfurter (Mar. 1, 1932), *in* THE DOUGLAS LETTERS, *supra* note 35, at 75–76; Letter from William O. Douglas to Felix Frankfurter (Dec. 8, 1933), *in* THE DOUGLAS LETTERS, *supra* note 35, at 77–78; Letter from William O. Douglas to Felix Frankfurter (June 30, 1937), *in* THE DOUGLAS LETTERS, *supra* note 35, at 81.

339. Letter from William O. Douglas to Felix Frankfurter (Nov. 6, 1934), *in* THE DOUGLAS LETTERS, *supra* note 35, at 73, 80.

340. Letter from William O. Douglas to Hugo Black (June 22, 1941), *in* THE DOUGLAS LETTERS, *supra* note 35, at 107.

341. *Id.*

342. For examples from Justice Frankfurter's personal journal entries, see LASH, *supra* note 23, at 154–55, 173–77. Lash devoted a section of his collection of Justice Frankfurter's reflections to this discord, titled "Wrath Against Douglas." *See id.* at 309–38.

343. LASH, *supra* note 23, at 154–55 (recreating a dialogue between Justice Frankfurter and Justice Murphy about Justice Douglas's political aspirations).

. . . ."[344] Justice Douglas continued, "[H]e's an ill man; and these violent outbursts create a fear in my heart that one of them may be his end."[345]

Justice Frankfurter's disdain for Justice Black took on a different hue. While he called Justice Douglas one of the "two most completely evil men I have ever met,"[346] he consistently criticized and resented Justice Black's power over the Court.[347] Justice Frankfurter's personal journals are filled with anecdotes and rumors from other justices about Justice Black conspiring to undermine him or to trick other justices.[348] In January 1943, Justice Frankfurter documented his disdain for Justice Black's leadership in his comments about a grain rate case the justices discussed in conference that day.[349] He noted Justices Douglas and Murphy merely voted, "I agree with Justice Black," concluding this was "a very painful and perfect illustration" of his power over the bloc.[350] In the same entry, he explained, "the history of this Court was my business for a quarter of a century, I knew all there was to know . . . ."[351] Passages such as these communicated his consternation with Justice Black's powerful role on the Court and correlates with the expectation that Justice Frankfurter expected to lead Roosevelt's New Deal Court. Justice Frankfurter had studied law for decades and been a close confidant and friend with Justices Holmes, Brandeis, Stone, and Cardozo.[352] Lash explained that, with Frankfurter's knowledge "of the Court and the Constitution, his strong analytic powers, his energy and political savvy, he was expected, and he expected himself, to dominate the 'Roosevelt Court.'"[353] Before joining the Court, Frankfurter had even coached Justice Black, at Justice Stone's request, to be more traditional and minimal with his opinions.[354] Justice Black's judicial philosophy, however, did not change, placing him in direct conflict with Justice Frankfurter's judicial minimalism.[355] Thus, Justice Frankfurter came to the Court expecting to lead, but faced a powerful bloc, which—while

344. THE DOUGLAS LETTERS, *supra* note 35, at 90 (quoting an unsent memorandum to the chief justice).

345. *Id.*

346. ROSEN, *supra* note 34, at 149.

347. LASH, *supra* note 23, at 208–09 ("It is an awful thing at this time of the Court's and country's history . . . to have one man, Black, practically control three others . . . .").

348. *See, e.g.*, *id.* at 174–76, 244–45, 286, 329–30.

349. *See id.* at 174.

350. *Id.*

351. *Id.* at 175.

352. Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 179 (1991).

353. LASH, *supra* note 23, at 67.

354. *Id.* at 67–68.

355. *See* ROSEN, *supra* note 34, at 148–49.

wavering in size depending on the makeup of the Court—was generally led by Justice Black.[356]

Justice Frankfurter's failing health in 1962, after a stroke led to his departure from the Court, rekindled his and Justice Black's friendship.[357] Justice Black visited Frankfurter often as his health worsened.[358] When he learned of Frankfurter's death, in February 1965, he cried.[359] Justice Black wrote a memorial for Justice Frankfurter in *Harvard Law Review* soon after he died, emphasizing, "I am happy to have had the opportunity . . . to have served with him . . . to argue with him; to agree with him; to disagree with him; and to live a large part of my life in the light of his brilliant intellect, his buoyant spirit and his unashamed patriotism."[360] Frankfurter's complex relationships with his fellow justices, as well as his life before joining the Court, provide contextual building blocks regarding the free-expression discourse he constructed. Justice Frankfurter left a complex legacy, which was particularly apparent in his free-expression-related opinions.

IV. JUSTICE FRANKFURTER AND THE FIRST AMENDMENT

This section analyzes six of Justice Frankfurter's free-expression opinions, all of which are from cases dealing with protest, sedition, harassment, or threats. The opinions were selected using qualitative document analysis, which is "an integrated and conceptually informed method, procedure, and technique for locating, identifying, retrieving, and analyzing documents . . . ."[361] The method provides for interaction between the research focus and the documents by allowing for texts to be identified and themes to emerge from an ongoing exchange of meaning through repeated readings of the documents.[362] Case selection began with a variety of key-word searches in Lexis-Nexis, each of which was targeted for Justice Frankfurter's time on the Court, 1939–1962. Initial searches, using terms such as "First Amendment" and "harassment," "hate," "sedition," or "threats," yielded nearly seventy cases. From those cases, only those that included an opinion in which Justice Frankfurter constructed rationales and communicated understandings of free

356. *See* THE DOUGLAS LETTERS, *supra* note 35, at 73–75 (explaining Justice Frankfurter's expectation that he would lead the Roosevelt Court); ROSEN, *supra* note 34, at 174–75 (regarding Black's enduring legacy as a leader on the Court).

357. NEWMAN, *supra* note 36, at 518–20.

358. *Id.*

359. *Id.*

360. Hugo L. Black, *Mr. Justice Frankfurter*, 78 HARV. L. REV. 1521, 1522 (1965).

361. David L. Altheide, *Plugged in Research*, QUALITATIVE MEDIA ANALYSIS 2 (1996).

362. *Id.* at 8.

expression were examined. Ultimately, six cases included substantive discourse by Justice Frankfurter regarding free expression and how it should be rationalized. The cases are: *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 1941; *Kovacs v. Cooper*, 1949; *Terminiello v. City of Chicago*, 1949; *Dennis v. United States*, 1951; *Beauharnais v. Illinois*, 1952; *Garner v. Louisiana*, 1961.[363]

A. Case Summaries: Frankfurter, Black, and Douglas Fracture the Court

Justice Frankfurter wrote for the Court in *Milk Wagon Drivers Union*, as he had done just more than six months earlier in the *Gobitis* flag salute case.[364] In *Milk Wagon Drivers Union*, the Court affirmed the Illinois Supreme Court's decision to uphold an injunction on all peaceful picketing because of the *potential* for violent acts to result during a union's dispute with a milk distributor.[365] The Court, led by Justice Frankfurter, contended that the peaceful picketing became coercive and threatening when coupled with the violent acts, such as smashing trucks and burning stores down.[366] Justice Black dissented, reasoning that Illinois violated the First Amendment when it limited peaceful picketing, regardless of the potential for violence.[367] Seven years later, the Court fractured in *Kovacs*, which dealt with a Trenton, New Jersey city ordinance against "loud and raucous noises."[368] The appellant was fined for using a vehicle-mounted amplifier to protest an ongoing labor dispute in Trenton.[369] The Court upheld the sound ordinance, concluding that it did not conflict with the First Amendment.[370] Three justices joined Justice Reed's opinion and Justices Jackson and Frankfurter wrote concurring opinions. Justice Frankfurter used his opinion to reject the idea that free expression should have a "preferred position," which was a response to a phrase Justice Reed used in the Court's opinion.[371] Justice

363. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); Kovacs v. Cooper, 336 U.S. 77 (1949); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Dennis v. United States, 341 U.S. 494 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952); Garner v. Louisiana, 368 U.S. 157 (1961).

364. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

365. *See Milk Wagon Drivers Union*, 312 U.S. at 291–93.

366. *Id.* at 293–95.

367. *Id.* at 307 (Black, J., dissenting).

368. *Kovacs*, 336 U.S. at 78.

369. *Id.* at 79.

370. *Id.* at 87–88.

371. *Id.* at 95–96 (Frankfurter, J., concurring). Justice Frankfurter lamented the "preferred position" approach to the First Amendment. He explained it has "uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase . . . ." *Id.* at 90.

Frankfurter devoted much of his nine-page concurring opinion to construct a complete history of the phrase "preferred position."[372] He also emphasized that expression made via loudspeakers does not deserve First Amendment protection.[373] The "Axis," as Justice Frankfurter called them, dissented. Justice Black, joined in his opinion by Justices Douglas and Rutledge, concluded that the ordinance was not sufficiently narrowly tailored and restrained any speaker who sought to use an amplifier.[374] He explained a more carefully worded law would allow a "competition of ideas between and within these [modes of communication]."[375]

The Court heard arguments in *Terminiello* the day after the *Kovacs* decision was announced.[376] A divided Court voted five-to-four to overturn a "breach of the peace" conviction against Father Arthur Terminiello, whose inflammatory and divisive speech in a Chicago auditorium had created numerous disturbances that led to his arrest.[377] Justice Douglas wrote a short opinion for the Court, which was followed by an impassioned dissent by Justice Frankfurter.[378] Justice Douglas explained, "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart . . . ."[379] Justice Frankfurter contended that the Court overstepped its bounds in overturning the conviction, concluding that Terminello's speech did not qualify for protection.[380] Two years later, the Court fractured along similar lines in *Dennis*.[381] The Court upheld convictions of Communist Party leaders under the Smith Act, finding that their advocacy for their political ideas was a clear and present danger and not protected by the First Amendment.[382] Again, Justices Frankfurter and Jackson concurred. Justice Frankfurter's opinion, which was more than 11,000 words, not including the extensive appendix, examined the history of the First Amendment and rejected an absolute interpretation of its safeguards.[383] Justices Black and Douglas wrote terse dissents.[384] Justice Black emphasized that Eugene Dennis and other Communist leaders were not found guilty of attempting to overthrow the government,

372. *See generally id.* at 89–97.
373. *Id.* at 96–97.
374. *Id.* at 101–04 (Black, J., dissenting).
375. *See id.* at 102.
376. Terminiello v. City of Chicago, 337 U.S. 1 (1949).
377. *Id.* at 2–3.
378. *See generally id.* at 2–6; *id.* at 8–13 (Frankfurter, J., dissenting).
379. *Id.*
380. *Id.* at 8–10.
381. Dennis v. United States, 341 U.S. 494 (1951).
382. *Id.* at 516–17.
383. *Id.* at 524–25 (Frankfurter, J., concurring).
384. *Id.* at 579–81 (Black, J., dissenting); *id.* at 582–91 (Douglas, J., dissenting).

planning to overthrow the government, or publishing anything about overthrowing the government.[385] They were convicted, Justice Black highlighted, for planning to organize and use speeches and publications to advocate the overthrow of the government.[386] Justice Black explained, "No matter how it is worded, this is a virulent form of prior censorship of speech and press."[387]

The Court heard arguments in the *Beauharnais* criminal libel case five months after it announced its decision in *Dennis*.[388] As in previous cases, the Court splintered along similar lines.[389] Justice Frankfurter wrote the Court's opinion, which upheld an Illinois law that criminalized publicly deprecating a group of people, and Justices Black, Reed, Douglas, and Jackson wrote dissents.[390] Justice Frankfurter reasoned that Illinois lawmakers, in light of the state's long history with race-related problems, had written the law to address a clear problem and that the Court's role did not include overturning such efforts.[391] Justice Black emphasized that Joseph Beauharnais and his followers were advocating for change in their community and the decision to uphold the law "degrades First Amendment freedoms to the 'rational basis' level."[392] Justice Douglas's dissent contended that Beauharnais's ideas were not a sufficient threat to others to justify limiting free expression.[393] Nine years later, during one of Frankfurter's final terms on the Court, the Justices generally unified in their decision to strike down disturbing-the-peace charges against a group of Black students who refused to leave a whites-only lunch counter in *Garner v. Louisiana*.[394] Chief Justice Warren, writing for the Court, concluded that there was "no evidence to support a finding that petitioners disturbed the peace."[395] Justice Frankfurter concurred, agreeing with the Court's reasoning that there was no evidence of disturbing the peace and using

385. *Id.* at 579 (Black, J., dissenting).
386. *Id.*
387. *Id.*
388. Beauharnais v. Illinois, 343 U.S. 250 (1952); *Dennis*, 341 U.S. at 494 (majority opinion).
389. *See Beauharnais*, 343 U.S. at 988; *see generally Dennis*, 341 U.S. at 495–517 (majority opinion); *id.* at 517–61 (Frankfurter, J., concurring); *id.* at 561–79 (Jackson, J., concurring); *id.* at 579–81 (Black, J., dissenting); *id.* at 581–91 (Douglas, J., dissenting); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Kovacs v. Cooper, 336 U.S. 77 (1949).
390. *See generally Beauharnais*, 343 U.S. at 251–67; *id.* at 267–76 (Black, J., dissenting); *id.* at 277–84 (Reed, J., dissenting); *id.* at 284–87 (Douglas, J., dissenting); *id.* at 287–305 (Jackson, J., dissenting).
391. *Id.* at 261–62 (majority opinion).
392. *Id.* at 267–70 (Black, J., dissenting).
393. *Id.* at 284–85 (Douglas, J., dissenting).
394. Garner v. Louisiana, 368 U.S. 157 (1961).
395. *Id.* at 173.

his opinion to emphasize that states must retain the power to enact and interpret laws.[396]

B. Freedom of Expression is Contextual

Justice Frankfurter consistently communicated that he understood the First Amendment's promise of freedom of expression as conditional, something that could be limited when lawmakers sought to address a specific problem.[397] In this regard, Justice Frankfurter conceptualized freedom of expression as being malleable, based on the challenges facing a community or society. In *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, Justice Frankfurter recognized the importance of the right to protest, but found the potential for violence surrounding the peaceful picketing was enough to limit the protestors' rights.[398] He reasoned that the "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."[399] Thus, the state could limit peaceful protest to *preclude* violence.[400] Similarly, in *Dennis v. United States*, Justice Frankfurter emphasized that First Amendment rights are "subject to certain well-recognized exceptions arising from the necessities of the case."[401] While the Court has generally agreed that certain expression is not protected by the First Amendment, Justice Frankfurter communicated both a far greater willingness to uphold laws that limited free expression and a fundamentally different understanding of free expression more generally.[402] Later in *Dennis*, he reasoned, "Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances . . . ."[403] In *Beauharnais v. Illinois*, Justice Frankfurter contended the state law, which criminalized disparaging a group of people based on their race,

396. *Id.* at 257–58 (Frankfurter, J., concurring).

397. *See* Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring); Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); Beauharnais v. Illinois, 343 U.S. 250, 253 (1952).

398. *Milk Wagon Drivers Union*, 312 U.S. at 292–94.

399. *Id.* at 293.

400. *See id.*

401. *Dennis*, 341 U.S. at 524 (1951) (Frankfurter, J., concurring).

402. The Court, for example, has concluded that fighting words (Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942)), obscenity (Roth v. United States, 354 U.S. 476, 507 (1957)), and incitement to imminent lawless action (Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969)) are not protected expression. Justice Frankfurter, however, communicated a far lower bar for limiting expression.

403. *Dennis*, 341 U.S. at 544 (Frankfurter, J., concurring).

religion, or other characteristics, was "directed at a defined evil" and was drawn "from history and practice in Illinois and in more than a score of other jurisdictions . . . ."[404] Thus, Justice Frankfurter communicated that he understood freedom of expression as conditional, based on the reasoning for the law's creation, the matter it sought to address, the perceived public value of the speech, and state courts' decisions regarding its validity.

The relatively low bar Justice Frankfurter communicated for limiting expression could also be seen in *Kovacs v. Cooper*.[405] In his opinion, he labeled a more absolutist reading of the First Amendment as a "sterile argumentation [that] treats society as though it consisted of bloodless categories. The various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison."[406] Similarly, Justice Frankfurter explained in *Dennis*, "Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value."[407] A substantial part of this conceptualization of free expression as a contextual, malleable matter included an understanding that lawmakers' efforts to address problems should generally be upheld, as long as the solutions were specific.[408] In *Garner v. Louisiana*, Justice Frankfurter emphasized, "It is not our province to limit the meaning of a state statute beyond its confinement by reasonably read state-court rulings."[409] He had found in *Kovacs*,

> These are matters for the legislative judgment controlled by public opinion. So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose . . . .[410]

Similarly, in *Dennis*, Justice Frankfurter concluded, "Full responsibility for the choice cannot be given to the courts. Courts are not

404. 343 U.S. 250, 253 (1952).
405. *See* 336 U.S. 77, 89–97 (1949) (Frankfurter, J., concurring).
406. *Id.* at 96.
407. *Dennis*, 341 U.S. at 555 (Frankfurter, J., concurring).
408. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 175 (1961) (Frankfurter, J., concurring); *Kovacs*, 336 U.S. at 97 (Frankfurter, J., concurring).
409. *Garner*, 368 U.S. at 175 (Frankfurter, J., concurring).
410. *Kovacs*, 336 U.S. at 97 (Frankfurter, J., concurring).

representative bodies. They are not designed to be a good reflex of a democratic society."[411] To this end, he also explicitly rejected the concept of free expression receiving a preferred position when in conflict with other concerns. Justice Frankfurter concluded in *Kovacs* that the preferred-position concept "expresses a complicated process of constitutional adjudication by a deceptive formula."[412] Such a conclusion encapsulates the broader understanding he communicated, which emphasized that free expression protections as more a liquid than a solid, something that could be moved and adjusted as needed, on a continual, case-by-case basis.

C. Freedom of Expression is Orderly

Within the understandings Justice Frankfurter communicated regarding a contextual, malleable right to free expression were expectations that, in order to be protected, speech must be orderly. In his concurring opinion in *Garner*, Justice Frankfurter emphasized that the Black protestors, who fought segregation by occupying a whites-only restaurant counter, did not create "disturbance or alarm in the behavior of the café employees or customers or even passers-by . . . ."[413] His opinion communicated that, had the protestors acted the same way, but their actions led to disorder, he might have found that their rights could be limited.[414] He conveyed a similar understanding in *Terminiello*, this time emphasizing that the Court should not go beyond the most basic question posed to it in siding with Terminiello.[415] He reasoned that "those indulging in such stuff as that to which this proceeding gave rise are hardly so deserving as to lead this Court to single them out as beneficiaries of the first departure from the restrictions that bind this Court in reviewing judgments of State courts."[416] Similarly, in *Kovacs*, Justice Frankfurter established early in his concurring opinion that his goal was a "[w]ise accommodation between liberty and order [which] always has been, and ever will be, indispensable for a democratic society."[417]

Within these expectations regarding order was a particular emphasis on peaceful expression. In *Beauharnais*, Justice Frankfurter reinforced the Illinois group libel law's exception for information "published with

411. *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring).
412. *Kovacs*, 336 U.S. at 96 (Frankfurter, J., concurring).
413. *Garner*, 368 U.S. at 176 (Frankfurter, J., concurring).
414. *Id.*
415. Terminiello v. City of Chicago, 337 U.S. 1, 9–11 (1949) (Frankfurter, J., dissenting).
416. *Id.* at 11–12.
417. *Kovacs*, 336 U.S. at 89 (Frankfurter, J., concurring).

good motives and for justifiable ends," explaining that the state had a right to limit expression that was "liable to cause violence" or a "tendency to cause breach of the peace."[418] He emphasized in *Milk Wagon Drivers Union* that the Bill of Rights assumes peaceful, orderly expression.[419] He wrote that at the "[b]ack of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind."[420] Justice Frankfurter conveyed a concern for public peace in *Kovacs*.[421] He contended the state legislature, rather than the Supreme Court, should decide how best to preserve peace and order.[422] Implied within his reasoning is the broader understanding that freedom of expression was intended to be peaceful and orderly, and communicators whose expression endangers organized society can be limited. To this end, Justice Frankfurter concluded in his concurring opinion in *Dennis*, "In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society."[423] Later in the opinion, Justice Frankfurter directly addressed Justice Douglas's more expansive understandings of free expression. He stated, "Mr. J[ustice] D[ouglas] quite properly points out that the conspiracy before us is not a conspiracy to overthrow the Government. But it would be equally wrong to treat it as a seminar in political theory."[424] The passage provides a stark contrast regarding the justices' understandings of the First Amendment, with Justice Frankfurter communicating a far lower constitutional threshold for limitations on expression that *could* cause disorder. Broadly, Justice Frankfurter's expectation that expression be orderly, and his conclusions that speech that could interrupt peaceful society can be halted, conjure a far less open marketplace of ideas than was envisioned by his contemporaries and the majority of Justices who have joined the Court since.

D. Truth is the Product of Experience

Justice Frankfurter consistently rejected rigid tests, absolute interpretations, and other a priori approaches to resolving cases. He instead conveyed that he understood experience, rather than static,

418. Beauharnais v. Illinois, 343 U.S. 250, 254 (1952).
419. *See* Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).
420. *Id.*
421. *Kovacs*, 336 U.S. at 97 (Frankfurter, J., concurring).
422. *Id.* at 96–97.
423. Dennis v. United States, 341 U.S. 494, 526 (1951) (Frankfurter, J., concurring).
424. *Id.* at 546.

dogmatic truth, as the best guide. In this regard, he communicated in his opinions a conceptualization of truth similar to his mentor, Justice Holmes.[425] Justice Frankfurter conveyed the understanding that, since it is not possible to know the truth or the absolute solution to a problem, the Court should be permissive in reviewing lawmakers' attempts to resolve problems.[426] In *Kovacs*, Justice Frankfurter examined Justice Holmes's ideas about truth.[427] He characterized Justice Holmes's conceptualization of truth as: "the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs . . . ."[428] He also characterized Justice Holmes as having "a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance."[429] Finally, he emphasized, "Mr. Justice Holmes who admonished us that 'To rest upon a formula is a slumber that, prolonged, means death.' Such a formula makes for mechanical jurisprudence."[430] In drawing these understandings into his reasoning, Justice Frankfurter communicated that he shared his mentor's conceptualizations of a pragmatic, experience-funded approach to resolving cases.[431]

Using this reasoning, Justice Frankfurter explicitly attacked rigid tests proposed by other justices, communicating, as outlined in the *Freedom of Expression is Contextual* theme, the situation or surrounding concerns of the case dominated his reasoning in First Amendment cases.[432] In *Dennis*, he rejected First Amendment absolutism, finding:

> Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, withing the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[433]

425. *See Kovacs*, 336 U.S. at 95–96 (Frankfurter, J., concurring); Beauharnais v. Illinois, 343 U.S. 250, 261–62 (1952); *Dennis*, 341 U.S. at 550 (Frankfurter, J., concurring).

426. *See Kovacs*, 336 U.S. at 95–97 (Frankfurter, J., concurring); *Beauharnais*, 343 U.S. at 261–62 (1952); *Dennis*, 341 U.S. at 550–52 (Frankfurter, J., concurring).

427. *Kovacs*, 336 U.S. at 95 (Frankfurter, J., concurring).

428. *Id.*

429. *Id.*

430. *Id.* at 96 (citation omitted).

431. *Id.*

432. *See supra* Part IV.B.

433. Dennis v. United States, 341 U.S. 494, 524–25 (Frankfurter, J., concurring).

His mentor's clear and present danger test received similar scrutiny.[434] Justice Frankfurter emphasized "[n]o matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values."[435] Justice Frankfurter devoted particular attention to the preferred-position approach in his concurring opinion in *Kovacs*, contending the idea has "uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."[436] Ultimately, Justice Frankfurter found a priori tests, such as these, were inadequate because they failed to account for the human experience wrapped up in the context of the case, an assumption that led him to look more closely at the collective factors regarding the cases than the Court's established approaches.[437]

Finally, Justice Frankfurter consistently communicated that the Court should uphold lawmakers' efforts to experiment with solutions to the issues confronting them because it was not for the Court to substitute its judgment for the elected representatives' reasoning.[438] In this regard, he conveyed an understanding that it is impossible for anyone to *know* what is true, thus the lawmakers' efforts, which focused on resolving a problem, should be upheld. In *Beauharnais*, he contended, "[o]nly those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy . . . ."[439] Similarly, he reasoned that the law in *Milk Wagon Drivers Union* should be upheld because, "We cannot say that such a finding so contradicted experience as to warrant our rejection."[440] Justice Frankfurter communicated this theme in *Beauharnais*, in which case he supported the state law, despite its limitations on expression.[441] He avowed, in the "frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups . . . ."[442]

434. *Id.* at 542–43.
435. *Id.*
436. *Kovacs*, 336 U.S. at 90 (Frankfurter, J., concurring).
437. *See id.* at 93–94.
438. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1952).
439. *Id.* at 262.
440. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941).
441. *Beauharnais*, 343 U.S. at 261.
442. *Id.*

He continued, stating that the utterances were "made in public [spaces] and by means calculated to have a powerful emotional impact on those to whom it was presented."[443] Broadly, Justice Frankfurter conveyed that he understood the limitations on expression as evaluations based on pragmatic considerations, rather than a priori tests or justices choosing to substitute their wisdom for that of lawmakers.[444]

E. A Protected Marketplace

Justice Frankfurter consistently communicated a concern for the accessibility and functionality of the marketplace of ideas.[445] The concern he conveyed indicated he understood a broad spectrum of limitations to freedom of expression as acceptable *because* they safeguarded participation and engagement from a variety of communicators.[446] Justice Frankfurter weighed an open marketplace against concern for access and functionality in *Dennis*, explaining, "[W]e should hesitate to prohibit it if we thereby inhibit the interchange of rational ideas so essential to representative government and free society."[447] He continued, "But there is underlying validity in the distinction between advocacy and the interchange of ideas, and we do not discard a useful tool because it may be misused."[448] Justice Frankfurter communicated similar concerns in *Garner*, in which his reasoning hinged on whether a protest intimidated others, a consideration connected to his broader concern about access and a protected marketplace.[449] He emphasized, "[I]t begs the whole question on the answer to which the validity of these convictions turns to assume that the 'public' tended to be alarmed by the conduct of the petitioners here disclosed."[450] He communicated similar concerns in *Milk Wagon Drivers Union*, where the threat for potential unrest was sufficient for him to support limiting expression.[451] He reasoned that "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence."[452] In highlighting the

443. *Id.*
444. *See generally id.*
445. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 517–56 (1951) (Frankfurter, J., concurring).
446. *Id.* at 519–20.
447. *Id.* at 545–46.
448. *Id.* at 546.
449. *See* Garner v. Louisiana, 368 U.S. 157, 175–76 (1961) (Frankfurter, J., concurring).
450. *Id.* at 175.
451. Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941).
452. *Id.*

potential for danger or intimidation, which might discourage people from participating in discourse, Justice Frankfurter communicated a broad, sweeping concern for protecting the marketplace.

His concern was also conveyed in the context of power dynamics in society. In reasoning that Illinois's group libel law should be upheld, he concluded, "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[453] Earlier in the opinion, he emphasized the powerful effect racial and religious attacks can have on a person's ability to take part in the public discourse.[454] Justice Frankfurter communicated similar concerns in *Dennis*, explaining that "[t]he treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization attained by a society."[455] Perhaps his reasoning for these concerns was most clearly conveyed in *Milk Wagon Drivers Union*, where he explained, "We are here concerned with power and not with the wisdom of its exercise."[456] In this regard, he communicated concern for the power of the state to create such regulations and the power of certain actors to endanger discourse by threats of violence.[457] Finally, in *Kovacs*, Justice Frankfurter emphasized the danger the sound truck posed to human discourse.[458] By ignoring the content of the message and highlighting the potential the truck's sound had to drown out of other voices, he, in a more literal sense, communicated concern that those with the power, the most access or tools, could dominate the exchange of ideas. In addressing the potential for certain communicators to intimidate others and the overall power dynamics in the market, Justice Frankfurter conveyed an understanding that laws could be used to safeguard the exchange of ideas.

V. CONCLUSIONS—FRANKFURTER'S DYNAMIC, CONTEXTUAL MARKETPLACE

Marketplace theory, as the Supreme Court has constructed it, faces monumental challenges to its relevance in the twenty-first century. Emerging technologies have fundamentally changed the way information flows and the discourse that takes place in democratic society,

453. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).
454. *Id.* at 261.
455. Dennis v. United States, 341 U.S. 494, 548–49 (1951).
456. *Milk Wagon Drivers Union*, 312 U.S. at 296.
457. *Id.* at 296–98.
458. Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring).

transforming the conceptual space justices have described as the marketplace of ideas into a multiverse of often fragmented virtual communities.[459] Within these communities, algorithms and personal preferences preempt the types of decisions marketplace thought assumed citizens make about the potential truth or falsity of ideas, instead sorting people based on past preferences and current interests.[460] Of course, these cracks in the marketplace's foundational assumptions are not new. Legal scholars have long identified fundamental concerns regarding the truth and human rationality assumptions of Enlightenment ideas, which justices installed into the marketplace's foundations.[461] In particular, scholars have identified the problems with a theory that paints a generally monolithic picture of a diverse society.[462] For these reasons, the assumptions of marketplace theory must be reevaluated. This article draws from the marketplace approach's history and development, and Justice Frankfurter's conceptualizations of free expression, to identify potential revisions to the theory. Justice Frankfurter's First Amendment rationale, in particular, provides novel potential building blocks for the twenty-first-century marketplace. Justice Frankfurter's time on the Court, which spanned from 1939 to 1962, was characterized by a wave of difficult free expression cases that dealt with threats, protests, and sedition.[463] At the same time, his years on the Court were defined by substantial disagreements with the group of justices he labeled "the Axis," which included Justices Black and Douglas, regarding the role and meaning of free-expression safeguards promised in the First Amendment.[464] Taken together, the historical influences and personal feuds that characterized Justice Frankfurter's time on the Court produced a less-heralded, under-explored, and alternative vision for free expression in democratic society.

459. *See* Himelboim et al., *supra* note 7, at 167, 171 (finding that in a choice-rich environment, people fragment into like-minded groups). See SUNSTEIN, *supra* note 5, at 69–75, in regard to the fragmentation and polarization that takes place in online spaces.

460. *See* Alexandra Giannopoulou, *Algorithmic Systems: The Consent Is in the Detail?*, 9 INTERNET POL'Y REV. 1, 10–11 (2020); Urbano Reviglio & Claudio Agosti*, Thinking Outside the Black-Box: The Case for "Algorithmic Sovereignty" in Social Media*, 6 SOCIAL MEDIA + SOC'Y 1, 5–6 (2020) (regarding how algorithms presort people before they can make affirmative decisions about the people and ideas they seek to encounter online); Himelboim et al., *supra* note 7, at 167, 171 (regarding the human tendency to gather in like-minded groups).

461. *See supra* Part II.A.

462. *See* Carroll Hawkins, *Harold J. Laski: A Preliminary Analysis*, 65 POL. SCI. Q. 376 (1950).

463. *See supra* Part IV.

464. *See supra* Part III.A.

Broadly, the Justice put forth a *contextual* marketplace, which would represent a substantial departure from the expansive marketplace justices developed and subscribed to after the 1960s.[465] The contextual marketplace approach places significant power in the hands of lawmakers to address problems, even if the solutions conflict with the First Amendment.[466] Justice Frankfurter's understandings also rejected rigid tests, making the case for a more malleable marketplace that can be adjusted based on changes in the communication environment.[467] Finally, Justice Frankfurter conceptualized truth as experience-based, which is more in line with the pragmatic ideals of his mentor Justice Holmes and foundational pragmatic thinker William James.[468] Ultimately, Justice Frankfurter's understandings would represent a substantial departure from contemporary freedom of expression rationales and open the door for widespread limitations to the free exchange of ideas. We need not, however, accept his ideas in whole to benefit from them. Instead, three ideas, when considered in the context of the history of the marketplace of ideas, can be fashioned from Justice Frankfurter's understandings and potentially used to revise the marketplace approach in the twenty-first century.

First, history and Justice Frankfurter's conceptualizations suggest that the marketplace should be understood as *dynamic*, rather than static. Second, the Enlightenment-based truth assumptions now contained within the theory's foundations should be replaced with more pragmatic, *experience-funded*, understandings of truth that better match the diverse nature of human discourse. Finally, more concern should be reserved for a *protected*, rather than a purely expansive, marketplace of ideas.

465. After Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), Justices disagreed about the need for a protected versus an expansive, wide-open marketplace. For examples of this transition, see First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Citizens United v. FEC, 558 U.S. 310 (2010); United States v. Alvarez, 567 U.S. 709 (2012).

466. *See supra* Part IV.B. For instances where Justice Frankfurter emphasized a contextual approach, see Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring); Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); Beauharnais v. Illinois, 343 U.S. 250, 253 (1952).

467. *See supra* Part IV.C. For examples of Justice Frankfurter's conceptualization of a malleable First Amendment, see Garner v. Louisiana, 368 U.S. 157, 175–76 (1961) (Frankfurter, J., concurring); Terminiello v. City of Chicago, 337 U.S. 1, 9–12 (1949) (Frankfurter, J., concurring); *Kovacs*, 336 U.S. at 89–97 (Frankfurter, J., concurring).

468. *See supra* Part IV.D. For examples of Justice Frankfurter's understandings regarding truth and experience, see *Kovacs*, 336 U.S. at 95–96 (Frankfurter, J., concurring); *Beauharnais*, 343 U.S. at 261–62; *Dennis*, 341 U.S. at 519–20 (Frankfurter, J., concurring).

The *dynamic* marketplace is a macro-level reconsideration of the theory. The theory has often been framed as monolithic and static.[469] However, its history tells us otherwise since it has gone from a relatively unsupported idea in Justice Holmes's dissent in *Abrams* through decades of growing pains until it eventually saw the justices sew Enlightenment-funded assumptions about truth and human rationality into its very foundations.[470] In other words, the marketplace theory's history has been defined by change, not consistency. Acknowledging the liquidity in the theory would place it in a better position to remain relevant during an unpredictable period in how individuals communicate. The dynamic approach also finds support in Justice Holmes's rejections of absolute conclusions and rigid tests.[471] Justice Frankfurter brought his mentor's rejections of dogmatic approaches into his own First Amendment opinions, contending rigid, unmoving tests were a danger to sound precedent.[472]

The *experience-funded* revision to the marketplace addresses one of the longest-standing concerns of the theory's Enlightenment-founded assumptions.[473] Enlightenment-based truth and human rationality claims fail to recognize human diversity and the role of personal experience as a determinant in the truths people form.[474] Justice Holmes rejected Enlightenment assumptions that truth is universal and discoverable.[475] He emphasized that absolute truths can be a danger and that all anyone can do is "wager" on what is true.[476] In other words, he concluded it is impossible to know the truth, and therefore no one can

469. For examples of a rigid, Enlightenment-funded use of marketplace theory, see *Red Lion Broad. Co.*, 395 U.S. at 390; *Alvarez*, 567 U.S. at 728; McCullen v. Coakley, 573 U.S. 464, 476 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)); Nat'l Inst. Fam. & Advocs. v. Becerra, 138 S. Ct. 2361, 2366 (2018).

470. *See supra* Part II.A–C.

471. See Letter from Oliver W. Holmes to William James (Mar. 24, 1907) (on file with the Harvard Law School Digital Suite); Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), *in* HOLMES, *supra* note 38, at 108; Letter from Oliver W. Holmes to Harold Laski (Jan. 11, 1929), *in* HOLMES, *supra* note 38, at 107, for instances when Justice Holmes questioned or rejected absolute truth. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (contending that people "wager" based on imperfect understandings of truth).

472. *See, e.g.*, *Kovacs*, 336 U.S. at 95–96 (Frankfurter, J., concurring); *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring).

473. BAKER, *supra* note 146, at 12; Ingber, *supra* note 265, at 15; Schauer, *supra* note 266, at 777; Bambauer, *supra* note 9, at 653.

474. BAKER, *supra* note 146, at 12; Ingber, *supra* note 265, at 15; Schauer, *supra* note 266, at 777; Bambauer, *supra* note 9, at 653; *see also* Hollinger, *supra* note 268, at 8–9.

475. *See* Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), *in* HOLMES, *supra* note 38, at 108; Holmes, *supra* note 74, at 40–43; HOLMES, *supra* note 72, at 1.

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

claim ownership of absolute truth.[477] Justice Frankfurter mirrored his mentor's understandings, particularly when attacking Justice Black's more absolute approach to the First Amendment's meaning.[478] In *Dennis*, for example, Justice Frankfurter framed truth as contingent on experience.[479] He explained, "The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths."[480] Earlier in the same opinion, he contended, "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them."[481] In terms of the twenty-first-century marketplace, replacing absolute truth assumptions with an understanding that truth will vary for each person, based on their personal experiences and exposure to information, allows for a more inclusive marketplace that better aligns with the choice-rich, fragmented nature of online discourse. When truth is formed, rather than discovered, the emphasis on the marketplace of ideas becomes protecting the flow of information, rather than safeguarding an open battle between truth and falsity.[482]

Finally, the *protected* marketplace approach is also concerned with truth and aligns with the *experience-funded* theme's emphasis on safeguarding the flow of information, rather than a battle between truth and falsity. Justice Frankfurter rationalized limiting free expression when it threatened access to and participation in democratic discourse.[483] He reasoned in *Beauharnais*, for example, that the state law against disparaging an entire group of people because of their race or religion helped protect participation in society.[484] Similarly, in *Kovacs*, Justice Frankfurter concluded the city could limit speech conveyed via sound trucks because the expression bore the potential of limiting human participation.[485] Justice Frankfurter's conceptualization of a *protected* marketplace, rather than an expansive one, finds substantial support

477. *Dennis*, 341 U.S. at 550 (1951) (Frankfurter, J., concurring).
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.* at 523.
482. *See* MILTON, *supra* note 8, at 50. Justice Holmes's friends immediately associated his dissent in *Abrams* with Milton's *Areopagitica*. *See* Letter from Felix Frankfurter to Oliver W. Holmes (Nov. 26, 1919) (on file with Harvard Law School Digital Suite).
483. *See supra* Part IV.E.
484. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).
485. Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring).

from justices' dissenting opinions from cases in the 1960s and 70s.[486] In *Bellotti*, for example, justices conveyed concern that the fundamentally non-human nature of corporations posed a danger to the marketplace of ideas.[487] Chief Justice Rehnquist, in his dissent, concluded that the "free flow of information" was not intended to include corporations.[488] In the twenty-first century, revitalizing a concern for a protected marketplace could allow lawmakers to create narrowly tailored limitations on artificial intelligence, for example, since non-human communicators can dominate the marketplace with a single idea, whether it is true or false, and drown human publisher ideas out. Essentially, AI communicators pose a threat to human access and participation in the marketplace.

When taken together, these three revisions carry substantial potential to revitalize the marketplace concept while, at the same time, accounting for and acknowledging existing free-expression rationales. The revisions represent careful, nuanced revisions, rather than massive, overbearing changes to the theory that has become the Court's dominant tool for rationalizing free expression safeguards. While the *dynamic* marketplace approach emphasizes reframing how we understand the theory, the *experience-funded* and *protected* marketplace revisions seek to improve the functionality of the marketplace during a time of substantial technological and social change.

486. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973); Citizens United v. FEC, 558 U.S. 310, 473 (2010) (Stevens, J., dissenting in part and concurring in part).

487. *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

488. *Id.* at 828 (Rehnquist, J., dissenting).