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## **Deliberate Democracy, Truth, and Holmesian Social Darwinism**

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# DELIBERATIVE DEMOCRACY, TRUTH, AND HOLMESIAN SOCIAL DARWINISM

*Alexander Tsesis\**

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## I. INTRODUCTION

**J**USTICE Oliver Wendell Holmes Jr.'s "marketplace of ideas" analogy continues to deeply influence First Amendment doctrine. It provides a rational substratum upon which the political or self-realization characterizations of free speech are built. However, typically overlooked is the Social Darwinistic root of the Justice's thought. He championed the spread of ideas and the political sway of majority opinions. That analytical insight is key to many of the Supreme Court's free speech precedents. On the one hand, the concept is invaluable for defending free discussions about philosophy, political science, the arts, humanities, pedagogy, and social sciences. In these areas, the marketplace of thoughtful expression will give rise to searching wisdom, understanding, culture, taste, achievement, scientific truth, political action, and creativity. On the other hand, market political leverage can drown out minority voices. According to a Holmesian relativist understanding, populist versions of truth can and should dominate law and its formation. To his mind, the judiciary lacks any power to check "proletarian dictatorship" from forming in the country.<sup>1</sup> Left unqualified, his political perspective on truth allows for abuses of representative governance. In the second decade of the twenty-first century, democratic institutions are being exploited by populist autocrats like Hungary's Viktor Orban or Turkey's Recep Tayyip Erdogan. Populism in the United States, on the right and on the left of the political spectrum, is alarmingly flirting with xenophobia, racism, and anti-Semitism. That political reality should give us some pause about expecting libertarianism to yield a just truth.

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1. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

Justice Holmes's Social Darwinistic approach to the marketplace of ideas is fraught with callous notions of preference for powerful speakers. It stands in opposition to a more equalitarian understanding of markets, which recognizes the policy balance governments sometimes undertake to advance important interests that protect open dialogue, while empowering indigent and powerless individuals to join the conversation.<sup>2</sup> Truth and falsity are manipulable concepts, not generally something courts want to resolve. Falsehood is inevitable in conversation. At a minimum, mistakes are rampant in discourse, therefore as *New York Times Co. v. Sullivan* championed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>3</sup> People living in a deliberative democracy must be given space to joke, speak figuratively, and hyperbolically criticize government without risk of censorship or punishment. Government lacks the authority to require parties to adopt its version of truth.<sup>4</sup> This essay first provides a brief doctrinal trajectory of how the Court developed its marketplace of ideas doctrine. It then critiques the construct's amenability to authoritarian doctrines. At its core, this essay argues against the libertarian view of free speech and for the adoption of a limited balancing test that, along with precedents, requires judges to weigh speech, public policy, a means/ends analysis, and the availability of less intrusive ways of achieving the narrowly tailored government aims.<sup>5</sup>

## II. MARKETPLACE OF IDEAS FRAMEWORK

Justice Holmes first articulated the marketplace of ideas doctrine in his 1919 dissent to *Abrams v. United States*.<sup>6</sup> He was not the first to come up with that framework for reviewing speech restrictions, rather he relied on John Stuart Mill's<sup>7</sup> and John Milton's<sup>8</sup> works. Neither was *Abrams* Holmes's first foray into free speech jurisprudence. Earlier the same year, he had initiated the clear and present danger test into (what should be said was really the creation of) modern First Amendment jurisprudence

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2. See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2127 (2018).

3. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

4. Totalitarian regimes equate official statements of truth with state policy and repress any views contrary to political dogma. For an excellent literary depiction of official truth used to manipulate the ideas of citizens, see ARTHUR KOESTLER, *DARKNESS AT NOON* 236-37 (Daphne Hardy trans., The Modern Library 1941) (expressing Soviet cynicism about the existence of any objective truth other than the totalitarian government's political definition of it).

5. I am borrowing the basic aspects of this standard from *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (Breyer, J., concurring). In addition to the four balancing factors Justice Breyer lists, traditional and doctrinal reasons are also relevant to the exercise of judicial judgment.

6. 250 U.S. 616, 630-631 (1919) (Holmes, J., dissenting).

7. JOHN STUART MILL, *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 105 (1957).

8. JOHN MILTON, *AREOPAGITICA* 58 (1918).

in *Schenck v. United States*,<sup>9</sup> *Frohwerk v. United States*,<sup>10</sup> and *Debs v. United States*.<sup>11</sup> Those cases accepted that government can restrict speech when it poses a clear and present danger to national security.

Consistent with those three cases, in *Abrams*, Holmes stated, “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.”<sup>12</sup> Holmes’s dissent should be read contextually with the events that led to the conviction of a group of Russian immigrants, who were sympathetic to the Bolshevik revolution in the Soviet Union. The five-person clique of Russian emigres living in New York opposed sending U.S. troops into the U.S.S.R., urging “the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the government of the United States, and to cease to render it assistance in the prosecution of the war.”<sup>13</sup> Holmes dissented to the conviction of these small-time pamphleteers, who posed no clear and present danger to the government, nor even to U.S. conscription.<sup>14</sup> He believed, instead, that government prosecuted Abrams and his co-publishers for their unpopular communist beliefs.<sup>15</sup>

Holmes’s statement of the marketplace of ideas is pithy:

[M]en . . . may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>16</sup>

While this powerful statement is often cited and quoted, too rarely noticed in literature about his dissent to *Abrams* is the relativistic nature of Holmes’s marketplace of ideas. He made its underlying cynicism clear in a 1925 dissent to *Gitlow v. New York*: “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.”<sup>17</sup> Holmes recognized that government can act against immediate threats to its continued existence; he thinks even the establishment of a “proletarian dictatorship” to be within the legitimate authority of the masses. Tragic twentieth century examples of popular dictatorships that benefitted from

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9. 249 U.S. 47, 52 (1919).

10. 249 U.S. 204, 206 (1919).

11. 249 U.S. 211, 216 (1919).

12. *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

13. *Id.* at 620–21 (majority opinion).

14. *Id.* at 628 (Holmes, J., dissenting).

15. *Id.* at 629–30. The Court has repeatedly ruled that there is a difference between advocacy of abstract theories justifying the use of violence and actual preparations taken in furtherance of such theories. See, e.g., *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

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

17. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

charismatic orators—in Nazi Germany, Maoist China, Soviet Union, and Khmer Rouge Cambodia—should give us pause about Holmes’s perfunctory assumption about truth being the eventual outcome of deliberative discourse. In those historical cases, it was not the most reasonable groups that ascended to power but the most ruthless, narrow-minded, and ideologically inflexible ones who established autocratic governments by the power of their rhetoric. Truths about the equality of persons, civic representation, and fundamental rights did not win in the marketplace of ideas. To the contrary, by their agitations against Jews, the bourgeois, Vietnamese, and other class enemies, they set off campaigns of terror. The marketplace of ideas is a philosophical ideal that does not always lead to ideal results. Sometimes the arguments that best convince the masses are also those that empower totalitarian regimes, who then shut off debate once their ideas are calcified by ruling elites. While Holmes’s formulation is utopian, the marketplace of ideas is really a neutral conduit for the forces of equality and those of oppression.

Holmes’s *Gitlow* dissent was not an anomaly in his thought but consistent with the relativistic philosophy expressed in his correspondence to friends. Judge Richard Posner compares Holmes’s Social Darwinism to Friedrich Nietzsche’s *Übermensch* morality, which advocates a complete reevaluation of orthodox views about good and evil.<sup>18</sup> Posner is right to say that Holmes, like Nietzsche, thinks that “morality . . . is relative rather than absolute.”<sup>19</sup> This legal insight recognizes, against the dominant school of formalism in Holmes’s day, that law is driven by social circumstances rather than abstract certainty. However, Posner’s analogy is somewhat misleading: Holmes’s identification of political truth with the “dominant forces of the community”<sup>20</sup> differs markedly from Nietzsche’s perspective of the *Übermensch*. The latter mocks herd mentality, championing instead an “independent intellect.”<sup>21</sup> Holmes, on the other hand, runs headlong into majoritarian relativism and mob rule.

Empowering dominant forces to impose truth heralds a political system where the will of majority justifies the silencing of outsider voices. Independence of thought, to the contrary, allows for constitutional judgment capable of checking abuses perpetrated against the minority. The prototype of judicial review is, in fact, built on this structure of independent judgment based on constitutional norms, text, doctrines, structure, and prudence.<sup>22</sup> The premise behind reliance on heightened judicial scrutiny to review suspect laws—those that intentionally target minorities, funda-

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18. See Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 885–86 (1988); see also FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 101 (R.J. Hollingdale trans., Penguin Classics 1969) (1883–1885).

19. Posner, *supra* note 18, at 885.

20. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

21. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 111, 114 (Marianne Cowan trans., Gateway ed. 1955) (1886).

22. For lexicographical modes of interpretation, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991); Alexander Tsesis, *Footholds of Constitutional Interpretation*, 91 TEX. L. REV. 1593, 1594 (2013).

mental rights, and democratic order—is that independent and impartial judgment is needed to check the power of majorities to impose arbitrary legal burdens.<sup>23</sup> The evolution of American jurisprudence since the New Deal has closely evaluated laws and their applications to prevent dominant strata of state and federal government from administering discriminatory legislative and executive fiat “against discrete and insular minorities.”<sup>24</sup> That counter-majoritarian methodology remains the fulcrum of contemporary strict and intermediate scrutiny cases, which courts rely on to review whether authority disproportionately harms a suspect class of people.

All this is to say that even the marketplace of ideas is not an unqualified analogy. It is rather a contextualizable framework that itself must be tested by rational analysis consistent with existing tradition and doctrine on matters requiring the balancing of speech, countervailing concerns, mean/ends analyses, and alternative channels of communication.<sup>25</sup>

For Holmes, legal justifications were matters of the sovereign power to compel or punish.<sup>26</sup> Holmes’s legal majoritarianism and epistemic skepticism are philosophical vertebrae to his marketplace of ideas doctrine. As one scholar put it, “Freedom of speech for Holmes is merely a concession flowing from the sympathy of the authoritarian dominant.”<sup>27</sup> Holmes understood truth to be “the road I can’t help travelling. What the worth of that *can’t help* may be I have no means of knowing. Perhaps the universe, if there is one, has no truth outside of the finiteness of man.”<sup>28</sup> There are as many truths as there are perceivers, and any attempt to articulate a singular philosophical theory about them is bound to turn out fruitless. For Holmes, the socially dominant strand of thought is, by definition, the truthful thought. Moreover, according to Holmes’s *Gilow* formula, those whose ideas eclipse others’ in the marketplace of ideas acquire the right to domineer politics, even to the point of imposing proletarian dictatorship upon the losers.

Professor Fredrick Schauer has pointed out that defining “moral truth as what in fact survives” commits one “to saying that Nazism was ‘right’ in Germany in the 1930s, and that slavery was equally ‘correct’ or ‘wise’ in parts of the United States prior to the Civil War.”<sup>29</sup> According to Jus-

23. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

24. *Id.*

25. The Court has relied on a similar self-evident rational reason. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (“There can, of course, be no doubt that . . . [a] program of daily classroom invocation of God’s blessings as prescribed in the [state] Regents’ prayer is a religious activity.”).

26. *See* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (“Deep-seated preferences can not be argued about . . . and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.”).

27. Francis E. Lucey, *Holmes—Liberal—Humanitarian—Believer in Democracy?*, 39 GEO. L.J. 523, 546 (1951).

28. Letter from Oliver Wendell Holmes to Lady Pollock (Oct. 27, 1901), in 1 HOLMES-POLLOCK LETTERS, 1874–1932, at 99–100 (Mark DeWolfe Howe ed., 1942) (emphasis in original).

29. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 21 (1982).

tice Frankfurter, Holmes's "mind is scrupulously skeptical," whereby "he has escaped sterile dogma and romantic impressionism."<sup>30</sup> The philosopher James H. Tufts regards Holmes's Social Darwinism to be a product of skeptical thought that was common when evolutionary biology was still in its youth.<sup>31</sup> For Holmes, then, truth is an evolving social construct. That perspective provides room for society to grow and not become stagnant in a historical myopia, but it also leaves no compass for differentiating popular tyranny from representative democracy.

Truth, Holmes believes, is identical to the dominant view of the crowd. If they wish, the people can place constitutional limits on their government, but no universal truth of governance—nothing along the lines of the Unalienable Rights Clause or Pursuit of Happiness Clause of the Declaration of Independence—restrains the crowd from including provisions overtly discriminatory against discrete and insular minorities. The exercise of law is justified by the majority's "power to compel or punish."<sup>32</sup> The group holding onto the reins of power creates truths about values—such as equality, justice, and the rule of law—in order to retain politically privileged positions. Study of legal rights is helpful for predicting how courts are likely to decide cases and controversies, but the quest for truth is ultimately an "empty substratum" defined by the public, not some stable constitutional meaning.<sup>33</sup> There is a short step between Holmes's perception of law as enforcement of power with no underlying purpose and the notion that "might makes right."<sup>34</sup>

In Holmes's hands, marketplace philosophy does not recognize any universal obligation to safeguard equal rights. What counts as legitimate for him is the legal order imposed by rulers: "[T]he ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way."<sup>35</sup> According to this conception, deliberative democracy is not established for identifying and shaping universal constitutional rights, enjoyed by every member of the polity. To the contrary, even the right to live an unmolested life is not an unconditional good that must be protected by society; rather, the right to life is a discretionary "privilege granted . . . by

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30. Felix Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717, 723–24 (1931).

31. See James H. Tufts, *Legal and Social Philosophy of Mr. Justice Holmes*, 7 A.B.A. J. 359, 359 (1921).

32. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts."); Oliver Wendell Holmes, *The Law Magazine and Review*, 6 AM. L. REV. 593 (1872) (book review), reprinted in 44 HARV. L. REV. 788, 788 (1931).

33. Letter from Oliver Wendell Holmes to Frederick Pollock (Jan. 19, 1928), in 2 HOLMES-POLLOCK LETTERS, 1874–1931, at 212 (Mark DeWolfe Howe ed., 1942).

34. See John C. Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 FORDHAM L. REV. 255, 257 (1942).

35. Letter from Oliver Wendell Holmes to John Wu (Aug. 26, 1926), in OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 187 (Harry C. Shriver ed., 1936).

the state.”<sup>36</sup> As Holmes put it, “[T]he sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.”<sup>37</sup> According to this perspective, majoritarian government determines whether human lives should be preserved and, if so, whose lives deserve the protection of laws. In fact, a state, by virtue of its public power to legislate, can discriminate against such groups as the mentally handicapped,<sup>38</sup> since after all Holmes thinks human life is not intrinsically valuable. Laws are malleable but enforceable customs which are posited on society by the will of the dominant (i.e., ruling) group.<sup>39</sup> As individuals living in a society, humans may have a personal interest to protect their lives, but the sovereign can take away that life and not respect their dignity: “I don’t believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn’t believe in.”<sup>40</sup> Holmes chucks deontological reasoning for Social Darwinism. In his populist social morality, legal protections are available to outgroups at the behest of those who are then in power, their will, and their categorical dictates. The “proletarian dictatorship” Holmes refers to in his 1925 opinion presumably involves only a small clique of political operatives, as was the case in the Soviet Union under Lenin and Stalin. In order to further its purposes and cosmology, the sovereign may unscrupulously sacrifice whosoever’s lives it sees fit:

The most fundamental of the supposed preexisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell.<sup>41</sup>

Holmes’s perspective on the relative value of life is tied into the power of populism. Around the globe today we see just this form of populism exploiting the instruments of democratic structures, including elections, to gain control and exercise authoritarian rule with a charismatic leader, like Prime Minister Viktor Orbán in Hungary or President Andrzej Duda in Poland, at the helms of their respective governments.<sup>42</sup>

All this philosophical background puts into context Holmes’s marketplace of ideas doctrine, found in his dissent to *Abrams*. Clearly, he does

36. Lucey, *supra* note 27, at 534.

37. Letter from Oliver Wendell Holmes to Frederick Pollock (Jan. 19, 1928), *supra* note 33, at 36.

38. See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

39. See Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 571 (1945).

40. Letter from Oliver Wendell Holmes to John Wu (Aug. 26, 1926), *supra* note 35, at 187.

41. OLIVER WENDELL HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310, 314 (1920).

42. See Sujit Choudhry, *Will Democracy Die in Darkness?*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 571, 574–77 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018); Sam Issacharoff, *Populism Versus Democratic Governance*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra*, at 445, 446, 450; Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra*, at 257, 257–60.



not mean that speech will inevitably yield representative democracy. In fact, he's skeptical of any truth about good government, much less that speech will bring it about. Rather, for him the marketplace of ideas could just as easily yield totalitarianism as it could deliberative democracy.

Holmes's perspective on the "free trade of ideas" being "the best test of truth," therefore, represents the position that dominant forces can impose their notion of truth on minority populations. Holmes is unclear about the extent to which the community that identifies truth should be local, statewide, or national. His disinterest in the rights of minorities rears its head in two of the cases that established First Amendment jurisprudence: *Schenck* and *Frohwerk*.<sup>43</sup> In both, he applied the newly minted clear and present danger test to uphold convictions against persons with little influence, who were opposed to U.S. involvement in World War I, but certainly posed no danger to the national, state, or local governments.<sup>44</sup> Nowhere in his judicial writings or personal correspondences did he second-guess those conclusions.

Outside the First Amendment field, Holmes's moral relativism is evident from *Buck v. Bell*, where he wrote the majority upholding the state sterilization of a woman crassly classified as an "imbecile."<sup>45</sup> That label—along with "feeble minded," "idiots," "imbeciles," and "morons"—was a common degradation leveled at the turn of the twentieth century against persons deemed to be mentally ill.<sup>46</sup> Holmes also upheld the dominant, racist faction opinion in Alabama—upholding state disenfranchisement of black voters.<sup>47</sup> Disenfranchisement was the will of the dominant forces of the state, and Holmes in *Giles v. Teasley* upheld it. Put another way, he entangled the Court in suppressing the votes of almost all blacks and illiterate whites living there.<sup>48</sup> Holmes's Social Darwinism is analytically suspect because its relativistic acceptance of majoritarian truth poses a threat to politically underrepresented groups.<sup>49</sup>

While the marketplace of ideas assumes that "uninhibited, robust, and wide open" speech will enrich public dialogue, that is not always the case.

43. See Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 625–26 (2010).

44. See *Frohwerk v. United States*, 249 U.S. 204, 207–08 (1919); Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 11 (1992); Frederick M. Lawrence, *The Collision of Rights in Violence-Conducive Speech*, 19 CARDOZO L. REV. 1333, 1340 (1998).

45. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

46. MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION 36 (1999). For an example of twentieth century popular perceptions, see *Training School for Mental Defectives Established*, 1919 Ga. Laws 377, 379; MARTIN W. BARR, MENTAL DEFECTIVES: THEIR HISTORY, TREATMENT AND TRAINING 99–100 (1904).

47. *Giles v. Teasley*, 193 U.S. 146, 166–67 (1904); *Giles v. Harris*, 189 U.S. 475, 486–88 (1903).

48. ALEXANDER TSESI, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 139–41 (2008).

49. See OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 372–79 (1993); LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 66 (2001).

In many circumstances, powerful actors often control expressive resources.<sup>50</sup> They use financial clout to dominate media outlets not as easily available to the average citizen and not always given to veridical expression.<sup>51</sup>

Instead of solely trusting in the marketplace for beneficial effects, the Court should examine whether a proper balance has been struck between the needs for public debate, security, anti-discrimination policy, and general welfare considerations. These are not simple matters to evaluate in the course of litigation, but a sophisticated judicial analysis and justified reasoning is needed. The marketplace of ideas model is neutral about the use of financial resources, political influence, and market standing to so dominate the speech markets as to silence minority, heterodox voices. Where more than one fundamental value of the Constitution is at stake in litigation, free expression should not be an automatic trump.

### III. CONSTRUCTIVE TRUTHS VS. DESTRUCTIVE MESSAGES

Truly threatening and inciteful messages add no truth to the marketplace of ideas, even when they pose no imminent threat of harm. And a Social Darwinistic approach to judicial interpretation risks undermining democratic rule. Misethnic speakers draw upon public opinion and shape it in the direction of greater fear, disrespect, dehumanization, and hatred of outgroups. As the great psychiatrist of prejudice, Gordon Allport, put it decades ago,

Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking. Fully seventy years of political anti-Semitism of the verbal order preceded the discriminatory Nürnberg Laws passed by the Hitler regime. Soon after these Laws were passed the violent program of extermination began. Here we see the not infrequent progression: antilocution → discrimination → . . . violence.<sup>52</sup>

Too many examples can be drawn to demonstrate Allport's powerful insight into how demagogues exploit historical prejudices to instigate violence. The growth of alt-right racism in the United States, supporting Donald Trump, and left wing anti-Semitic populism, favored by the leaders of the Women's March and Black Lives Matter movements, has increased racial and ethnic tension and, worse yet, hate crimes around the country.<sup>53</sup> Just like shouting "fire" in a crowded movie theater, which can

50. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986).

51. See *id.* at 1410–11, 1414.

52. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 57 (1954).

53. See *2017 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/hate-crime/2017/tables/table-1.xls> [<https://perma.cc/CW8K-C6CJ>] (last visited Mar. 15, 2019); Joe Concha, *Meghan McCain Presses Women's March Co-President Over Farrakhan Remarks*, HILL (Jan. 14, 2019), <https://thehill.com/homenews/media/425265-meghan-mccain-presses-womens-march-president-over-association-with-farrakhan> [<https://perma.cc/NU35-JMY6>]; Hamid Dabashi, *Black Lives Matter and Palestine: A Historic Alliance*, AL JAZEERA (Sept.

be prohibited without violating the First Amendment,<sup>54</sup> misethnic speech can cause a stampede. More precisely, destructive messages can instigate pogroms, lynchings, internments, disenfranchisement, and, in the worst cases, even genocide. A few historical examples will help to make the point.

The Inquisition in Spain long spread propaganda and instigated the popular movement culminating in the expulsion of the Jews in 1492.<sup>55</sup> Priestly zealots like Vincent Ferrer, a Dominican monk whom the Roman Catholic Church later canonized, raised nationwide anti-Jewish hysteria during the late fifteenth century.<sup>56</sup> Ferrer stirred the population against Jews by first demanding their forced conversion and then retaliation for those who failed to heed his commands.<sup>57</sup> Repercussions of his teachings were by no means benign. His advocacy led to the issuing of a Castilian decree that discriminated against Jews in the spheres of employment, dress, and criminal punishment.<sup>58</sup> The great German historian Heinrich Graetz describes the connection between anti-Jewish preaching and draconian edicts: violent assaults on the Jews were “inflamed by the passionate eloquence of the preacher.”<sup>59</sup> In addition to Graetz’s explanation,

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6, 2016), <https://www.aljazeera.com/indepth/opinion/2016/09/black-lives-matter-palestine-historic-alliance-160906074912307.html> [<https://perma.cc/87PZ-WMQP>]; Alan M. Dershowitz, *Black Lives Matter Must Rescind Anti-Israel Declaration*, BOS. GLOBE (Aug. 12, 2016), <https://www.bostonglobe.com/opinion/columns/2016/08/12/black-lives-matter-must-rescind-anti-israel-declaration/EHDYV3gNLwrTTwfp0JA8QN/story.html> [<https://perma.cc/B76Q-KU3X>]; Griffin Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes*, SSRN (Jan. 14, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3102652](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652) [<https://perma.cc/8P3R-Z5U2>]; Leah McSweeney & Jacob Siegel, *Is the Women’s March Melting Down?*, TABLET (Dec. 10, 2018), <https://www.tabletmag.com/jewish-news-and-politics/276694/is-the-womens-march-melting-down> [<https://perma.cc/DL9U-RWBQ>]; Brendan Skwire, *Meghan McCain Corners Women’s March Organizer Tamika Mallory Over Her Praise of Louis Farrakhan*, SALON (Jan. 15, 2019), [https://www.salon.com/2019/01/14/meghan-mccain-corners-womens-march-organizer-tamika-mallory-over-her-praise-of-louis-farrakhan\\_partner/](https://www.salon.com/2019/01/14/meghan-mccain-corners-womens-march-organizer-tamika-mallory-over-her-praise-of-louis-farrakhan_partner/) [<https://perma.cc/5S2K-K8VD>]; Marc A. Thiessen, *Trump’s Failure to Condemn the Bigots of the Alt-Right Tars His Presidency*, WASH. POST (Aug. 14, 2018), [https://www.washingtonpost.com/opinions/trumps-failure-to-condemn-the-bigots-of-the-alt-right-tars-his-presidency/2018/08/14/6f076fee-9fe2-11e8-8e87-c869fe70a721\\_story.html?utm\\_term=.f8764b554fed](https://www.washingtonpost.com/opinions/trumps-failure-to-condemn-the-bigots-of-the-alt-right-tars-his-presidency/2018/08/14/6f076fee-9fe2-11e8-8e87-c869fe70a721_story.html?utm_term=.f8764b554fed) [<https://perma.cc/TAN2-47X3>]; Chloe Valdary, *Black Lives Matter’s Jewish Problem Is Also a Black Problem*, TABLET (Aug. 4, 2016), <https://www.tabletmag.com/jewish-news-and-politics/209977/black-lives-matters-jewish-problem> [<https://perma.cc/6LN4-DZZ9>]; Bari Weiss, *Ilhan Omar and the Myth of Jewish Hypnosis*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/opinion/ilhan-omar-israel-jews.html> [<https://perma.cc/96BV-ZWEP>].

54. *Schenck*, 249 U.S. at 52 (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

55. BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 70 (2007).

56. See JAMES M. ANDERSON, *DAILY LIFE DURING THE SPANISH INQUISITION* 92 (2002); 4 HEINRICH GRAETZ, *HISTORY OF THE JEWS* 200–06 (1894); FREDERIC DAVID MOCATTA, *THE JEWS OF SPAIN AND PORTUGAL AND THE INQUISITION* 20–21 (1877); JOSEPH PÉREZ, *THE SPANISH INQUISITION: A HISTORY* 9–12 (Janet Lloyd trans., 2005); GRETCHEN D. STARR-LEBEAU, *IN THE SHADOW OF THE VIRGIN: INQUISITORS, FRIARS, AND CONVERTS IN GUADALUPE, SPAIN* 37–38 (2003).

57. MIRI RUBIN, *GENTILE TALES: THE NARRATIVE ASSAULT ON LATE MEDIEVAL JEWS* 128 (1999).

58. ANDERSON, *supra* note 56, at 92.

59. GRAETZ, *supra* note 56, at 204–05.

another historian writes:

For centuries, Christians had been encouraged to hate the Jews. With preachers telling them, Sunday after Sunday, that Jews were perverted and guilty of complicity in the death of Christ, the faithful ended up by detesting them with a hatred that was bound one day to express itself in violence.<sup>60</sup>

From the verbal harassment Jews suffered during the Inquisition, Jewish expulsion from Spain during Ferdinand and Isabella's regal rein followed naturally from centuries of verbal degradation. By no means was this injustice accomplished in an expressive vacuum. The ideological floor for injustice was set by centuries of verbal abuses.<sup>61</sup>

Forced conversion, mass violence, exclusion from public office, mandatory ghettos, restrictions on professions, and prohibitions against mingling with Christians followed from the repeated spread of verbal hatred during the Inquisition. The economic consequences on Spain were ruinous, as many Jews fled to North Africa, Portugal, and Palestine. "Spain lost an incalculable treasure by the exodus of Jewish . . . merchants, craftsmen, scholars, physicians, and scientists, and the nations that received them benefitted economically and intellectually."<sup>62</sup> Many other ethnic groups have likewise suffered from long-term verbal degradations.

The danger of today comes from the far right who are led by charismatic leaders, like David Duke and Louis Farrakhan, and from the far left whose charismatic leaders include Linda Sarsour and Tamika Murray, who welcome anti-Semites into their movements.<sup>63</sup> While the United States remains a safe haven, without the mass killings of hot spots like Syria or the Democratic Republic of the Congo, it would be naive, especially after Donald Trump's Electoral College victory with the support of the Ku Klux Klan and the American Nazi Party, to believe that hate groups could not capture the attention of the electorate through racial incitement and xenophobia. With no limits to the marketplace of ideas, parties and politicians can harness age-old stereotypes to achieve political victories.

Understanding the risks of nefarious political capture, Germany and other countries prohibit anti-democratic parties from forming and run-

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60. PÉREZ, *supra* note 56, at 9.

61. MARVIN PERRY & FREDERICK M. SCHWEITZER, *ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT* 128 (2002).

62. 6 WILL DURANT, *THE STORY OF CIVILIZATION* 220 (1957). Durant also writes of Spain's economic losses from expelling Muslims from Castile and León. *See id.*

63. *See* Richard Cohen, *Why Does the Left Still Associate with Louis Farrakhan?*, WASH. POST (Jan. 21, 2019), [https://www.washingtonpost.com/opinions/why-does-the-left-still-associate-with-louis-farrakhan/2019/01/21/de47f966-1db7-11e9-9145-3f74070bbdb9\\_story.html?utm\\_term=.ae4cf5cc1c7d](https://www.washingtonpost.com/opinions/why-does-the-left-still-associate-with-louis-farrakhan/2019/01/21/de47f966-1db7-11e9-9145-3f74070bbdb9_story.html?utm_term=.ae4cf5cc1c7d) [<https://perma.cc/M7B4-YDW5>]; Deroy Murdock, *Farrakhan Awash in Federal Dollars, Anti-Semitic Hate Notwithstanding*, FOX NEWS (Dec. 26, 2018), <https://www.foxnews.com/opinion/farrakhan-awash-in-federal-dollars-anti-semitic-hate-notwithstanding> [<https://perma.cc/7SDU-X2LX>].

ning in elections.<sup>64</sup> Algeria recognizes the right of people to use the marketplace of ideas to organize political parties but prohibits them from violating fundamental values or the people's sovereign authority to safeguard "the democratic and republican nature of the State."<sup>65</sup> These countries have determined that maintaining representative democracies is of greater moment than securing a libertarian marketplace of ideas, especially one tainted by Social Darwinistic undertones.

In some of the worst crimes against humanity, hate speech has incited brutality against minorities inadequately protected through ordinary political processes. As I've detailed elsewhere, in the United States mis-ethnic speech has been used to justify the enslavement of blacks and aborigines.<sup>66</sup> Around the globe, mass slaughter has followed extensive, dehumanizing campaigns that drew from and stirred nativist, racist, bigoted, and otherwise exclusionary rhetoric.<sup>67</sup> The historian Ben Kiernan documents how dehumanizing narratives preceded, spread, and influenced massacres against segments of the indigenous Irish, Northern and Southern America natives, and Australian aboriginal populations.<sup>68</sup> Throughout the modern world, ethnocentrism and racism have also sparked violence through widely disseminated incitements in tribal clashes in Kenya.<sup>69</sup> Some of the most heinous examples of how media broadcasting of ethnic stereotyping coupled with abstract calls for violence can lead to extreme violence occurred in Rwanda prior to the 1994

64. GRUNDGESETZ [GG] [BASIC LAW] art. 21, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [<https://perma.cc/HW5U-6UMK>].

65. CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA 1989 (amended 1996), art. 42, *available at* [http://confinder.richmond.edu/admin/docs/local\\_algeria.pdf](http://confinder.richmond.edu/admin/docs/local_algeria.pdf) [<https://perma.cc/RUR7-G7HR>] ("The right to create political parties is recognized and guaranteed. However, this right cannot be used to violate the fundamental liberties, the fundamental values and components of the national identity, the national unity, the security and integrity of the national territory, the independence of the country and the People's sovereignty as well as the democratic and republican nature of the State.")

66. See ALAN GALLAY, *THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH, 1670-1717*, at 294 (2002); ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 28-29* (2002); DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA 127-28* (1992).

67. See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION 16-17* (2014) ("There is actually a long history to the links between animalization and genocide or ethnic cleansing, and the formula by no means ended with the Nazis [attempt to commit genocide against the Jews]. In 1994, when the Hutu slaughtered some 800,000 Tutsi neighbors in Rwanda, the victims were repeatedly likened to inyenizi, or cockroaches."). This is an example I shared with Davis during an extensive email exchange.

68. KIERNAN, *supra* note 55, at 77-100, 187-212, 219-48, 252, 276-309.

69. See BINAIFER NOWROJEE, *HUMAN RIGHTS WATCH, FAILING THE INTERNALLY DISPLACED: THE UNDP DISPLACED PERSONS PROGRAM IN KENYA 61-63* (1997); JOHN O. OUCHO, *UNDERCURRENTS OF ETHNIC CONFLICT IN KENYA 90* (2002); Kwamboka Oyaro, *KENYA: The Media Is Not Innocent*, INTER PRESS SERV. (Feb. 2, 2008), <http://www.ipsnews.net/2008/02/kenya-the-media-is-not-innocent/> [<https://perma.cc/2ZEH-B4DP>]; Ofeibe Quist-Arcton, *Tracing the Roots of Ethnic Violence in Kenya*, NAT'L PUB. RADIO (Jan. 31, 2008), <https://www.npr.org/templates/story/story.php?storyId=18582319> [<https://perma.cc/3R3Q-GSYW>].

genocide perpetrated by the Hutus against the Tutsis.<sup>70</sup>

The government of Sudan has supported and participated in racial hate propaganda spread by Jingaweid (Arab) militias against black Africans living in Darfur.<sup>71</sup> The government in the Democratic Republic of the Congo has relied on ethnic hatred to incite militias to perpetrate ethnic violence.<sup>72</sup> Publications filled with dehumanization, bigotry, and anti-Semitism fill Arab newspapers, inspiring terrorist groups like the Hamas and Hizballah to freely operate and fund violent operations. In Saudi Arabia, the government and its supported Wahhabi sect produces and writes textbooks that teach children that killing Jews and hating Christians is the way to true Muslim piety.<sup>73</sup>

Organizations and individuals who benefit politically or personally from incitement, threat, and harassment often adopt misethnic rhetoric that appeals to community prejudices. In his dissent to *Gitlow*, Holmes defends the legitimacy of political campaigns that bring populist autocrats to power. Once they are installed, popular dictatorships shut down opposition and, as in Russia under the Bolsheviks or Turkey under the Justice and Development Party, stymie democratic participation. Missing from his account of populist rhetoric is any proportional context of how inflammatory speech can spark discrimination and violence. The instigators of racial, ethnic, nationalistic, and religious intolerance have relied on various forms of propaganda to influence conduct by unsound, clearly erroneous, and dehumanizing views, ideologies, and instigations.

This raises the question of how to determine whether governmental authority can be brought to bear on misethnic speech intentionally calling on followers to commit atrocities. Rather than figuring out how likely it is that speech will cause an imminent harm, as *Brandenburg* requires of judges, a more nuanced analysis is needed to transcend the deficiencies of

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70. ANTHONY CORTESE, *OPPOSING HATE SPEECH* 45–46 (2006); CHARITY KAGWINDUNGU, *THE CHALLENGES IN PROSECUTING PRINT MEDIA FOR INCITEMENT TO GENOCIDE*, in *THE MEDIA AND THE RWANDA GENOCIDE* 330, 339–40 (Allan Thompson ed., 2007).

71. See BUREAU OF DEMOCRACY, H.R. & LAB., U.S. DEP'T OF STATE, *SUDAN: ETHNIC CLEANSING IN DARFUR* (Apr. 27, 2004), <https://2001-2009.state.gov/g/drl/rls/31822.htm> [<https://perma.cc/QYK7-887S>]; BRIAN STEIDLE & GRETCHEN STEIDLE WALLACE, *THE DEVIL CAME ON HORSEBACK: BEARING WITNESS TO THE GENOCIDE IN DARFUR* xvii (2007); Mahgoub El-Tigani Mahmoud, *Inside Darfur: Ethnic Genocide by a Governance Crisis*, 24 *COMP. STUD. S. ASIA, AFR. & MIDDLE E.*, Nov. 2, 2004, at 3.

72. See CHRISTIAN P. SCHERRER, *GENOCIDE AND CRISIS IN CENTRAL AFRICA: CONFLICT ROOTS, MASS VIOLENCE, AND REGIONAL WAR* 283 (2002); *HRW Alarmed About Hate Radio Broadcasts and the Incitement of Ethnic Violence in the DRC*, HUMAN RIGHTS WATCH (Aug. 12, 1998), <https://www.hrw.org/news/1998/08/12/hrw-alarmed-about-hate-radio-broadcasts-and-incitement-ethnic-violence-drc> [<https://perma.cc/78CX-P3BM>]; Hannah Summers, *Democratic Republic of Congo: 250 Killed in 'Ethnic' Massacres, Says UN*, *GUARDIAN* (Aug. 5, 2017), <https://www.theguardian.com/global-development/2017/aug/05/democratic-republic-of-congo-250-killed-in-ethnic-massacres-says-un> [<https://perma.cc/HP66-7BT5>].

73. See Anne Applebaum, *The Saudi Guide to Piety*, *WASH. POST* (July 22, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/21/AR2008072102357.html> [<https://perma.cc/4LTN-EA49>].

Holmes's Social Darwinistic version of the marketplace of ideas.<sup>74</sup> How likely racial, ethnic, and religious hatred is to stir up violent or anti-democratic conduct is a contextual question needing analysis of the speaker's interests, including the circumstances under which the statement was made; countervailing public concerns to advance, maintain, and safeguard representative governance committed to liberty, equality, and the general welfare; fit between government action and the end sought; the notoriety of the speaker; and whether there are less restrictive means for the government to achieve its intent.

#### IV. TRUTH AND DELIBERATIVE DEMOCRACY

The search for constitutional truth logically involves at least the freedom to exchange views, to criticize, to ideate, and to emote. These are content-based preferences of deliberative democracy. The First Amendment marketplace of ideas is critical for the preservation of those substantive values. Free exchange of idea is necessary to just governance predicated on reasonable policies, statutes, regulations, and executive orders. Prudence should be exercised, not categorical cheerleading of all speech, totalitarian and egalitarian alike. Holmes's version of the marketplace of ideas is not utilitarian, as was John Stuart Mill's earlier use of the analogy. Even Mill recognized that "the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution."<sup>75</sup> Moreover, as the great American free speech theorist Alexander Meiklejohn explained it, the "marketplace of ideas" doctrine is unhelpful in assessing the differences between right and wrong, as well as the differences between true and false.<sup>76</sup>

As we saw in Part III, time and again hate speech has been crucial for catalyzing misethnic harms. Even democratic institutions can be exploited to bring a violent minority to power or to harness the prejudice of the people into collective violent acts, including mobocracy.

The First Amendment is not a shield for intentionally violent and genocidal rhetoric. Governance that caves into the Holmesian proletarian dictatorship version of truth<sup>77</sup> undercuts pluralism and governance for the happiness and safety of free and equal persons. There are limits to free speech. The difficult question for courts, however, is how to determine whether group animus will likely instigate state or vigilante harms against identifiable groups.

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74. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

75. JOHN STUART MILL, *ON LIBERTY* 89 (Pelican Classics 1980) (1859).

76. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 87 (1948).

77. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("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.").

This essay argues that the delegation model of democracy signaled by Justice Holmes leans too strongly to majoritarian public opinion. Majoritarian democracy can be manipulated by anti-egalitarian parties.<sup>78</sup> We see that today throughout the world, where democracies have been manipulated by autocratic forces, as in Venezuela, Turkey, the United States, and Poland. Even autocracies, such as North Korea, Cameroon, Zimbabwe, and the Democratic Republic of the Congo, use elections—albeit with rigged results.

The U.S. Supreme Court's libertarian doctrine on campaign financing poses a challenge to deliberative democracy, allowing plutocratic and oligarchic influences (corporate and private) to gain significantly more access than the average citizen to public officials by contributing to campaigns or expending their own money to promote special interest issues.<sup>79</sup> This political preference for the wealthy in the United States threatens to undermine orderly, fair, and representative elections and to increase the appearance of corruption and, in some cases, even actual corruption.

Warnings of the dangers associated with majoritarian abuses of power are found in the political philosophy of James Madison, who opposed factional cabals in *Federalist No. 10*. In that tract, he explained the need to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.”<sup>80</sup> Representative deliberation, at least in theory, seeks policy solutions that achieve the public good for all segments of the population rather than automatic preferences that emerge in the marketplace of ideas. A representative government, as Madison went on to say, may better pronounce the public voice “by the representatives of the people . . . than if pronounced by the people themselves convened for the purpose.”<sup>81</sup> Factions, on other hand, can betray the interests of the people's general welfare.<sup>82</sup> As Madison explained in *Federalist No. 51*,

In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . by introducing into the government . . . a will independent of the society itself.<sup>83</sup>

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78. More than two millennia ago, Plato described in the *Republic* how demagogues pursuing autocratic rule manipulate democratic institutions and gain control through factional politics. 1 PLATO, THE REPUBLIC, in THE DIALOGUES OF PLATO 820–24 (B. Jowett trans., 1937).

79. Ganesh Sitaraman, *Economic Inequality and Constitutional Democracy*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 42, at 537–38.

80. THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961).

81. *Id.*

82. *Id.*

83. THE FEDERALIST NO. 51, at 352–53 (James Madison) (Jacob E. Cooke ed., 1961).



To Madison's account, we may add that the "general good" should be understood to be a social condition where each individual is treated with equal dignity.

The bounds of democracy, then, are representation and justice, with liberal equality for the common good being essential to establish a reasonably ordered self-governing polity. Now what the bounds of liberal equality are is always a matter of contestation. The marketplace of ideas provides a forum for sorting out ideas, but the dominant forces of the community should not define truth. An analysis of the matter at stake is difficult in decisions pitting government against private interests, but answers need not be along Holmes's Social Darwinistic model. They should not, for example, allow neo-Nazi rallies to proceed, where there is a reasonable likelihood of violence as occurred during the violent neo-Nazi and alt-right rally in Charlottesville, Virginia, in the summer of 2017 where participants chanted, "The Jews will not replace us!"<sup>84</sup>

The task of free speech theory is to articulate the conditions for robust debate, cathartic expression, and informative communication, while defining narrowly tailored regulations that punish linguistic conduct that is intentionally threatening to individuals and groups or inciting of others to harm them. Free speech commands a special place in a deliberative democracy because it allows each person, no matter how powerful or renowned, to participate in discussions about polity, personal taste, and feelings. Yet some balance must be made to provide the state with legitimate control and the liberty interests of the individual. That scale is one Justice Breyer has advocated in concurrence, weighing the rights of the speaker against countervailing policy interests, means/ends fit, and alternative avenues of communication.<sup>85</sup>

## V. CONCLUSION

Speech that causes harm, including workplace and educational harassment,<sup>86</sup> can be limited without violating the First Amendment. Legitimate justifications for coercive laws can work against majoritarian interests, preventing harms even when such measures are unpopular with the electorate. The marketplace of ideas is not absolutely determinative; to the contrary, it must be tied to the fundamental ethos of the Constitution requiring general welfare through safeguards of freedom and equal-

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84. See Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/> [<https://perma.cc/6JYE-BSCS>]; Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline> [<https://perma.cc/X497-F7W5>]; *What Charlottesville Changed*, POLITICO MAG. (Aug. 12, 2018), <https://www.politico.com/magazine/story/2018/08/12/charlottesville-anniversary-supremacists-protests-dc-virginia-219353> [<https://perma.cc/W8SR-A27K>].

85. See *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (Breyer, J., concurring); ALEXANDER TESIS, *CONTEXTUALIZING FREE SPEECH* (forthcoming 2020).

86. See Civil Rights Act of 1964 tit. VI, 42 U.S.C. §§ 2000d–2000d-7 (2012); Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e–2000e-17 (2012).

ity. Free speech theory, then, need not be libertarian—and certainly not Social Darwinism in Justice Holmes’s sense—but grounded in equal political representation and universal human dignity. Freedom is not absolute but subject to limitations necessary to equal general welfare. The right to free speech is not a stand-alone principle but is linked to the overarching purpose of deliberative democracy to establish laws likely to achieve liberal equality for the common good.<sup>87</sup>

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87. For an extensive study on how to analyze free speech issues through a contextual framework, see ALEXANDER TESIS, *CONTEXTUAL FREE SPEECH* (forthcoming 2020); Alexander Tesis, *Free Speech Constitutionalism*, 2015 ILL. L. REV. 1015 (2015).

