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### Bankrupt Marketplace: First Amendment Theory and the 2016 Presidential Election

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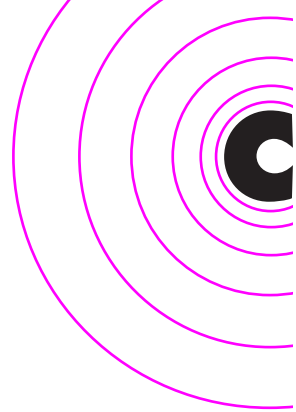
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## Bankrupt Marketplace: First Amendment Theory and the 2016 Presidential Election

LEN NIEHOFF

**I**n this article I advance two arguments. The first is that 2016 was a particularly important year for freedom of speech and of the press, although not for conventional reasons. The second is that the events of 2016 revealed that one of the essential components of our democracy—the central role that free expression plays in the democratic process—is in a state of serious dysfunction, if not crisis.

### 2016: An Important Year for the First Amendment

In determining the significance of a year for First Amendment purposes we often apply a measure that has to do with the decisions issued by the Supreme Court of the United States. We ask whether the Supreme Court gave us one or more cases that extended, limited, or clarified our understanding of this open and ambiguous text in a meaningful way.<sup>1</sup>

So, for example, we might identify 1919 as such a year, because that is when Justice Holmes wrote his influential dissenting opinion in *Abrams v. United States*<sup>2</sup>—a case about which I will have a great deal more to say later. Or we might identify 1964 as such a year, because that is when the Supreme Court issued its opinion in *New York Times Co. v. Sullivan*<sup>3</sup>—a case that made it much harder for public officials to

bring libel cases based on critical statements made about them. Or we might identify 1971 as such a year, because that is when the Supreme Court decided *New York Times Co. v. United States*,<sup>4</sup> a case that upheld the right of a newspaper to publish information even in the face of government allegations of national security concerns.

In this conventional sense, 2016 has no claim for special prominence. In the winter, the Supreme Court did not decide any especially provocative First Amendment cases. The closest it came was its decision in *Heffner v. City of Paterson*,<sup>5</sup> which somewhat expansively held that a public employee's constitutional rights were violated when his employer punished him for engaging in protected speech—even though the employer was mistaken and the employee had *not*, in fact, made the statements in question. Furthermore, none of the half-dozen or so First Amendment-related cases on the Supreme Court's fall docket seems likely to move the Court's jurisprudence in dramatic ways.

No, 2016 is important for much less conventional and more colorful reasons. One reason relates to the invasion of privacy lawsuit brought against Gawker Media by Terry Bollea, a Florida resident who had professionally wrestled under the name “Hulk Hogan.” The case arose from the dissemination of a video made by Todd Clem—one of Bollea's best friends—of

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redo your work product.

Before emailing or calling us to discuss a matter, think through what you want to say. It will help you to communicate your thoughts effectively. Consider whether it is possible for us to address a number of concerns in a single sitting, rather than addressing your concerns piecemeal. However, when there is an important development, communicate it without delay, particularly if it will require us to consider changing strategy, or it will increase the cost of your representation.

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## Bankrupt Marketplace: First Amendment Theory and the 2016 Presidential Election

*Continued from page 1*

Bollea having sex with Clem's estranged wife.

The brief and grainy video of their tryst found its way into the hands of Gawker Media, an online publication that delighted in revealing the secrets of the rich and famous. Gawker posted the video and Hogan brought an invasion of privacy action, which he won—big. A Florida jury awarded him \$115 million in compensatory damages (\$15 million more than he sought) and \$25 million in punitive damages.<sup>6</sup>

This case has very significant implications for the First Amendment in three respects. The first relates to the finding of liability in that case. For purposes of assessing the significance of that finding, I want to put aside questions about the specific conduct of Gawker, whether it should have posted the video, and whether it should have taken the video down when Bollea pro-

tested. Those are interesting questions, but I think the answers to them are unrelated to the broader significance of the case.

Rather, the finding of liability here is important because of Bollea's behavior *before* the video came to the public's attention. Prior to the posting of the video, Bollea had a long pattern of publicly disclosing abundant and detailed information about his sex life. These disclosures included revelations he made on the Howard Stern radio show.

This conduct posed a problem for him at trial, where he claimed privacy as to the same sorts of things he had openly disclosed to millions of people. Bollea dealt with this challenge by suggesting that the person who made those statements was his professional wrestler alter ego, Hulk Hogan, and *not* Terry Bollea himself, who had an intact right of privacy regardless of what his Hogan character had said and done.<sup>7</sup>

The finding of liability under these circumstances poses a significant problem for other media—including responsible mainstream journalists—as they move forward. After all, it is difficult, if not impossible, to discern the guiding and instructive principle that emerges from this result. Are we to understand that public figures that openly discuss private matters have a legitimate invasion of privacy claim if the *media* disclose the same information? Wouldn't such a rule create the risk of a privacy bait-and-switch, where a celebrity could lure the media into exploring a presumptively private topic and then sue them when they do?

Or are the lessons of the case limited to visual images? Numerous media entities had talked about Hulk Hogan's sexual escapades over the years but Bollea did not sue them. So is this case about the difference between words and video? And, if that is so, then is that intellectually coherent? How does a non-private matter become private by virtue of someone showing a video of it?

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Or are the lessons here limited to videos about sex? Was Bollea able to capitalize on the lingering fragments of our Puritanical past—even at a time

when Americans support a multi-million-dollar pornography industry and spend vast amounts of time viewing online obscenity? One of La Rochefoucauld's famous maxims is that "hypocrisy is the tribute that vice pays to virtue."<sup>8</sup> Did Hogan simply find a way to cash in as a big-time payee of our hypocritical guilt?

Or perhaps these are the wrong questions. Maybe the finding of liability here stands for the exquisitely narrow proposition that a media entity shouldn't post video of a popular professional wrestler having sex with his friend's wife. But if the case stands for something further—something that could and should shape the decision making of the mainstream media—then it is not obvious what that "something further" is. And in the field of free speech, where we view legal clarity as critical to the preservation of our liberties,<sup>9</sup> a vague, amorphous, and free floating source of potential liability is deeply worrisome.

This case is even more troubling, however, because of the size of the verdict. The judgment against Gawker was so large as to drive the company into bankruptcy and effectively out of existence.<sup>10</sup> This fulfilled a concern that the Supreme Court voiced in *New York Times v. Sullivan*—that civil judgments pose a fearsome threat to free expression.

Indeed, in *Sullivan* the Court argued that in this arena civil judgments pose even more troubling threats than criminal prosecutions.<sup>11</sup> After all, the Court observed, criminal fines tend to be relatively low; substantial procedural safeguards apply to criminal cases; and the principle of double jeopardy guards against multiple prosecutions for the same offense. In contrast, civil jury verdicts can be astronomical; procedural safeguards are fewer; procedural costs, such as those associated with discovery, can be crippling; and there is no double-jeopardy-like principle to protect a media entity from being sued by multiple plaintiffs over the same story. The Gawker verdict demonstrates how a civil lawsuit can accomplish something that no other kind of proceeding could have done: censor speech by annihilat-

ing the speaker.

And there is a third reason the Gawker case is particularly important. After the verdict came down, it became known that Bollea's lawsuit had been financially underwritten by Peter Thiel, the Silicon Valley billionaire who helped found Pay Pal.<sup>12</sup> In part, Thiel may have acted out of one of history's oldest motives—revenge—because Gawker had revealed that Thiel is gay, a fact he had maintained as private.<sup>13</sup>

Thiel has stressed that his support of Bollea was primarily about deterrence, sending a message on behalf of those who do not have the resources to pursue invasion of privacy claims against the media.<sup>14</sup> To the extent Thiel offered this explanation as a source of consolation it provides none. An isolated act of retribution has less ominous implications than does a corrective philosophy that might find numerous occasions for expression.

Of course, the concern here should not be overstated. Third-party litigation funding serves a purpose within our civil justice system and has become increasingly commonplace.<sup>15</sup> And, although such arrangements can give rise to ethical questions about whether the lawyer involved is maintaining his or her independence and is making decisions in the best interest of the client, it is not clear that the problems they create are any greater than those encountered when financing comes through insurance or a contingent fee.<sup>16</sup> Finally, as a practical matter it seems unlikely that we will see a huge rash of billionaire-funded privacy and libel cases in the near future.

But it is also important that we do not understate the concern. At least to some degree, the design of our libel and privacy laws reflects our assumptions about the financial incentives that will exist for plaintiffs and defendants in such cases. Third-party litigation funding can skew those incentives and dramatically change the dynamics. Think, for example, of the financial motivations that would have existed for Terry Bollea to reach an early settlement with Gawker if he had been financing his own case and then what happens to those considerations when a billionaire

starts writing checks to cover his costs.

Furthermore, the Gawker case fulfills the most disturbing of possibilities anticipated by the Supreme Court in *Sullivan*. After all, the judgment in this civil suit did not just chill the speaker: it resulted in the onset of fatal hypothermia. Of course, it may turn out that third-party litigation financing will only rarely result in the bankruptcy and destruction of a media entity, but surely those numbers do not even need to reach double digits before we pronounce the consequences dire.

One additional fact makes Thiel's funding of the Hogan lawsuit particularly interesting. Thiel is closely linked with another public figure who has within the past year repeatedly threatened lawsuits against media entities and even individuals. That public figure is, of course, President Donald Trump, who named Thiel to the executive committee of his transition team.<sup>17</sup>

This brings us to the primary reason 2016 proved to be a particularly important year in the history of the First Amendment: the President. It seems inarguable that during the election cycle Mr. Trump had a profound and multi-dimensional influence on freedom of expression. This is not a partisan statement and for purposes of this article we need not decide whether that influence was beneficial or baleful or both. The measurement here refers simply to the extent of the influence and the multiple ways in which it played out.

During his campaign, Mr. Trump fully availed himself of his own right to freedom of expression. He used the full range of the vernacular. And he did so without any of the self-censorship or restraint that has usually characterized aspirants to our nation's highest office. Indeed, by one count, in the course of this election cycle Mr. Trump (via Twitter alone) insulted 282 different people, places, and things.<sup>18</sup> Experts continue to try to discern the primary drivers of his election victory, but his apparently unfiltered speech may have held appeal for a number of voters.<sup>19</sup>

Mr. Trump so pushed the boundaries of ordinary political discourse that commentators repeatedly predicted that

he had, at long last, gone too far.<sup>20</sup> In this respect, however, a public appetite for unscripted speech may not be the only thing that helped Mr. Trump. He may also have received an assist from the fact that the public knew him as a television personality—as the outsized caricature of himself that he played as a guest on *Saturday Night Live* and as the star of *The Apprentice*.

In this sense, Mr. Trump deployed a strategy not unlike that used by Terry Bollea, although he did it less explicitly. He argued: do not confuse the “real me” with the “celebrity me,” the serious candidate who wants to shake things up in Washington with the guy who engages in “locker room talk.”<sup>21</sup> And, as with Bollea, he benefited from the blurring of the very line he wished to draw.

The similarity is not surprising. Both Mr. Bollea and Mr. Trump owe a good deal of their notoriety to the Howard Stern show, where they honed their celebrity personas and put them on full display.<sup>22</sup> Mr. Trump’s strategic use of his persona aligns with the trenchant observation made in *The Atlantic* that while the press took Mr. Trump literally but not seriously, his supporters took him seriously but not literally.<sup>23</sup>

Furthermore, in advancing this speech, Mr. Trump made successful use of a wide variety of vehicles, ranging from local rallies to national television platforms to international social media. His use of Twitter was particularly noteworthy. He tweeted relentlessly—often into the late hours of the night and early morning—and (consistent with his unfiltered theme) never in the carefully curated voice of a handler or spokesperson.<sup>24</sup>

While exploring the outer reaches of his own free speech rights, Mr. Trump argued vigorously for curtailing the expressive rights of others. For example, he declared that as President he would “open up” libel laws in order to make it easier for public officials to sue media entities.<sup>25</sup> “We’re going to have people sue you like you’ve never got sued before,” he declared.<sup>26</sup>

To indulge in a variation on a phrase of Mr. Trump’s, this did not appear to be just “lawyer-room talk.” To the contrary, Mr. Trump has on numerous

occasions threatened libel suits against individuals and entities. For example, in October of 2016, his legal counsel sent a letter to *The New York Times* demanding a retraction of stories it had published about two women who had come forward to allege that Mr. Trump had forcibly touched them.<sup>27</sup> And in the same time frame he announced that after being elected he would commence libel suits against those women individually.<sup>28</sup>

In a number of instances, Mr. Trump has gone beyond a demand for retraction and has commenced suit. Shortly before the election, Susan Seager prepared a report describing and assessing the speech-related lawsuits that Mr. Trump and his companies have filed. She reached the conclusion that Mr. Trump had proven himself to be a “libel bully,” because he used litigation to try to silence critics, but also a “libel loser,” because his efforts had met with little success.<sup>29</sup>

Seager reports that, of the seven speech-related cases that Mr. Trump filed, four were dismissed on the merits and two were voluntarily withdrawn. And some of those cases—like a breach of contract lawsuit based on a prank pulled by Bill Maher—seem conspicuously weak. Nevertheless, as if to place a punctuation mark on the chilling effect that even unsuccessful libel suits can have, the American Bar Association initially expressed concern over publishing the piece in this journal.<sup>30</sup>

At the same time, during 2016 a national dialogue ensued with respect to the legality of some of Mr. Trump’s own speech. For example, early on accusations were made that Mr. Trump had incited his supporters to engage in acts of violence against protestors at his rallies.<sup>31</sup> Discussions about a presidential candidate unexpectedly turned to analyses of the Supreme Court’s decision in *Brandenburg v. Ohio*.<sup>32</sup>

The debate intensified in August of 2016, when Mr. Trump gave a speech in which he decried Secretary Clinton’s likely appointments to the Supreme Court. He cautioned: “If she gets to pick her judges, nothing you can do, folks.” And then added: “Although the Second Amendment people—maybe

there is, I don’t know.” This comment sparked a discussion of whether Mr. Trump had made a distasteful joke or had crossed a line by encouraging his followers to assassinate Clinton or her judicial nominees.<sup>33</sup>

Then, toward the end of his campaign, concerns were expressed that he was inciting crowds to violence against the media—a favorite target of his criticisms.<sup>34</sup> Allegations were made that journalists had been verbally harassed, violently grabbed, choked, and thrown to the ground.<sup>35</sup> A photograph went viral of a man wearing a t-shirt at a Trump rally that had emblazoned across the back the words: “Rope. Tree. Journalist. Some assembly required.”<sup>36</sup>

Turning the tables, a debate also ensued over whether the women who had accused Mr. Trump of assaulting them could sue *him* for libel on the theory that he had falsely accused them of lying.<sup>37</sup> Such lawsuits have a recent precedent. When Bill Cosby claimed that the women who had accused him of sexual assault had lied, a number of them sued for defamation.<sup>38</sup>

Discussion of Mr. Trump’s statements involved not just domestic but international law. Toward the beginning of his campaign, questions were raised to as to whether some of his statements about Arab-Americans, Muslims, and Mexicans ran afoul of European “hate speech” laws.<sup>39</sup> Some public officials even argued that he should be banned from entering their country on this basis.

2016 thus proved a signal year in the debate over the reach and limitations of freedom of expression. But additionally—and ironically—2016 is of critical importance for another reason as well. For it was during this period that we also saw a massive failure of our leading conceptual model of how free speech works and how it contributes to the democratic process.

### **Our Democratic Crisis**

This brings me to my second argument: that we are in the midst of a crisis involving an essential component of our democracy. I refer here to a dynamic that goes to the very heart of how our democracy works—or does

not work. And that dynamic is directly connected to the First Amendment and the role that it plays in the preservation and advancement of our republic.

We can begin with a straightforward and non-controversial proposition: the free speech protected by the First Amendment plays an essential—indeed, indispensable—role in the democratic process. The Supreme Court has repeatedly so held, often deploying some of the most rhapsodic language it knows how to use. This includes Justice Brandeis’s poetic concurring opinion in *Whitney v. California*.<sup>40</sup>

In that opinion, Brandeis declared that “[t]hose who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.” He added that they believed that “without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” The Supreme Court has sounded the same theme in numerous later decisions, in opinions written by justices across the political spectrum.

Over time a dominant conceptual model has emerged to describe how free expression plays this central role in our democracy. I do not mean to suggest that there is only one such model—to the contrary, courts and legal scholars have articulated a variety of explanations for why free expression matters and how it helps us achieve our democratic goals. But the most persistent and influential model for how the First Amendment works in our democratic system almost certainly comes from the opinion of Justice Holmes in *Abrams v. United States*.<sup>41</sup>

As Lee Bollinger has stated, “[W]ithin the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech.”<sup>42</sup> In the same vein, Ronald K.L. Collins has observed that

“in its own secular way, the opinion has become canonical.”<sup>43</sup> Some notable scholars have criticized the opinion, but “many view [its central] metaphor as key to any healthy system of freedom of expression.”<sup>44</sup>

The facts of *Abrams* seem stunning today. Five people wrote, printed, and distributed leaflets around New York City that were supportive of the Russian Revolution and that, by contemporary standards, seem utterly harmless. Although this was the extent of their activity, the five were charged with and convicted of violating the federal Espionage Act. In one of its darker and less competent moments, the Supreme Court upheld the convictions.

Justice Holmes wrote a dissenting opinion that has so carried the judgment of history that people sometimes forget it was a dissent. Justice Holmes begins by noting the understandable, perhaps even good, intentions of those who want to censor speech:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.

Holmes starts with this valuable insight: the impulse to silence speech with which we disagree is understandable and extends to people with benevolent designs.

Of course, this does not make the impulse any less dangerous. In his dissenting opinion in *Olmstead v. United States*,<sup>45</sup> a case involving a different kind of constitutional concern, Justice Brandeis observed that: “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

And so Holmes continues:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, 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.

This model—often called the “marketplace of ideas” model—tells us how free speech works to advance our democratic goals: ideas compete for our allegiance in a free market; through this competition we entertain alternative possibilities; as a result of this consideration and analysis we arrive at the truth; and that truth empowers us to participate constructively as informed citizens of our democracy.

This model rests upon certain assumptions about this market operates, how human beings behave, how we receive and consider information, how we ascertain the truth, and how we make decisions based on what we have learned. In 2016, however, most—perhaps all—of these assumptions turned out to be wrong. To stay with Justice Holmes’s storied metaphor, in this election cycle the marketplace of ideas went just as bankrupt as Gawker Media.<sup>46</sup> We can see this if we consider some of the assumptions that underlie Justice Holmes’s model and see how they betrayed us this year.

As an initial matter, the marketplace of ideas model assumes that people will receive information (or what passes for it) in quantities that they can manage. But this election cycle has shown us that this assumption no longer holds true. Although the model rests upon the proposition that more information is always better, 2016 showed us that at some point the number of inputs becomes so great, and their pace so fast, that we can no longer effectively process them.

Writing before we understood the full significance of this informational barrage, Justice Scalia said *McConnell v. FEC*,<sup>47</sup> concurring in part and dissenting in part:

The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a [great] problem to overcome ... Given the premises of democracy, there is no such thing as too much speech.

Or so we thought.

The too-many-inputs-too-fast phenomenon might not be problematic if we responded by slowing down, working through the complexity, and withholding judgment until we had sorted things out. But for the most part we do not do that. Because the informational onslaught moves quickly and does not let up we find it difficult to focus our attention on the same issue for a sustained period. We therefore often take a much simpler course, simply defaulting to our biases and predispositions.

Sociologists and psychologists have documented that when we find ourselves in a “landscape of near-infinite choice,” we “do what feels easiest”: we gorge on information that aligns with what we think and ignore what does not.<sup>48</sup> Or, as Simon and Garfunkel succinctly put it: “a man hears what he wants to hear and disregards the rest.” In this sense, we no longer have a marketplace of ideas; we have a marketplace of confirmation bias. And this undermines one of the principal goals of the marketplace of ideas, which is to compel us to defend our accepted truths—or abandon them.

The marketplace of ideas model further assumes that we will be able to sort reliable information from unreliable. But 2016 showed us that this assumption no longer holds true, either. In the course of this election cycle it became apparent that “fake news” stories were

being uncritically accepted, posted, reposted, and re-posted on social media.<sup>49</sup> To take one dramatic example, a widely circulated fake news report identified a pizza parlor as a front for a child abuse ring secretly run by Hillary Clinton and John Podesta—a story absurd on its face but that some people accepted so literally as to prompt them to threaten the restaurant owner.<sup>50</sup> Measuring the effect, if any, that fake news had on the election and its outcome poses serious challenges, but there are good reasons to believe that these stories may have significantly skewed public dialogue and opinion during the past year.

The public’s inability to tell reliable from unreliable information may have given both major party candidates increased confidence that they could freely indulge in misstatements. This may explain the dismal truthfulness records both candidates amassed. Perhaps such behavior inevitably comes with the territory of a marketplace of ideas where the making of false statements has no negative consequences.

Consider Politifact’s evaluations of Mr. Trump and Secretary Clinton. The Politifact website assessed 19% of Mr. Trump’s evaluated statements as mostly false, 34% as false, and 17% as what they call “pants on fire” false. Hillary Clinton scored better, with 14% as mostly false, 10% as false, and only 7% in the worst category. In other words, Politifact maintains that the *more truthful* of our two major candidates was making false statements to us almost a third of the time.

In the course of 2016, we also discovered just how stubborn misinformation can be. Efforts made to correct false statements were often dismissed as the work of partisans or mouthpieces or a biased and unreliable press—the last an ironic criticism given the prevalence of fake news in non-mainstream media. But the important point is this: the marketplace of ideas becomes wholly unworkable once no form of counter-argument remains possible; at this stage, the marketplace of ideas becomes the marketplace of ossified stances.

Occasionally in 2016 the struggle with misinformation became so great

that the media were excoriated for not reporting facts that were not facts. For example, during this election cycle Mr. Trump bemoaned that the murder rate is the highest it has been in forty-five years and chided the press for not reporting on it. But the omission is easily explained: this “fact” is simply wrong. Indeed, the murder rate is less than half of what it was in 1980 and it is lower than it has been during any time between 1965 and 2009.<sup>51</sup>

These developments have prompted some commentators to ask whether we have entered into a “post-factual” or “post-truth” politics.<sup>52</sup> The irony is titanic. In the midst of vast, prevalent, and easily accessible information, facts and truth appear to have become an unanticipated casualty. And even if we do not accept quite so dim an assessment, it seems clear that truth struggles now, more than ever, to get breathing space—let alone attention and allegiance.

In this respect, it is important to note that the marketplace of ideas model also assumes that we *care* about the truth and *want* to find it. But 2016 strongly suggests to us that an election may have little to do with what is factually right or wrong. An election may be about something else altogether: a shaking up; a destabilization; a cry for something different; an angry scream from those who believe no one hears them anymore.

Such gestures are not wholly without value in our quest for truth. If someone yells: “You’re not listening to me!” they may be right and the complaint may be justified. But, importantly for purposes of how we ordinarily think about the marketplace of ideas as functioning, the yelling does nothing to advance the merits of any underlying substantive point.

There are other problems as well. The marketplace of ideas model assumes that all ideas will have equal access to the conversation. But in 2016 the barriers to entry into this market became obvious. For example, critics pointed out that three presidential debates were conducted with almost no discussion of climate change, which many people view as one of the most



pressing issues of our time.<sup>53</sup>

Or consider this: at present, an estimated 1.4 million American children are homeless.<sup>54</sup> We heard almost nothing about this during the 2016 election cycle—and certainly less than we heard about Mr. Trump’s sexual peccadillos and the size of his hands and Secretary Clinton’s emails and her stumble on some stairs. It seems reasonable to expect that ideas about how to address this national tragedy should enter the marketplace where we supposedly engage in our national problem solving. The absence of such discussion may prompt us to wonder whether in 2016 the marketplace of ideas wholly crashed and we now find ourselves in a Great Depression of clear, informed, and productive thought.

### Conclusion

There is no single, comprehensive strategy for restoring the vigor, integrity, and viability of this market. Some measures are already underway, such as efforts by Google and Facebook to police the dissemination of fake news. But our fundamental, and most daunting, challenge lies in the reality that the effective functioning of the marketplace of ideas depends upon our cautious, critical, and considered analysis of the “information” that comes our way. That has always asked a lot of human beings; in the current communications environment it demands still more.

It may console us, in some small way, to remember that the man who formulated the marketplace of ideas model was a pragmatist and realist. Justice Holmes understood that this marketplace could sputter, fail, and leave us intellectually and ideologically bereft. But he saw it as the best, if not the only, means through which we might accomplish the ideals of democracy.

“It is an experiment,” he says in his dissent in *Abrams*, “as all life is an experiment.” And so it is. Sometimes the experiment will go well. Sometimes it will go poorly. Sometimes its protocols will work effectively. Sometimes they will need fine-tuning or even radical adjustment.

Sometimes the experiment will lead us to grand discoveries. Sometimes it

will reveal to us, in the language of a sacred text, “things hidden since the foundations of the world.” Sometimes the experiment will fail spectacularly. Sometimes the laboratory will catch on fire.

### Endnotes

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