



## First Amendment potluck

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## FIRST AMENDMENT POTLUCK

ROBERT JENSEN\*

*This essay argues that the marketplace-of-ideas metaphor for law is inadequate to deal with contemporary problems in free expression because many of the entailments of the metaphor are destructive of communication and community. After a review of how metaphors work in the world and the law, the essay reviews the history of the marketplace metaphor, critiques the metaphor and its entailments, and makes a case for a potluck supper metaphor that would be more helpful in resolving contemporary conflicts over freedom of expression.*

Legal guarantees for free expression in the United States have expanded dramatically in the 20th century, while effective free expression in a corporate-dominated, mass-mediated society has contracted. During that same period, issues have emerged that make it clear that what appear to be victories for free expression often raise the question of "free expression for whom?" So, at the end of this century United States citizens are relatively free to speak out against the government during wartime in ways that were criminalized at the beginning of the century. At the same time, the growth of mass media and concentration of ownership has made it difficult, if not impossible, for most citizens to gain effective access to the public sphere. Meanwhile, the protection of hate speech and pornography has freed some voices at great costs to others.

In short, things are getting better, things are getting worse and things are getting more complicated. Suppression of speech by governmental forces—always a real threat, especially to radical voices from less privileged sectors of society—is no longer the primary free expression problem. The dominance of private power in

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matters concerning free expression grows, and grows more threatening to real democracy.<sup>1</sup> In areas such as access to mass media, campaign finance, advertising, hate speech and pornography, it is the power of non-governmental people and organizations (primarily large corporations) that threaten real freedom of expression, a truly democratic political system, or social equality for oppressed groups.<sup>2</sup>

Rather than focus on specific legal and policy proposals regarding these problems, in this essay I want to reflect on a more basic question: The value of the dominant metaphor that underlies contemporary free expression law, the marketplace of ideas. Although that metaphor has in many instances helped carve out protection for free expression, I argue that at this point in history it should be scrapped. The metaphor is unhelpful not only for the often-stated reasons—that the notion of an open marketplace for speech is romantic nonsense in contemporary mass society, and that the marketplace is too painfully accurate a metaphor in a world in which increasingly speech is money—but because the deeper entailments of the metaphor are in some ways destructive of communication and community. In other words, the metaphor is, unfortunately, descriptively accurate in contemporary society, but normatively insufficient. I will argue for a new metaphor, the potluck supper, which offers us a better chance of understanding and achieving free expression.

## METAPHORS

A growing literature drawing on philosophy, linguistics and communication studies has shown how metaphors not only organize our thinking but shape our experience and action.<sup>3</sup> Metaphors structure how we understand the world; metaphors are important not just for what they tell us but for how they affect how we see the world. Metaphors provide options and reasons and frame evalu-

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<sup>1</sup>I use "private" here in the fashion typical in American political discourse, although I reject the public/private distinction that underlies American law. Because no law is pre-political or natural, all private space is in some sense the result of a public action. Private space is constructed collectively, often by law. For a discussion of this claim in relation to the First Amendment, see J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.

<sup>2</sup>See generally RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (1996).

<sup>3</sup>See, e.g., GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); EVA FEDER KITTAY, *METAPHOR: ITS COGNITIVE FORCE AND LINGUISTIC STRUCTURE* (1987).

ation. Metaphors can determine what counts as a possible course of action or a description of events. Metaphors highlight some aspects of the world around us and obscure others.

Eva Feder Kittay argues that metaphorical thought is “as fundamental as inductive and deductive reasoning in formulating hypotheses, providing explanations, forming categories, generating predictions, and guiding behaviour.”<sup>4</sup> She suggests:

The cognitive force of metaphor comes, not from providing new information about the world, rather from a (re)conceptualization of information that is already available to us. ... Metaphor is a primary way in which we accommodate and assimilate information and experience to our conceptual organization of the world. In particular, it is the primary way we accommodate new experience. Hence it is at the source of our capacity to learn and at the centre of our creative thought.<sup>5</sup>

The power of metaphors is in their ability to bring a whole set of relations with them, to allow quick reference to complex relations and stories, to facilitate understanding by providing structure for knowledge.

George Lakoff and Mark Johnson also suggest that our conceptual system is fundamentally metaphorical in nature. Because much of our social reality is understood in metaphorical terms and our conception of the physical world is partly metaphorical, metaphor plays a significant role in determining what is real. So, metaphors are not distorting lenses that we need to shed, not things we need to see beyond:

In fact, one can see beyond them only by using other metaphors. It is as though the ability to comprehend experience through metaphor were a sense, like seeing or touching or hearing, with metaphors providing the only ways to perceive and experience much of the world. Metaphor is as much a part of our functioning as our sense of touch, and as precious.<sup>6</sup>

So, it usually is not the truth or falsity of a metaphor that is at issue, “but the perceptions and inferences that follow from it and the

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<sup>4</sup>KITTAY, *supra* note 3, at 326.

<sup>5</sup>*Id.* at 39.

<sup>6</sup>LAKOFF & JOHNSON, *supra* note 3, at 239.

actions that are sanctioned by it. ... [W]e define our reality in terms of metaphors and then proceed to act on the basis of the metaphors."<sup>7</sup>

In this essay, I will focus on these "entailments" of the metaphor, what Johnson defines as "the perceptions, discriminations, interests, values, beliefs, practices, and commitments tied up with the metaphorical understanding."<sup>8</sup> Entailments affect patterns of inference, perception and action: "What is possible under one metaphorical understanding is not always possible under another."<sup>9</sup>

Metaphors also have moral dimensions, both because the practices they inspire have consequences that are subject to moral evaluation and because metaphors structure the options people see as available. If something seems to be the only reasonable option, it appears immune to ethical investigation. If we cannot see outside the framework of the metaphor, we may not see other morally preferable choices. Ethical/political questions arise, then, about who gets to decide which metaphors are used.

This essay examines the way in which the marketplace metaphor structures our view of free speech by looking at the entailments of the metaphor and then raises ethical/political questions about who benefits from the continued use of that metaphor.

## METAPHORS AND THE LAW

Judges have warned about the "dangers" of metaphors in the law.<sup>10</sup> United States Supreme Court Justice Potter Stewart, for example, wrote that "the Court's task is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution,"<sup>11</sup> while New York Court of Appeals Judge Benjamin Cardozo warned that metaphors in law "are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>12</sup>

Some legal scholars also have expressed a fear that metaphors can too easily deceive. For example, Safranek suggests that judges

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<sup>7</sup>*Id.* at 158.

<sup>8</sup>MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* 132 (1987).

<sup>9</sup>*Id.* at 136.

<sup>10</sup>Haig Bosmajian, *The Judiciary's Use of Metaphors, Metonymies and Other Tropes to Give First Amendment Protection to Students and Teachers*, 15 J.L. & EDUC. 439, 442-43 (1986).

<sup>11</sup>*Engel v. Vitale*, 370 U.S. 421, 445 (1962).

<sup>12</sup>*Berky v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94 (1926).

use metaphors to create obscurity, not clarity. In First and Fourteenth Amendment cases, he argues, the Supreme Court's use of metaphors "is an attempt to mask what the Court seems unwilling to admit: that the Court lacks a paradigm. ... [It] uses these metaphors to mask the random nature of its decisions as it projects an appearance of scientific objectivity upon the Supreme Court's decisions."<sup>13</sup>

This reflects the view that metaphors, at least as they are used by the Court, are likely to distort, and that propositions and rigorous logic are the proper bases of legal reason. More than two decades of Critical Legal Studies, feminist theories of jurisprudence and critical race scholarship have highlighted the limitations of such legal formalism.<sup>14</sup> If the philosophical examinations of metaphor cited earlier are accurate, it would be better to acknowledge that metaphor is everywhere in the law just as it is in all use of language. It is not a question of whether a court uses metaphors, but which ones are used. As Thomas Ross notes, "legal metaphors are indispensable pieces of the legal culture, not merely tolerated, but needed."<sup>15</sup>

That is not to say that metaphors cannot be used toward bad ends. Indeed, it is when the belief in scientific truth is accepted without examination that metaphors can be most dangerous. As Ball suggests, "preemptive metaphors" can be imposed by those in power or simply through evolution:

When such colonization of the mind occurs in conjunction with adherence to the belief that truth is objective and absolute, then the ruling metaphors—more dangerous because unrecognized as metaphor—come to define what is considered to be true ... . Without access to alternative metaphors, we act and think on the basis of limited comprehension masquerading as the whole truth.<sup>16</sup>

Ball argues that the main metaphor for law is law-as-bulwark-of-freedom, protecting people and making orderly sense of otherwise chaotic life. This metaphor "masks much aggression against the powerless ... [and] also allows injustice to harden into law which

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<sup>13</sup>Stephen J. Safranek, *Can Science Guide Legal Argumentation? The Role of Metaphor in Constitutional Cases*, 25 LOY. U. CHI. L.J. 357, 360 (1994).

<sup>14</sup>E.g., Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994).

<sup>15</sup>Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1077 (1989).

<sup>16</sup>MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY* 22 (1985).

then commands obedience."<sup>17</sup> He offers the metaphors of water and the hydrologic cycle to replace the bulwark: "[L]aying down the law may prove promising if the law laid down is not like rocks for a dam in opposition to life, but like stones on a creek bank along the axis of revolutionary movement. The end is not stasis but circulation."<sup>18</sup>

That metaphor could see law as "connecting rather than disconnecting, enhancing a flow of dialogue, containing the dynamics of life in common."<sup>19</sup> This essay aims at a similar critique of the dominant metaphor in First Amendment law and a preliminary attempt to think through a replacement.

## WRESTLING

Long before the marketplace metaphor took hold in the United States, two of England's most well-known defenders of free speech, John Milton and John Stuart Mill, made their arguments in part by highlighting the competition between truth and falsehood, though neither invoked the market. Discussions of free-speech metaphors typically begin with Milton's *Areopagitica*, an essay arguing against the licensing of printing in 17th century England.

Milton first cites the Biblical comparison of truth to a streaming fountain: "[I]f her waters flow not in perpetuall progression, they sick'n into a muddy pool of conformity and tradition."<sup>20</sup> But he does not pursue the image of truth as flowing water and goes on to offer his often-quoted wrestling metaphor:

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter.<sup>21</sup>

Milton goes on to call the individual's search for truth the "hardest labour in the deep mines of knowledge," after which one

calls out his adversary into the plain, offers him the advantage of wind and sun, if he please; only that he may try the matter by dint of

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<sup>17</sup>*Id.* at 25.

<sup>18</sup>*Id.* at 33.

<sup>19</sup>*Id.* at 122.

<sup>20</sup>John Milton, *Areopagitica*, in *THE PROSE OF JOHN MILTON* 265, 310 (J. Max Patrick ed., New York University Press 1968) (1644).

<sup>21</sup>*Id.* at 327.

argument, for his opponents then to skulk, to lay ambushments, to keep a narrow bridge of licencing where the challenger should passe, though it be valour enough in shouldiership, is but weakness and cowardise in the wars of Truth. For who knows not that Truth is strong next to Almighty; she needs no policies, nor stratagems, nor licensings to make her victorious.<sup>22</sup>

For Milton, the test was raw strength, not ability to win acceptance in the market, and he explicitly rejected the comparison of speech and goods: "Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all knowledge in the Land, to mark and licence it like our broad cloth, and our wooll packs."<sup>23</sup>

Still, for Milton truth and falsehood are in some kind of contest, in battle if not in business. The only way to defeat truth, he suggests, is by ambush.

Milton also argued that just as vice is necessary to understand virtue, so is "the scanning of error to the confirmation of truth."<sup>24</sup> Likewise, Mill contended that falsehood (or, what looks as if it is false) is valuable because (1) it may in fact turn out to be true, (2) it may contain a portion of the truth which would come out in the conflict or (3) even if it is totally false, it can keep the truth from becoming dead dogma. However, Mill did not share Milton's faith in the certainty of truth's victory:

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. If not suppressed forever, it may be thrown back for centuries.<sup>25</sup>

People are, Mill cautioned, "not more zealous for truth than they often are for error."<sup>26</sup>

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<sup>22</sup>*Id.* at 328.

<sup>23</sup>*Id.* at 303-04.

<sup>24</sup>*Id.* at 288.

<sup>25</sup>JOHN STUART MILL, ON LIBERTY 27 (Elizabeth Rapaport ed., Hackett 1978) (1859).

<sup>26</sup>*Id.* at 28.



## THE MARKETPLACE

This discussion should start with the obvious qualifier that the free marketplace invoked by this metaphor—individuals engaging in economic activity (a) with total freedom of entry and exit into the market and perfect knowledge of all opportunities, hence (b) without unjust interference or unfair advantage—is mythical and bears little resemblance to past or present markets in Western industrial capitalism, which always have been structured by government to benefit certain interests, almost always of the wealthy and powerful. As seen in the rhetoric justifying the North American Free Trade Agreement and the Multilateral Agreement on Investment, “free” trade and “free” markets are imposed on weaker nations by more powerful ones to allow the powerful to more extensively exploit the weaker. So, this discussion of the metaphor will refer not to real markets, but to the mythical market of neo-classical economics.

The marketplace metaphor is, of course, not the only metaphor used in judicial decisions concerning freedom of expression. For example, in a review of six key Supreme Court decisions, Donna Dickerson identified six principal metaphors: guardian, foundation, light source, medicine, commodity and space.<sup>27</sup> But it is the marketplace metaphor that has attracted the most attention, showing up in free speech cases with increasing frequency through the 20th century (in 29 cases in the 1980s alone), in virtually every area of First Amendment law and in some non-expression cases as well.<sup>28</sup>

The story of the metaphor begins in 1919. After crafting the clear-and-present-danger standard and voting with the Supreme Court majority to repress dissident speech in several World War I era cases, Justice Oliver Wendell Holmes turned toward a more expansive view of the First Amendment in *Abrams*. Holmes and Justice Louis Brandeis argued that Congress cannot forbid all efforts to change people's minds and in his dissent Holmes offered up the metaphor of the market as the best test of truth:

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

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<sup>27</sup>Donna Dickerson, <Freedom of Expression> and Cultural Meaning: An Analysis of Metaphors in Selected Supreme Court Texts, 3 COMM. L. & POL'Y 367 (1996).

<sup>28</sup>W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1994).

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. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.<sup>29</sup>

The marketplace metaphor proved to have staying power. For example, Justice William O. Douglas drew on the metaphor in his dissent in one of the Communist conspiracy cases of the 1950s:

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.<sup>30</sup>

Justice William Brennan used the phrase “marketplace of ideas” in his concurrence in *Lamont v. Postmaster General* in 1965. The Court overturned a law giving the postmaster the right to detain communist material unless a person asked for it, focusing on the right to receive information: “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.”<sup>31</sup>

While generally used to argue against government regulation of speech, the marketplace metaphor was used to justify broadcast regulation in *Red Lion Broadcasting Co. v. FCC*. In that case, which upheld the constitutionality of the Fairness Doctrine, the goal of a free marketplace of ideas required government intervention to prevent monopolies because: “[T]he purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.”<sup>32</sup>

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<sup>29</sup>*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>30</sup>*Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

<sup>31</sup>*Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

<sup>32</sup>*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

In *CBS v. Democratic National Committee* a few years later, the Court ruled that the First Amendment did not compel broadcasters to accept editorial ads. Brennan dissented, willing to apply *Red Lion* reasoning to force stations to take ads. Chief Justice Warren Burger's majority opinion argued that the marketplace would not be served by forcing acceptance of the ad because such a policy benefits only those who can afford to pay. Brennan, however, argued that people have a right to engage in and hear vigorous debate. To give the network the right to stop ads, Brennan wrote, excludes citizens "from the most effective 'marketplace of ideas' ever devised."<sup>33</sup>

David Cole has pointed out that Brennan's conception of the market is more like the Greek "agora," a central meeting place, than a contemporary market, and is less weighed down with Holmes' economic baggage: "The marketplace of ideas connotes diversity and pluralism at ground level without resting on theories of abstract, truth-generating invisible hands."<sup>34</sup> Brennan moves from a focus on market acceptance as a test of truth to the rights of the individual speaker and the value of everyday exchanges in a marketplace. Because television is a key public forum, Brennan reasoned, people should have access. Cole writes: "Read as agora rather than as a free market funnel for truth, [the metaphor] carries with it the underpinnings of Brennan's conceptual revision, evoking a strong concern for access to effective communication—both listening and speaking, buying and selling—on public issues."<sup>35</sup>

The dominance of the metaphor can be seen in the fact that it can be used by all sides in varying First Amendment debates. For example, the majority opinion in *Texas v. Johnson*, which struck down a state law that criminalized burning a flag, asserts: "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas."<sup>36</sup> In his dissent in that case, Chief Justice William Rehnquist writes, "The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."<sup>37</sup>

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<sup>33</sup>CBS v. Democratic National Committee, 412 U.S. 94, 199 (1973).

<sup>34</sup>David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 894 (1986).

<sup>35</sup>*Id.* at 902.

<sup>36</sup>*Texas v. Johnson*, 491 U.S. 397, 417 (1989).

<sup>37</sup>*Id.* at 429 (Rehnquist, J., dissenting).

Outside of the court, the marketplace has been widely invoked in the argument to deregulate the broadcast industry, which took many forms, including the abandonment of the Fairness Doctrine by the FCC. This total reliance on market mechanisms to produce free expression was perhaps best summed up by former FCC chair Mark Fowler, who said of the Reagan-era move to deregulate broadcasting, "It was time to move away from thinking about broadcasters as trustees. It was time to treat them the way almost everyone else in society does—that is, as businesses." In short, Fowler asserted, "television is just another appliance. It's a toaster with pictures."<sup>38</sup>

### CRITIQUES OF THE MARKETPLACE METAPHOR

The common critique of the marketplace metaphor—that the market has been cornered by those with the most money—usually does not undermine the metaphor. When commentators point out how vast disparities of money and power can skew the marketplace of ideas, they typically are not saying it is an inherently bad metaphor but are using the metaphor to critique existing distributions of power. Implicit in these critiques is the notion that if there existed a truly free and open marketplace of ideas in which everyone could be heard, all would be well. For example, Stanley Ingber argues the marketplace has become a "legitimizing myth" that no longer promotes free speech: "Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market."<sup>39</sup>

Cass Sunstein offers a deeper critique but one that does not abandon the metaphor. He argues that, contrary to popular belief, no market is ever free of government; distributions of wealth and power are based on law and regulatory systems. There is no pre-political or pre-regulatory status quo that we can look to as the way things would be if not for government interference. But, in arguing for the possibility of the constitutionality of some content rules, Sunstein invokes the metaphor by suggesting that "we do not know what a well-functioning marketplace of ideas would look like."<sup>40</sup> The

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<sup>38</sup>Quoted in Bernard D. Nossiter, *The F.C.C.'s Big Giveaway Show*, NATION, Oct. 26, 1985, at 402.

<sup>39</sup>Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 (1984).

<sup>40</sup>Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 296 (1992).

implication is that a well-functioning marketplace of ideas might serve us well.

Jerome Barron was an early proponent of the notion that the marketplace does not serve free speech. Barron argued in an influential law review article: "Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist."<sup>41</sup>

Barron suggested that the Supreme Court was well aware that contemporary social realities made the marketplace metaphor useless, but that "[p]erhaps the interment of this theory has been denied for the understandable reason that the Court is at a loss to know with what to supplant it."<sup>42</sup>

Barron pursued this position in front of the Supreme Court in a case concerning the constitutionality of a Florida statute that mandated that newspapers give space to candidates for replies to attacks. In his opinion striking down the right-of-reply statute, and rejecting Barron's argument, Burger acknowledged that "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."<sup>43</sup> But Burger and a unanimous Court rejected government solutions to the market failure.

One way of understanding the problems of the marketplace metaphor in contemporary society is to acknowledge, like Barron, its nostalgic quality. A more accurate, updated metaphor, some have suggested, would be the supermarket, in which people do not talk or argue about the quality and value of products but simply fill their carts with "prepackaged goods priced by people, or a computer, we will never meet."<sup>44</sup> Charles Pinzon explains the various pressures at work to decide which products get the extensive, but fixed, shelf space in a supermarket, concluding, "Given the resources needed to gain outlets for new products, smaller manufacturers are at a distinct disadvantage when competing with the impressive resources of the food giants."<sup>45</sup>

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<sup>41</sup>Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

<sup>42</sup>*Id.* at 1647.

<sup>43</sup>*Miami Herald v. Tornillo*, 418 U.S. 241, 248 (1974).

<sup>44</sup>Bosmajian, *supra* note 10, at 451.

<sup>45</sup>Charles M. Pinzon, *The Supermarket of Ideas: How Information Subsidy Can Limit the Access of Ideas*. Paper presented to the Free Speech in a Democratic Society Conference 6 (Tampa, Fla., Nov. 1994) (on file with author).

The same can be said for the ideas available in the mass media's supermarket of ideas. The trend in the media business is toward a "media monopoly," the concentration of power in fewer and fewer corporations<sup>46</sup> that are increasingly global in scope.<sup>47</sup> William Bailey makes similar points to bolster his argument that the root problem is giving fictional corporate persons First Amendment rights:

The modern marketplace of ideas is a commercial, mass-media pandemonium where the role of the ordinary citizen is little better than that of a consumer in a supermarket. There are many attractive packages to choose from, but the contents are all standard and manufactured for easy packaging, shipping, and the largest return for the smallest investment.<sup>48</sup>

Mark Tushnet has made a more direct attack on the metaphor in his critique of the deep structure of capitalist ideology in areas of corporate speech, which he claims are based on the doctrines of (1) the corporation as person, (2) the marketplace metaphor and (3) "money talks." He argues that the metaphor of corporations-as-persons is forced and unnatural, and that:

The market metaphor and "money talks" are powerful precisely because they capture important aspects of life in a capitalist society, where nearly everything, from food to friendship, seems to be a commodity available for sale and purchase. But then it seems only sensible to treat speech as a commodity as well.<sup>49</sup>

Tushnet asserts that decisions such as *First National Bank v. Bellotti*,<sup>50</sup> which affirmed corporations' First Amendment rights, and *Buckley v. Valeo*,<sup>51</sup> which treated money as speech in campaign finance, were inevitable, for: "If free speech was defended with the metaphor of the market, it was only a matter of time and political circumstance before the market was defended with the metaphor and substance of free speech."<sup>52</sup>

<sup>46</sup>BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (5th ed. 1997).

<sup>47</sup>EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA: THE NEW MISSIONARIES OF GLOBAL CAPITALISM* (1997).

<sup>48</sup>William Bailey, *Corporate/Commercial Speech and the Marketplace First Amendment: Whose Right Was It, Anyway?* 61 S. COMM. J. 122 (1995).

<sup>49</sup>Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 253, 260 (David Kairys ed., 1982).

<sup>50</sup>435 U.S. 765 (1978).

<sup>51</sup>424 U.S. 1 (1976).

<sup>52</sup>Tushnet, *supra* note 49, at 258.

I want to move on to argue that the marketplace metaphor is flawed not solely because the modern marketplace is less like a free-flowing bazaar and more like a sterile supermarket. I will examine the entailments of the marketplace and suggest that it is inherently inadequate as a metaphor for questions about freedom of expression.

### THE ENTAILMENTS OF THE MARKETPLACE METAPHOR

I first want to consider four core entailments: individualism, rationality, competition and voluntariness. From there, I will talk about several corollary entailments that grow from those.

Central to the market ideology is the concept of the rational economic man (historically, economists have gendered this mythical person as male). Each person enters a market as an individual, a buyer or seller, with no necessary connection to others except for a common acceptance of the rules of the game. Any collective action, any sense of connection, occurs only when those autonomous individuals choose to cooperate to further their own self-interest. In this world, rationality is defined simply as maximizing utility. One is rational when one acts in one's own self-interest to gain those things one desires. Inherent in this conception is the notion of splitting off reason and emotion, so that the rational economic man can make those self-interested decisions untainted by sentiment. Also implied is the standard of objectivity. In the market, competition is said to be the engine that fuels the machine, the force that sparks insight and innovation. Without it, market ideology warns, society would fall into a morass of mediocrity. This is taken to be natural, an inherent feature of being human. And, in the market, exchange behavior is assumed to represent voluntary, uncoerced choice that is by definition mutually profitable and nonexploitative.

The problems with this model are readily evident: Individualism is an inadequate account of how we become persons; rationality-as-maximizing-utility is a caricature of human thinking and decision-making; competition produces much waste and human suffering; and only by ignoring the vast disparities in power and control of resources can exchanges be said to be voluntarily engaged in. The market assumptions embrace an impoverished view of humanity, one of the reasons for the failure of market economics.<sup>53</sup>

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<sup>53</sup>I realize that statement would be taken as lunacy by many, as capitalism appears to have won out in the Cold War. But the collapse of a competing system

Nancy Hartstock points out this conception of people constructs "a radically truncated and incompleting creature, incapable of either honor or ferocity" and reduces the variety of human passions to a desire for economic gain. The market account also "legitimizes (by obfuscating and concealing) relations of domination, presents coercion as choice, and ultimately justifies domination."<sup>54</sup> She continues:

By claiming (falsely) that we live in a world of free and equal individuals interacting on the basis of self-interest, exchange theorists impoverish the theoretical understanding of community. ... Theorization of the community in the form of a market results in the conclusion that the human community can only be fragile, instrumental, and ultimately false, composed of person with no intrinsic connections with each other. Human beings are held to be profoundly separate and isolated from each other, lacking even common preference and sharing little more than the most elementary needs. ... A community that bases itself on the self-interested passing back and forth of objects can only be an instrumental community in which exchange and competition lead directly to relations of domination.<sup>55</sup>

Whatever the value of market theory in economics—and I think it has little if any—these constructions of human nature are clearly detrimental to understanding speech. As Paul Campos writes: "The marketplace of ideas commodifies, or, if you will, profanes the inexpressible richness of experience by reducing our communicative gestures to an impoverished series of tradable propositions which are assumed to capture all we know, and all we need to know."<sup>56</sup>

From these basic assertions, I will examine some of the specific entailments that come with the marketplace-of-ideas metaphor:

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(totalitarian, command-style communism à la the Soviet Union) does not necessarily mean capitalism has not failed as well. By failure, I simply mean that the system has not provided widespread prosperity and human happiness. The material gain of a few has required the abject suffering of millions, both in the United States and around the world. See generally EDWARD N. WOLFF, *TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT* (1995). For an alternative economic vision, see MICHAEL ALBERT & ROBIN HAHNEL, *LOOKING FORWARD: PARTICIPATORY ECONOMICS FOR THE TWENTY FIRST CENTURY* (1991).

<sup>54</sup>NANCY M. HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* 48–49 (1983).

<sup>55</sup>*Id.* at 50.

<sup>56</sup>Paul Campos, *Silence and the Word*, 64 U. COLO. L. REV. 1139, 1141 (1993).



1. The right to speak, not right to be heard, is guaranteed, just as in the market for goods and services one has a right to sell but is not guaranteed a buyer.
2. One asserts a broad right to speak but the system imposes no responsibilities to others or to the common good. The only checks come through product-liability style laws; in expression, this involves the torts of libel and invasion of privacy and narrow criminal actions such as direct incitement to lawless action. Therefore, there can be only minimal rules. Regulations that question the individualism of the marketplace metaphor are unacceptable.
3. The marketplace's virtue, at least in theory, is efficiency. There is no guarantee of justice, democracy or compassion. Even if the market worked the way it is supposed to (and it does not) results still likely to be skewed, from view of democratic and human values.

I will elaborate on these entailments by examining alternatives in the next section. For now, I want to be clear that my claim is not just that the marketplace metaphor is descriptively inadequate but that it shapes speech. Jackson points out that political and economic values can affect "the arrangement of even the molecules of heredity." Crops have "Chicago Board of Trade" genes, because the development of them has been shaped by the market.<sup>57</sup> Likewise, the law's use of the marketplace metaphor comes with a set of values, and those values shape the law as well as the speech at issue.

### THE POTLUCK SUPPER

I no longer remember how the notion of the potluck supper as a metaphor for the law of free expression entered my consciousness. But my conception of potlucks comes from two clear sources. One is the potlucks of church basements in the upper Midwest where I was raised, the potlucks made famous by radio storyteller Garrison Keillor and his gently mocking tales of Jello salads and hotdishes. My other conception of potlucks comes from the feminist philosophy discussion group to which I belonged in graduate school. On the surface they were quite different from church-basement events, but there is a potluck ethic that underlies such gatherings, no matter what the specific nature of the dishes or group.

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<sup>57</sup>WES JACKSON, *BECOMING NATIVE TO THIS PLACE* 21 (1994).

Sometime after I began pondering this, I came across Joyce Trebilcot's essay *Dyke Methods*, in which she outlines an ethic for the use of language with three principles: (1) I speak only for myself, (2) I do not try to get other wimmin to accept my beliefs in place of their own and (3) there is no given. In the discussion of the second, she rejects the marketplace-of-ideas metaphor in favor of the potluck, in which:

[W]e each contribute something and thereby create a whole meal. It is understood that our contributions may be diverse and may seem, on some standards, not to go well together, but we are not bothered by that; we each choose according to our own taste, eating from our own and/or other dishes. The food I bring is usually something I like myself, but also I want to share it—I hope that at least some others will like it too.<sup>58</sup>

Trebilcot's brief description of the potluck touches on many of the issues I will raise.

The dictionary defines potluck as a meal that a guest would be served when no special preparation was made; the guest hoped for luck in what was in the pot. I use potluck to refer to gatherings of people in which everyone brings a contribution to the meal to a pre-arranged site at a specific time. There is some connection between all the people coming, most often membership in a group. The group could be well defined with clear membership rules (the members of a hobby club who have paid their dues), less formally defined (those who attend a church's adult Bible study class at least once in a while) or almost wide open (friends of Jane and anyone a friend of Jane might want to bring along). But there is some connection, no matter how loose, between everyone.

The contribution rules for potlucks vary. For some potlucks, one signs up to bring a specific dish or product. For others, there is no coordination and it is left up to fate to ensure that the group doesn't end up with 25 desserts and one salad. The work beyond food preparation—setting up tables or cleaning up afterward—is generally shared, either by rotating assignments or by everyone pitching in.

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<sup>58</sup>JOYCE TREBILCOT, *DYKE IDEAS: PROCESS, POLITICS, DAILY LIFE* 49 (1994).

## THE ENTAILMENTS OF THE POTLUCK SUPPER

The potluck offers a quite different view of individualism, rationality, competition and power than the marketplace. My discussion of these issues follows Michael Sandel<sup>59</sup> in rejecting the radically disembodied self of contemporary liberalism and market economics in favor of a radically situated subject, a subject who, in Charles Taylor's terms, arises within, and is constituted in, conversation. Taylor writes: "We cannot understand human life merely in terms of individual subjects, who frame representations about and respond to others, because a great deal of human action happens only insofar as the agent understands and constitutes himself or herself as integrally part of a 'we.'"<sup>60</sup>

For many, the rise of individualism is an unambiguously positive development that freed people from rigid moral and political systems which constrain the individual. Indeed, few people want to abandon the progress made in freeing individuals from the illegitimate moral and political claims that hierarchies often make on their members. But that freedom has come with a cost, what Taylor has described as the dark side of individualism: "a centering on the self, which both flattens and narrows our lives, makes them poorer in meaning, and less concerned with others or society."<sup>61</sup>

For a definition of community, I turn to a practitioner of community building, farmer and writer Wendell Berry, who defines it as

the commonwealth and common interests, commonly understood, of people living together in a place and wishing to continue to do so. ... A community identifies itself by an understood mutuality of interests. But it lives and acts by the common virtues of trust, goodwill, forbearance, self-restraint, compassion, and forgiveness. If it hopes to continue long as a community, it will wish to—and will have to—encourage respect for all its members, human and natural.<sup>62</sup>

To focus on the way in which communities constitute our identities is not to argue for totalitarian collectivism in which individual interests are squelched without concern. However, the very lan-

<sup>59</sup>MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

<sup>60</sup>Charles Taylor, *The Dialogical Self*, in *THE INTERPRETIVE TURN: PHILOSOPHY, SCIENCE, CULTURE* 304, 311 (David R. Hiley et al. eds., 1991).

<sup>61</sup>CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 4 (1992).

<sup>62</sup>WENDELL BERRY, *SEX, ECONOMY, FREEDOM & COMMUNITY* 119–20 (1993).

guage used to assert individualism makes sense only in a community of language users; the reification of the disengaged first-person-singular self, who comes into the marketplace of ideas fully formed and autonomous, keeps us from understanding the process of communication.

Along with a harsh individualism, I reject the narrow definition of rationality that comes with the market. First, it does not make sense to talk about reason and rationality as distinct from emotion, intuition and other forms of knowing. The notion that these processes of understanding the world are separate and distinct is, at best, interesting speculation. Sarah Lucia Hoagland argues that accepting the split between reason and emotion "keeps alive the idea of power as control and keeps our selves fragmented and isolated."<sup>63</sup> She writes:

The idea that emotions are independent of our reasoning can only come from a political perspective that depicts individuals as isolated, solitary, and competitive; a political perspective that pretends we do not develop in relation to each other and presupposes that social groups are built on "independently existing characteristics of individuals."<sup>64</sup>

Wes Jackson, a key figure in the sustainable agriculture movement, suggests not an abandonment of this notion of rationality but an expansion of what counts as knowledge. Jackson writes:

If this is the only path to all knowledge, it is a path posted with one-way signs directing us toward separation, alienation, abstraction, things quantitative, and all of it at last sense-bound. All of the important qualities we call human—meaning, value, consciousness, soul, self, spirit—are off that path of knowing.<sup>65</sup>

From this view of personhood and community, clearly competition is not the only, or necessarily the best, way to organize and motivate people. The linking of aggressive behavior with energy, competence, and effectiveness can be rejected, and we can see the ways in which aggressiveness can be counterproductive. Escaping the marketplace metaphor also lets us be honest about the way in

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<sup>63</sup>SARAH LUCIA HOAGLAND, *LESBIAN ETHICS: TOWARD NEW VALUE* 157 (1988).

<sup>64</sup>*Id.* at 195–96.

<sup>65</sup>Jackson, *supra* note 57, at 39.

which disparities in power affect people's actions, how people's "voluntary" choices in the market can be structured by unjust distributions of power and resources.

How does the metaphor of a potluck supper help us on these points? Each person comes to the potluck as an individual, a separate human entity with a distinct identity. But at the same time, in a potluck we understand how we are in part constituted by the community and we can see the vast array of connections we have to others, even to those at the potluck whom we don't know; because we are at the potluck, we have a connection to them. We are not isolated individuals coming to the market but people with connections. One's self is not absolutely opposed to community nor completely determined by community. As Lorraine Code puts it, the goal is "an appropriate interplay between autonomy on the one hand, and communal solidarity on the other."<sup>66</sup> We see in a potluck how "uniqueness, creativity, and moral accountability grow out of interdependence and continually turn back to it for affirmation and continuation."<sup>67</sup>

At a potluck, people can move beyond a definition of rationality as maximizing utility. An action taken at a potluck out of compassion that was not in one's self-interest—an action that would be irrational in market terms—might be quite rational, for it might strengthen the community. There is less of a need to hang onto a notion of objectivity in a potluck, less of a need to know the sole, absolute truth about an object or phenomenon or other person. Viewing others as people-I-am-connected-to-in-community, rather than as self-interested others, allows us to be less instrumental in our approach to understanding the world; it becomes easier to rely on other ways of knowing—emotion, embodied reactions, intuitions.

Competition is not only not necessary for a functioning potluck, it is almost always detrimental. The best potlucks work on a cooperative model, with an understanding that the supper's success rests on collaborative effort. My contribution doesn't fight with others'; the dishes aren't in a battle to determine which one is best, which one will win acceptance in the market. Each dish tells its own story, inviting the diners to taste. Certainly competition can enter a potluck; participants might engage in a covert battle to see who can

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<sup>66</sup>Lorraine Code, *Second Persons*, in SCIENCE, MORALITY AND FEMINIST THEORY 357, 382 (Marsha Hanen & Kai Nielsen eds., 1987).

<sup>67</sup>LORRAINE CODE, WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE 82 (1991).

bake the best pie, for example. But such competition is not at the heart of a potluck; it is an aberration from the prevailing ethic, a colonization of the potluck by market values. Potlucks show that competition is not necessary to produce innovation and quality. The foods at the potlucks I have been part of have always been varied, imaginative and generally delicious. Creativity and innovation are always the product of a social process, and the support and gentle critique of a potluck can produce more of that creativity than competition.

Finally, potlucks do not require belief in the fiction that there are not disparities of power, and it provides a mechanism for leveling out those differences. This is possible, I think, because potlucks do not have at their core, as do contemporary markets, the acquisition of power over others. No one pretends that each person contributing to a potluck is an equally skilled cook. When I first started attending the potluck, I had only recently begun learning to cook much beyond warmed-up canned food. I brought simple dishes to the potluck and I talked to others about how they cooked. I picked up recipes and ideas and expanded my range. I was welcomed as part of the group even when my contribution was minimal. Because I was part of a community, in which people did not act solely out of self-interest and did not compete with each other, those with more power (cooking knowledge) and resources (better-tasting dishes) did not need to pretend there was a level playing field and then use that fiction to further concentrate power and resources in their hands.

The value of the potluck metaphor for free expression law becomes more clear when we track with the specific entailments of the market discussed above:

1. At a potluck, everyone has a right not only to bring a dish but to expect that some people will try it. Everyone understands that to cook something that is not eaten leaves the cook feeling unnoticed and unappreciated, not a full member of the group. In a potluck there is an ethic of respect for people that leads to each dish being tasted. That does not mean that potlucks impose an absolute requirement that each person eat from every dish; if I really do not like lima beans, no one will force me to try the lima beans. But I have never been to a potluck where a dish was untouched. If there is a dish that is widely unpopular, there are ways to communicate that to the cook and at some point that person will stop bringing it. But, the dish will have had a fair hearing and the group will support the cook's attempts to make it work.

Under a market metaphor, no such consideration is accorded to speakers. They have the right only to put out for sale their ideas. But just as cooking requires eating to make it coherent, speaking requires listening.

2. In a potluck, my right to eat is balanced with a responsibility to respect others and their contributions to the supper. The group can make rules, often unstated but understood, about what kind of food is appropriate for the gathering and how one behaves. One rule at potlucks is that you do not take so much of a dish that there is not enough for others. Every potluck also has unstated rules about what should not be served. For example, at my graduate student potluck, a substantial percentage of the group was vegetarian. The unstated rule was that people should not bring meat dishes to the potluck because more than half the people would not be able to eat them. Everyone who participated in the potluck certainly had a right to bring a meat dish, but rights talk in such a context makes very little sense. No one framed the issue as infringing on individual rights; instead, an understanding was reached. It was a small thing to ask of the meat-eaters not to bring meat and to my knowledge none of them ever felt oppressed by the arrangement.

Such rules need not be enforced by repressive measures. The one time I recall the no-meat rule being broken was when a newcomer to the potlucks brought a pot of chili with hamburger in it. We talked about it, and the newcomer said he had not realized how many of us were vegetarian. The chili stayed on the table, and the meat-eaters in the group ate it. If some participants in an overwhelmingly vegetarian potluck consistently refused to bring non-meat dishes, the conflict would require resolution. If the potluck community were composed of mostly vegetarians and vegetarian-sympathizers, it seems likely that those who insisted on bringing meat would at some point be asked to leave the community, or new understandings would have to be negotiated.

3. Potluck suppers can be efficient, a good way of sharing tasks to feed a large number of people. Each person has to cook only one dish but gets to taste many. Still, efficiency is neither the primary motivation for a potluck nor the standard for judging its success. Potlucks exist to bring people together, to celebrate connection through the ritual of contributing to the common table and eating together. Potlucks are a method of creating and holding together a

community. If a potluck is efficient, it is coincidence or accident. In many situations it might be more efficient for me to cook a simple meal myself or pay someone else to cook for me. But I still would go to the potluck to maintain connections with people.

By using the potluck metaphor, I hope to move toward the creation of an environment in which people (1) would feel free to speak in as frank of terms as necessary, under rules that establish respectful limits; (2) could have access to channels for speaking and some assurance that their voices will be heard, and (3) would be free from the speech of others that seeks to oppress or injure them or deny to them a place in the circulation and discussion of ideas. Like any system of free expression, this involves evaluating harms, assessing risks and balancing values. Shifting to a new metaphor does not make this balancing any simpler. Indeed, by rejecting the pseudo-absolutism of the marketplace metaphor and its simplistic "more speech" answer to most questions, the potluck metaphor can seem to get us in more trouble.

### POSSIBLE OBJECTIONS TO THE POTLUCK METAPHOR

I am sure that numerous objections can be raised to the metaphor. No metaphor works all the time or provides a perfect model for all situations. At least two key objections to the potluck metaphor are likely to arise.

First is the simple question of applicability. The United States is a huge, diverse, unwieldy political unit. While individual communities exist, there is no true national community. The sense of connectedness that exists in a potluck does not exist in the wider society. So, one might argue that the marketplace, which relies on common culture or bonds between group members to a much lesser degree, can work in large, diverse population, but a potluck cannot.

True, potlucks succeed when the participants feel some connection, and hence obligation, to each other. That kind of connection does not widely exist in the United States beyond small groups and communities. But that is a reason for moving from a metaphor that privileges individualism to one that focuses on connection—understanding that, at the same time, critique of illegitimate, concentrated power must go forward. The potluck metaphor highlights and forces to the foreground the ways in which we are connected. The contemporary American is more a consumer, an individual in the market satisfying desires, than a citizen or community member. If



speech is not a commodity to be bought and sold, but is instead one way in which we construct ourselves and others, then this shift in metaphors might be valuable precisely because it seems unworkable.<sup>68</sup>

Second, some might argue that any system of freedom of expression that includes such collective notions will necessarily result in the imposition of orthodoxy and the thwarting of innovation and individual creativity. Marketplace advocates rely on the idea that the free market does not punish someone who presents wild ideas and that sometimes the wildest ideas turn out to be the most important; ideas that violate norms of the day can eventually become accepted as the truth. Two responses are relevant. One, potlucks do not by definition squelch innovation. Potlucks are a place where one often tastes something new for the first time and they are often a setting for someone to try a new recipe. Also, while there are limits and rules imposed in a potluck, a marketplace also imposes limits and rules, just of a different kind. Markets are a human construct based on arbitrary choices (to use money as the basis for an economy, allowing concentrations of private property, the use of police power to enforce a property system); there is nothing natural or neutral about them. A potluck also is based on choices that are the product of culture and human agency; again, there is nothing natural or neutral about them. Some people are effectively silenced in the marketplace of ideas and some would be silenced under a potluck supper metaphor. Markets impose their own kind of orthodoxy, which are masked by myths of objectivity and neutral principles. As Ronald Beiner points out, liberalism has an orthodoxy, "a center out of which it ranks the paradigmatic practices that define it as a society[,] ... the maximization of social productivity, the organization of social life so as to enhance efficiency and technological control, the privileging of scientific over other forms of knowledge, the favoring of ways of life consistent with maximal individual mobility."<sup>69</sup>

And, just as all systems have orthodoxies, all systems come with certain costs. The marketplace metaphor and American individualism have contributed to the breakdown of social networks, people's

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<sup>68</sup>This also raises questions that seem almost unspeakable in contemporary political discourse: What is the workable size of a political unit, and is scaling back to more local forms of organization necessary for sustainable human societies? While there are numerous battles to be fought against existing oppressive institutions that operate on a global scale, the hope for a decent future for human society is not global, but local.

<sup>69</sup>RONALD BEINER, WHAT'S THE MATTER WITH LIBERALISM? 78 (1992).

sense of isolation, widening gaps between rich and poor, environmental degradation, etc.—problems that have enormous and life-threatening implications.

This fear of imposed orthodoxy is often premised on the assumption that any collectivity necessarily leads to totalitarianism, that Stalin's Soviet Union is the inevitable result of stepping on that much-feared slippery slope. While the dangers are clear, nothing makes such a situation inevitable. Is there a way to conceptualize individual identity and existence that, in James Ogilvy's terms, need not accept wholly either the individualist and collectivist "creation myths"? Ogilvy suggests that "rather than seeing the individual and the collective as ontologically given and concrete, individuality and collectivity can be recast as equal and opposite abstractions from the concrete life of everyday communities."<sup>70</sup>

Our goal should be, to borrow from Marilyn Friedman (1988), "individuality without individualism."<sup>71</sup> Individuality is different from liberal individualism; the goal is individuals who are capable of genuine friendship, "of contextualizing Self and other amidst values and purposes which transcend both Self and other."<sup>72</sup> It is that kind of notion of personhood, I believe, which can lead us to devising ways of organizing a society and living in it that are consistent with what Freire calls "the beauty of being human."<sup>73</sup>

## CONCLUSION

As J.M. Balkin has suggested, "the problems of the future cannot be solved using the intellectual frameworks of the past, no matter how much good they may have done us."<sup>74</sup> I argue that the marketplace-of-ideas metaphor in the law of free expression is no longer adequate—if indeed it ever was—to help us make sense of the important freedom of expression issues of the day. The potluck metaphor is better able to help us conceptualize these issues because it acknowledges that expression is an essentially collective aspect of social life, that individual selves are intertwined with society, and

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<sup>70</sup>James Ogilvy, *Beyond Individualism and Collectivism*, in REVISIONING PHILOSOPHY 217, 229 (James Ogilvy ed., 1992).

<sup>71</sup>Marilyn Friedman, *Individuality without Individualism: Review of Janice Raymond's A Passion for Friends*, 3 HYPATIA 131 (1988).

<sup>72</sup>*Id.* at 136.

<sup>73</sup>MYLES HORTON & PAULO FREIRE, WE MAKE THE ROAD BY WALKING: CONVERSATIONS ON EDUCATION AND SOCIAL CHANGE 131 (1990).

<sup>74</sup>Balkin, *supra* note 1, at 429.

that human social ideals such as rights are always socially constructed, contingent, and context-bound instead of natural or universal.

To make that claim is not to say that the metaphor works in all ways for all time. But that does not detract from a metaphor's value. In Marilyn Frye's words, metaphors and judgments about patterns of human behavior "work until they stop working. You find out where that is by working them until they dissolve."<sup>75</sup> This essay is simply a suggestion that we start working with a new metaphor to see where it takes us. One possibility is that it will take us home, a path described by Berry in his poem "The Mad Farmer, Flying the Flag of Rough Branch, Secedes from the Union":

From the union of power and money ...  
the Mad Farmer walks quietly away. ...  
He goes to the care of neighbors,  
he goes into the care of neighbors.  
He goes to the potluck supper, a dish  
from each house for the hunger of every house.<sup>76</sup>

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<sup>75</sup>MARILYN FRYE, *WILLFUL VIRGIN* 69 (1992).

<sup>76</sup>WENDELL BERRY, *ENTRIES: POEMS* 39-41 (1994).