

## THE MISSING MARKETPLACE OF IDEAS THEORY

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One hundred years ago, Justice Holmes embraced the marketplace of ideas in his dissenting opinion in *Abrams v. United States*.<sup>1</sup> The same year as this centennial anniversary, Justice Kennedy, one of the most ardent adherents to this theory, retired from the Supreme Court. The dovetailing of these two events offers the perfect excuse to evaluate the marketplace of ideas in the Court's First Amendment jurisprudence today.

The marketplace of ideas drives many of the Court's First Amendment decisions, from the public forum doctrine to restrictions on offensive expression to campaign finance. Although the theory is not perfect, this Article contends Kennedy should have embraced the lessons from this dissent more—not less—in some of his First Amendment opinions. In particular, Kennedy often failed to use the marketplace of ideas theory to guide his thinking on public school students and government employees as well as in cases involving the government speech doctrine. Furthermore, in these cases where the Court—often but not always led by Kennedy—has abandoned the marketplace of ideas as a guiding principle, it has frequently embraced ad hoc balancing tests. Although such tests may be appealing because they permit courts to take into account a range of factors excluded from traditional First Amendment analysis—such as the value of the speech, various types of harms it causes, and alternative restrictions—they also give the government far too much discretion to censor and punish speech that it does not like and favor speech that it does. The Court's decisions involving public school students, government employees, and the government speech doctrine illustrate this problem all too well.

Part I outlines the general principles of the marketplace of ideas theory of expression. Part II explores the Court's application of this theory with a focus on Kennedy's opinions. Part III argues that in cases involving public school students, government employees, and the government speech doctrine, the Court and Kennedy frequently lost sight of the marketplace of ideas theory. Kennedy's approach allows the government to manipulate the

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1 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

marketplace of ideas in these contexts by giving the government wide authority to make content-based and even viewpoint-based speech restrictions.

## I. THE MARKETPLACE OF IDEAS

Prior to his memorable dissent in *Abrams v. United States*,<sup>2</sup> Holmes was the author of the majority opinions in *Schenck v. United States*,<sup>3</sup> *Frohwerk v. United States*,<sup>4</sup> and *Debs v. United States*.<sup>5</sup> As some scholars have argued, Holmes moved toward a more civil-libertarian position in the summer of 1919 due to his correspondence with other judges and scholars.<sup>6</sup> Whatever the cause for Holmes's shifting attitude, his *Abrams* dissent provides significant protection for the freedom of expression and severely limits the power of the government to restrict speech. Although at first blush Holmes's marketplace of ideas metaphor might appear to be an overly simplistic and deeply flawed comparison to the commercial marketplace, a close read of that opinion reveals much more significant guiding principles that have guided the Court in many of its First Amendment decisions of the last century. Once we have a deeper understanding of the marketplace of ideas theory, we can consider how the Supreme Court—and Kennedy in particular—used this marketplace of ideas theory in the last several decades.

Although the phrase “marketplace of ideas” has entered not only the Court's First Amendment opinions but also our common parlance, a complete understanding of what Holmes meant in *Abrams* remains a matter of debate. Indeed, even though Holmes's dissent is often cited as proposing a theory of the First Amendment based on the marketplace of ideas, the opinion never uses precisely that phrase.<sup>7</sup> Instead, Holmes referred to the “petition of the market.”<sup>8</sup>

On the one hand, Holmes's metaphor has lots of surface appeal, especially today. Our current communications environment feels like a marketplace, if not a very crowded and noisy street fair. We are blasted with information and different voices fighting for our attention (and, in many cases, financial support). The internet has lowered if not eliminated the barriers to entry so that everyone can have a voice, not just the most powerful or the very rich. The traditional media no longer has such a dominant

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2 *Id.* at 624–31.

3 249 U.S. 47 (1919).

4 249 U.S. 204 (1919).

5 249 U.S. 211 (1919).

6 See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 198–211 (2004). Some scholars disagree with Stone's assessment. See, e.g., Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303, 304 (“Historical evidence has been used selectively in this debate. Viewed as a whole, the evidence shows without much doubt that Holmes's views did not change, and that *Schenck* and *Abrams* were cut from the same bolt.”).

7 See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24.

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

gatekeeping role in determining what information makes its way into the public conversations.

But if this theory simply equates the freedom of speech with the commercial marketplace, the theory has little persuasive force. Many scholars have pointed out the many ways our marketplace of ideas is inherently flawed. As with the commercial marketplace, the playing field is not even. Even with the internet, people do not all have the same resources to speak or the same access to the most powerful avenues of communication. The voices of those with more power, or wealth, or fame (or all three) are not only louder and more visible, but they are also amplified in both new and traditional media. Given this uneven playing field, the marketplace of ideas analogy does not necessarily restrict the government power to restrict speech but instead might actually support government intervention to make sure this marketplace is “fair.”

Most depressingly, some studies suggest that our very psychological makeup works against the power of the marketplace of ideas. People tend to seek others who already agree with them and embrace their prior beliefs even more strongly when they are confronted with opposing views.<sup>9</sup> The recent explosion of “fake news” on social media has led even more people to doubt that the free exchange of ideas can lead to truth.<sup>10</sup> Getting to the “truth” (if one ever does) can take a very long time. Some recent psychological studies suggest that the quest for ultimate agreement is particularly unlikely because people tend to become even more entrenched in their positions when they hear contrary ones.<sup>11</sup> The faith the marketplace of ideas theory has in people as rational actors often feels misplaced. Relatedly, the marketplace of ideas theory feels particularly out of place in the context of certain speech questions where there is a disparity of knowledge and the ability to assess information, such as commercial speech and speech between various professional actors (like doctors and lawyers) and their clients.<sup>12</sup>

But before we give up on the marketplace of ideas theory—at least as presented in Holmes’s famous dissent—we should recognize that it is not simply an embrace of a free-market trade in facts and idea. Instead, as Professor Vincent Blasi has argued, the *Abrams* dissent “contains the seeds of an understanding of the First Amendment that has more to do with checking, character, and culture than with the implausible vision of a self-correcting, knowledge-maximizing, judgment-optimizing, consent-generating, and par-

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9 See Christopher A. Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 PROC. NAT’L ACAD. SCI. U.S. 9216 (2018).

10 See generally Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519 (2019).

11 See, e.g., Elizabeth Kolbert, *Why Facts Don’t Change Our Minds*, NEW YORKER (Feb. 19, 2017), <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds>.

12 See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2366 (2000).

ticipation-enabling social mechanism.”<sup>13</sup> A deeper reading of Holmes’s opinion reveals several layers of important guiding principles for considering the scope of First Amendment protection, including a distrust for government interference with speech unless serious harm is imminent, a concept that is useful for more than simply determining the incitement doctrine; a “reality check” that sometimes seemingly harmful speech is spoken by “puny anonymities” who pose no real threat to peace and order; and most importantly, a grave distrust of government efforts to squelch speech with which it disagrees (evident in Holmes’s condemnation of the Sedition Act of 1798).<sup>14</sup>

Although the Court has not always specified the theory of free speech that supports its decision in individual cases, the influence of Holmes’s famous *Abrams* dissent is evident throughout its one hundred years of First Amendment decisions. Kennedy, who was on the bench for almost thirty years, has helped solidify the Court’s reliance on this theory of the First Amendment.

## II. THE MARKETPLACE OF IDEAS IN JUSTICE KENNEDY’S OPINIONS

The marketplace of ideas theory has played a dominant role in the Court’s free speech jurisprudence and in Kennedy’s opinions in particular. Adamantly opposed to content-based and viewpoint-based speech restrictions, Kennedy has opposed efforts to exclude speakers from the public fora, has expressed deep faith in the power of counterspeech, railed against the dangers of permitting the government to censor or punish speech it does not like, equated free speech with liberty and democracy, and refused to permit the curtailing of “offensive” speech. In addition, he has led the Court’s rejection of ad hoc balancing tests that would weigh the value of the speech against the weight of the government’s interest in restricting it.

Throughout his twenty years on the bench, Kennedy repeatedly asserted that the First Amendment does not tolerate the abridgement of speech in public fora. For Kennedy, these public places are the epicenter of the marketplace of ideas, where all people can share their thoughts and ideas directly with other citizens, and any government efforts to restrict speech in these areas should be regarded with suspicion. For example, in his concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*, in which he argued that a ban on the distribution of literature in an airport is unconstitutional, he argued that “[o]ne of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak.”<sup>15</sup> Kennedy took issue with the majority’s application of the public forum doctrine, arguing that it gave the government far too much power to limit free speech. Here, Kennedy expressly stated that “[t]he First Amendment is a limitation on government” power and “[i]ts design is to prevent the

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13 Blasi, *supra* note 7, at 2.

14 *Abrams v. United States*, 250 U.S. 616, 627, 629–30 (Holmes, J., dissenting).

15 *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 709 (1992) (Kennedy, J., concurring).

government from controlling speech.”<sup>16</sup> Kennedy rejected the majority’s more wooden view of the public forum doctrine that permitted the government to classify public spaces as nonpublic fora dedicated to nonspeech uses. Instead, Kennedy argued for an evolving and flexible view of the public forum doctrine where the lowliest and poorest among us could engage in public debate. Throughout his time on the Supreme Court, Kennedy frequently voted to strike down speech restrictions as violative of the public forum doctrine. Indeed, in one of his last opinions, Kennedy suggested that in light of technological changes, the new public forum might be online.<sup>17</sup>

Kennedy robustly defended speakers’ rights in a public forum even when that speech is offensive to some listeners. In *Hill v. Colorado*, for example, he wrote a separate dissent angrily attacking the majority for upholding speech restrictions surrounding abortion clinics, declaring that “[i]f from this time forward the Court repeats its grave errors of analysis, we shall have no longer the proud tradition of free and open discourse in a public forum.”<sup>18</sup> In soaring rhetoric that is classic Kennedy, he declared that “[t]he liberty of a society is measured in part by what its citizens are free to discuss among themselves.”<sup>19</sup> He rejected arguments that women entering abortion clinics should not have to listen to speech they might find offensive because it was precisely in that location that abortion opponents might be able to change some minds.<sup>20</sup> He concluded, “[i]n a fleeting existence we have but little time to find truth through discourse.”<sup>21</sup> Kennedy took this same approach in *Snyder v. Phelps*, where he joined Chief Justice Roberts’s opinion protecting the right of the Westboro Baptist Church to engage in offensive speech on a public sidewalk.<sup>22</sup> Citing the Court’s statement in *New York Times Co. v. Sullivan* that “[t]he First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be

16 *Id.* at 695.

17 See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (“A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”). In this opinion, Kennedy protected the rights of a sex offender, among the most reviled of all members of our society, to use social media. See *id.* at 1737 (“By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”).

18 *Hill v. Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting). Kennedy also joined Justice Scalia’s concurrence in *McCullen v. Coakley* asserting this same principle. See 573 U.S. 464, 505 (2014) (Scalia, J., concurring) (“Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.”).

19 *Hill*, 530 U.S. at 768 (Kennedy, J., dissenting).

20 *Id.* at 789 (“For these protesters the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place.”).

21 *Id.* at 792.

22 *Snyder v. Phelps*, 562 U.S. 443 (2011).

uninhibited, robust, and wide-open,'<sup>23</sup> Roberts declared that the Church's speech on a matter of public concern was entitled to constitutional protection.

Kennedy has frequently rejected government efforts to restrict speech because it is "offensive," even when it is not occurring in a public forum. Kennedy's Supreme Court career is bookended with cases in which he rejected restrictions on offensive speech. One of the first Supreme Court First Amendment cases in which Kennedy participated is *Texas v. Johnson*,<sup>24</sup> in which the Court upheld the right of a Vietnam War protestor to burn the American flag on the steps of a courthouse. Near the end of his career, Kennedy made clear that his objection to viewpoint-based speech restrictions had not diminished one iota. In *Matal v. Tam*, for example, he joined Justice Alito's majority opinion striking down a ban on "offensive" trademarks.<sup>25</sup> In his *Tam* concurrence, Kennedy excoriated the government, emphasizing his concerns that such a policy permits the Trademark Office to engage in viewpoint discrimination.<sup>26</sup> He asserted that "the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf."<sup>27</sup>

In his *Tam* concurrence, Kennedy fleshed out why he thinks it is important for the government to tolerate offensive speech. He explained that while it is always disconcerting when the government restricts viewpoint, "[t]hat danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position."<sup>28</sup> In addition, Kennedy expressed concern that "[b]y mandating positivity, the law here might silence dissent and distort the marketplace of ideas."<sup>29</sup> Government efforts to silence offensive speech are also dangerous:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.<sup>30</sup>

Kennedy's concerns about offensive speech restrictions reflect his aggressive approach to content-based and speaker-based speech restrictions, an approach that is rooted expressly in his adherence to the marketplace of ideas theory of the First Amendment. His majority opinion in *Citizens United*

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23 *Id.* at 452 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

24 491 U.S. 397 (1989).

25 *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring).

26 *Id.*

27 *Id.* at 1768.

28 *Id.* at 1767.

29 *Id.* at 1766.

30 *Id.* at 1769.

*v. FEC*<sup>31</sup> offers the best example of his antipathy to these sorts of speech restrictions. In *Citizens United*, the Court struck down as unconstitutional a federal statute prohibiting corporations from making independent campaign contributions.<sup>32</sup> Kennedy explained that speaker-based speech restrictions were just as suspect as content-based speech restrictions because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>33</sup> He concluded that restricting corporate speech in order to level the playing field “is wholly foreign to the First Amendment”<sup>34</sup> and impermissibly “interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”<sup>35</sup> Kennedy concluded that government may not engage in censorship “to command where a person may get his or her information or what distrusted source he or she may not hear” because “[t]he First Amendment confirms the freedom to think for ourselves.”<sup>36</sup>

Kennedy (and the Court more generally) has demonstrated a high tolerance for false speech. Holmes’s dissent does not directly address whether the government can restrict false statements of fact; arguably the marketplace of *ideas* does not require inaction in the face of clear falsity. Nevertheless, the Court has rejected attempts to restrict false speech. The Court first grappled with false speech in *New York Times Co. v. Sullivan*, where the Court noted that false statements are nevertheless “inevitable in free debate” and held that false and defamatory speech about public officials could not be punished absent actual malice (knowledge of falsity or reckless disregard for falsity).<sup>37</sup> In later cases, the Court declared that although “[f]alse statements of fact are particularly valueless” and “interfere with the truth-seeking function of the marketplace of ideas,” they are not completely without First Amendment protection.<sup>38</sup>

None of Kennedy’s opinions embrace protection for false speech more than his plurality opinion in *United States v. Alvarez*.<sup>39</sup> In *Alvarez*, the Court struck down the Stolen Valor Act of 2005, a federal law that criminalized false representations about the receipt of military honors.<sup>40</sup> Although Kennedy

31 *Citizens United v. FEC*, 558 U.S. 310 (2010).

32 *Id.* In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), Kennedy joined both Justice Thomas’s majority opinion and Justice Alito’s concurring opinion making clear that subject-matter speech restrictions posed just as much threat to the marketplace of ideas as viewpoint-based speech restrictions.

33 *Citizens United*, 558 U.S. at 340.

34 *Id.* at 350 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam)) (internal quotation marks omitted).

35 *Id.* at 354 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

36 *Id.* at 356.

37 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271, 279–80 (1964).

38 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). Kennedy did not participate in this case. The case had been argued and submitted for decision before he was confirmed. *Id.* at 47.

39 567 U.S. 709 (2012) (plurality opinion).

40 *Id.* at 713–15.

acknowledged that the Court had suggested in several prior decisions that false speech stood outside of the First Amendment because it does not contribute to the marketplace of the ideas,<sup>41</sup> he adamantly rejected the government's argument that false speech was outside of the First Amendment or could constitute a new category of unprotected speech.<sup>42</sup> Instead, these prior decisions permitted restrictions on false speech in limited situations where some sort of legally cognizable harm would result.

Although Kennedy agreed that the government had a compelling interest in protecting the integrity of military honors,<sup>43</sup> he concluded that there was a "lack of a causal link between the Government's stated interest and the Act."<sup>44</sup> The Government argued that false claims of military honors "dilute the value and meaning of military awards,"<sup>45</sup> but Kennedy said that the Government has presented "no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."<sup>46</sup> Kennedy did not even bother to address arguments that the Stolen Valor Act was constitutional because true medal holders might feel "offend[ed]" or "might experience anger and frustration."<sup>47</sup> This is consistent with Kennedy's rejection in other cases of "offense" as a reason to restrict speech.

Once he concluded that false speech was not outside of the First Amendment, Kennedy embraced the idea of counterspeech as the cure, citing Justice Brandeis's *Whitney v. California* concurrence<sup>48</sup> and asserting, "[t]he facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie."<sup>49</sup> Kennedy has a strong belief that counterspeech can be effective: "The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."<sup>50</sup> Indeed, Kennedy notes that the facts of *Alvarez* itself supported the marketplace of ideas at work. Xavier Alvarez was a board member of a water district board in Claremont, California, and, as Kennedy summarizes in the first line of his opinion, "[l]ying was his habit."<sup>51</sup> The lie about his Congressional Medal of Honor was "a pathetic attempt to gain respect that eluded him."<sup>52</sup> This attempt failed immediately, as he was quickly ridiculed

41 *Id.* at 718–19 (citing such cases).

42 *Id.* at 719 ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.").

43 *Id.* at 724–25.

44 *Id.* at 726.

45 *Id.* (quoting Brief for United States at 54, *Alvarez*, 567 U.S. 709 (No. 11-210)) (internal quotation marks omitted).

46 *Id.*

47 *Id.*

48 *Id.* at 727–28 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

49 *Id.* at 726.

50 *Id.* at 727–28 (citing *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)).

51 *Id.* at 713.

52 *Id.* at 714.

online, and another board member asked him to resign.<sup>53</sup> If anything, Kennedy concluded, “the outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”<sup>54</sup> Notably, Kennedy concluded that “suppression of speech by the government can make exposure of falsity more difficult, not less so.”<sup>55</sup>

Kennedy feared that upholding this law would mean that “there could be an endless list of subjects the National Government or the States could single out.”<sup>56</sup> Echoing Holmes’s admonition that it is not necessary to suppress the speech of “puny anonymities,” Kennedy pointed out that anti-lying laws could punish speech “whether shouted from the rooftops or made in a barely audible whisper.”<sup>57</sup> Kennedy asserted, “[o]ur constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”<sup>58</sup>

In *Sorrell v. IMS Health Inc.*, Kennedy again wrote for the Court, declaring that a law banning the sale and use of information about pharmaceutical prescriptions violated the First Amendment as a content-based and speaker-based law subject to strict scrutiny.<sup>59</sup> Kennedy made clear that *facts* are just as entitled to First Amendment protection as *opinions*.<sup>60</sup> He also rejected blatant assertions that information can be restricted because it can be used in bad or negative ways.<sup>61</sup> Specifically, he rejected the State of Vermont’s assertion that the people of Vermont want this law because it makes them feel “anxious” that their doctors may not have their patients’ best interests in mind.<sup>62</sup> Kennedy noted that doctors do not have to talk to pharmaceutical representatives but that they probably continue to do so because they find these visits useful.<sup>63</sup>

Kennedy’s concerns about restricting “false” speech relate to his passionate resistance to compelled speech. In one of his last opinions, a concurrence in *National Institute of Family & Life Advocates v. Becerra*,<sup>64</sup> Kennedy joined Justice Thomas’s majority opinion rejecting the creation of “professional speech” as a new category of lesser-protected speech.<sup>65</sup> Among other things, Thomas reasoned that professionals “have a host of good-faith disagreements” that are best left to the marketplace of ideas to sort out and warned that “the people lose when the government is the one deciding which

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53 *Id.* at 727.

54 *Id.*

55 *Id.* at 728.

56 *Id.* at 723.

57 *Id.*

58 *Id.*

59 *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

60 *See id.* at 570.

61 *See id.* at 575–77.

62 *Id.* at 576.

63 *Id.*

64 138 S. Ct. 2361 (2018).

65 *Id.* at 2371–72.

ideas should prevail.”<sup>66</sup> In his separate concurrence in *Becerra*, Kennedy specifically attacked the California law for compelling speech. Quoting *Wooley v. Maynard* and mocking the California State Legislature’s proclamation that the law under review was “forward thinking,” Kennedy asserted, “it is not forward thinking to force individuals to ‘be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.’”<sup>67</sup>

Kennedy also joined the Court in fighting back efforts to move to balancing tests that weigh the value of speech against the government’s interest in restricting it.<sup>68</sup> In *United States v. Stevens*,<sup>69</sup> for example, then–Solicitor General Elena Kagan argued that the Court should reject a First Amendment challenge to a law criminalizing depictions of animal cruelty because “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”<sup>70</sup> Writing for an almost unanimous Court (except Alito), Roberts declared, “[a]s a free-floating test for First Amendment coverage, that sentence is startling and dangerous.”<sup>71</sup> Roberts concluded unequivocally and with some sense of outrage that “[o]ur Constitution forecloses any attempt to revise that judgment [that benefits of restrictions on the government outweigh the costs] simply on the basis that some speech is not worth it.”<sup>72</sup>

In so many decisions, Kennedy led the Court’s charge against viewpoint-based and subject-matter based speech restrictions, the creation of new categories of unprotected or lesser-protected speech, arguments in favor of “balancing” the marketplace, and laws that restricted speech regarded as “offensive.” His commitment to these principles appears unwavering; he speaks in quasi-philosophical terms about how these principles are essential to our democracy and to our liberty. Kennedy has argued that “the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence.”<sup>73</sup> Ad hoc balancing tests, he has con-

66 *Id.* at 2374–75.

67 *Id.* at 2379 (Kennedy, J., concurring) (alterations in original) (first quoting Joint Appendix at 39, *Becerra*, 138 S. Ct. 2361 (No. 16-1140), 2008 WL 388836; then quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)) (internal quotation marks omitted).

68 See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 275–76 (2009) (pointing out that “[i]n theory, this approach seems sensible, but in practice it proved unworkable”).

69 559 U.S. 460 (2010).

70 *Id.* at 470 (quoting Brief for the United States at 8, *Stevens*, 559 U.S. 460 (No. 08-769)) (internal quotation marks omitted).

71 *Id.*

72 *Id.*

73 *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 785 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). In the same decision, Justice Souter also recognized that adherence to these general principles “keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.” *Id.* at 774 (Souter, J., concurring) (citing

tended, fail to provide “notice and fair warning”<sup>74</sup> about how courts will analyze speech restrictions; instead, such an approach permits judges to “wander into uncharted areas of the law with no compass other than our own opinions about good policy.”<sup>75</sup>

### III. THE MISSING MARKETPLACE OF IDEAS THEORY

Although the marketplace of ideas plays an important role in the Court’s First Amendment jurisprudence, and in Kennedy’s opinions especially, a closer look at the caselaw reveals that Kennedy—and the Court more generally—invokes this theory selectively.<sup>76</sup> The marketplace of ideas is not as entrenched in the Court’s First Amendment doctrine, at least when it comes to less-favored speakers like public school students and government employees, and when the Court is grappling with the still-developing government speech doctrine. In these contexts, the Court—including Kennedy—has given the government exactly the same broad authority to make content-based, speaker-based, and even viewpoint-based distinctions that are anathema outside of these areas.

#### A. Public School Speech

One of the most famous lines from *Tinker v. Des Moines Independent Community School District* is that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>77</sup> Ever since *Tinker*, which embraced a robust version of student speech rights, the Court has been clawing back student speech rights, and in so doing has abandoned its commitment to the marketplace of ideas.<sup>78</sup> Although the abandonment of the marketplace of ideas theory in the university setting has been less apparent, the Court’s most recent decision in *Christian Legal Society v. Martinez*<sup>79</sup> suggests a weakening commitment to the marketplace of ideas in that setting as well.

*Tinker* represents the high-water mark for student speech rights. In that case, the Court considered whether a public school could constitutionally

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Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) (arguing that “courts . . . should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense”).

74 *Id.* at 785 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

75 *Id.* at 787.

76 Professor Erwin Chemerinsky has also pointed out that the Supreme Court is not always dedicated to the freedom of expression, although he has focused on the Roberts Court in particular and has not specifically focused on the marketplace of ideas theory. See Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011).

77 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

78 For more detail on the Court’s K–12 First Amendment jurisprudence, see Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008).

79 561 U.S. 661 (2010).

punish three students for wearing to school black armbands in protest of the Vietnam War.<sup>80</sup> While the Court recognized that it must evaluate the students' speech rights "in light of the special characteristics of the school environment,"<sup>81</sup> the Court's commitment to the marketplace of ideas carried the day. Citing *Terminiello v. Chicago*,<sup>82</sup> the Court made clear that schools could not repress speech based simply on "undifferentiated fear or apprehension of disturbance,"<sup>83</sup> a line that is consistent with Holmes's *Abrams* dissent. *Tinker* expressed grave concern about schools becoming "enclaves of totalitarianism" that regard students as "closed-circuit recipients" of state-approved messages or information.<sup>84</sup> Leaving no doubt that the marketplace of ideas was the driving theory behind its decision, the Court expressly noted that student speech is an important part of the "marketplace of ideas" and that "personal intercommunication among the students" is "an important part of the educational process."<sup>85</sup> The Court concluded that schools could prohibit only speech that created a "material and substantial interference with school-work or discipline," not speech that merely provokes discussion.<sup>86</sup>

The Court's commitment to student speech rights has diminished sharply since *Tinker*. In *Bethel School District No. 403 v. Fraser*, the Court held that schools could prohibit lewd speech, even though the sexually suggestive speech at issue did not meet *Tinker*'s substantial disruption test.<sup>87</sup> Instead, after declaring that at least the school did not engage in viewpoint discrimination,<sup>88</sup> the Court permitted schools to restrict speech in order to promote "socially appropriate behavior"<sup>89</sup> and to prevent the undermining of "the school's basic educational mission."<sup>90</sup> The Court explained that the speech was "plainly offensive to both teachers and students—indeed to any mature person."<sup>91</sup> In holding that the freedom of speech must give way in the face of the school's role to teach students the "boundaries of socially appropriate behavior," the Court asserted that "the First Amendment gives a high school student the classroom right to wear *Tinker*'s armband, but not *Cohen*'s jacket."<sup>92</sup> The Court suggested various bases for its decision but no clear

80 *Tinker*, 393 U.S. at 504.

81 *Id.* at 506.

82 337 U.S. 1 (1949).

83 *Tinker*, 393 U.S. at 508.

84 *Id.* at 511; *see also id.* at 513 ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").

85 *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

86 *Id.* at 511.

87 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

88 *Id.* ("[T]he penalties imposed . . . were unrelated to any political viewpoint.").

89 *Id.* at 681.

90 *Id.* at 685.

91 *Id.* at 683.

92 *Id.* at 682–83 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result) (internal quotation marks omitted)).

standard aside from an ad hoc balancing approach that gave virtually no weight at all to the student speech rights.<sup>93</sup> In dissent, Justice Marshall pointed out that both the district court and court of appeals had concluded that the school had failed to present sufficient evidence that the speech substantially disrupted the educational process, and he argued the Court should not “unquestioningly accept a teacher’s or administrator’s assertion that certain pure speech interfered with education.”<sup>94</sup>

Notably, the Court also rejected Fraser’s argument that his suspension violated his due process rights by failing to give him adequate notice that his speech was punishable. The school’s policy prohibited “[c]onduct which materially and substantially interferes with the educational process . . . , including the use of obscene, profane language or gestures.”<sup>95</sup> As Justice Stevens noted in his separate dissent, both the district court and court of appeals concluded that the speech at issue was not substantially disruptive and did not involve obscenity.<sup>96</sup> Nevertheless, the Court simply held that schools need “flexibility” and that “the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.”<sup>97</sup>

In *Hazelwood School District v. Kuhlmeier*, decided just before Kennedy became a Supreme Court Justice, the Court continued its abandonment of core First Amendment principles when it held that schools can censor student speech in school-sponsored activities as long as “their actions are reasonably related to legitimate pedagogical concerns.”<sup>98</sup> In that case, the Court held that school officials did not violate the First Amendment when they prohibited students from writing articles in the school paper about the impact of divorce on students and about teen pregnancy.<sup>99</sup> The majority explained that *Tinker’s* standard did not apply when schools censor “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>100</sup> Justice Brennan argued in dissent that the majority had abandoned the core principles of *Tinker*, which gave schools very limited power to restrict student speech, by permitting blatant viewpoint-based discrimination, and by doing so, threatened to turn schools into the “enclaves of totalitarianism” that *Tinker* roundly rejected.<sup>101</sup>

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93 *Id.* at 682. The Court later admitted “[t]he mode of analysis employed in *Fraser* is not entirely clear.” *Morse v. Frederick*, 551 U.S. 393, 404 (2007).

94 *Fraser*, 478 U.S. at 690 (Marshall, J., dissenting).

95 *Id.* at 678 (quoting the school’s disciplinary policy) (internal quotation marks omitted).

96 *Id.* at 693–95 (Stevens, J., dissenting).

97 *Id.* at 686 (majority opinion) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)) (internal quotation marks omitted).

98 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

99 *Id.* at 263, 276.

100 *Id.* at 271.

101 *Id.* at 280 (Brennan, J., dissenting) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)) (internal quotation marks omitted).

Rather than serving as a backstop for the Court's abandonment of traditional First Amendment principles in the school setting, Kennedy joined those efforts. In 2006, he was on the bench for the Court's decision in *Morse v. Frederick*, where the Court held that schools are constitutionally permitted to restrict student speech that they reasonably believe encourages drug use.<sup>102</sup> In that case, a student held up a banner at a parade students attended with their school that read, "BONG HiTS 4 JESUS."<sup>103</sup> Kennedy did not write separately in this case, but he joined the majority and also joined a concurring opinion Alito authored.

The *Morse* majority rejected the argument that schools had broad authority under *Fraser* to restrict student speech that is "offensive."<sup>104</sup> Nevertheless, the Court asserted that the school's speech restrictions were constitutional. Although it recognized that the phrase in the banner was arguably "[g]ibberish,"<sup>105</sup> the Court held that the school's interpretation that the banner advocated illegal drug use was "reasonable" and posed a danger to the students.<sup>106</sup> In reasoning that would be unthinkable outside of the school setting, the Court confidently asserted that the school had not interfered with political speech, asserting, "this is plainly not a case about political debate over the criminalization of drug use or possession."<sup>107</sup>

Notably, the *Morse* majority was unconcerned that the speech restriction in that case did not satisfy *Tinker's* substantial disruption test or *Hazelwood's* imprimatur test.<sup>108</sup> Instead, the Court demonstrated its willingness to create new legal standards in each student speech case. The legal rule that comes out of *Morse* is unclear, but it appears that the following principles emerge: (1) schools are entitled to deference when interpreting what student speech means; (2) schools are permitted to restrict that speech if it refers in any way to drug use—and perhaps any other activity regarded as "dangerous" for minors; and (3) *Tinker's* "substantial disruption" standard does not limit the Court's ability to develop additional standards for restricting student speech in the future.<sup>109</sup> At bottom, the Court emphasized that the "special charac-

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102 *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

103 *Id.*

104 *Id.* at 409 (rejecting petitioners' argument that schools should be permitted to restrict speech that is "offensive" but concluding that the speech restriction was nevertheless justified in this case because "[t]he concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use").

105 *Id.* at 402.

106 *Id.* at 401 ("But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.").

107 *Id.* at 403.

108 *See id.* at 403–06.

109 *See id.* at 401, 405, 408; *see also id.* at 422 (Alito, J., concurring) ("[*Tinker*] does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.").

teristics” of the school environment justify almost all of its foundational First Amendment principles.<sup>110</sup>

In a concurring opinion, Alito—joined by Kennedy—appears to have recognized the potentially broad sweep of the majority’s opinion and tried to cabin it in, going so far as to say that he “join[s] the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.”<sup>111</sup> Alito praised the majority for rejecting the argument that schools could constitutionally restrict speech whenever to do so would serve their educational missions because, although schools “are invaluable and beneficent institutions, . . . they are, after all, organs of the State.”<sup>112</sup> Instead, the majority opinion asserted, because schools have “custodial and tutelary responsibility for children,”<sup>113</sup> schools can prohibit any speech that poses a threat of violence or harm to the physical safety of its students.<sup>114</sup> Alito recognized that this standard would be inconsistent with the Court’s incitement cases, “[b]ut due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence.”<sup>115</sup> Alito identifies these “special features” as the inability of parents to protect their children themselves and “[e]xperience” demonstrating that “schools can be places of special danger.”<sup>116</sup> He then (unconvincingly) concluded that “[s]peech advocating illegal drug use poses a threat to student safety that is just as serious [as speech advocating violence], if not always as immediately obvious.”<sup>117</sup>

Writing for the *Morse* dissenters, Stevens argued that the speech in *Morse* did not expressly advocate illegal conduct and instead “the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school’s decision to punish Frederick for expressing a view with which it disagreed.”<sup>118</sup> He chastised the Court for forgetting *Tinker’s* admonition that there is a “constitutional imperative to permit unfettered debate, even among high school students.”<sup>119</sup> He concluded that “students everywhere could be forgiven for zipping their mouths about drugs at school lest some ‘reasonable’ observer censor and then punish them.”<sup>120</sup>

The *Fraser*, *Hazelwood*, and *Morse* decisions represent a dramatic abandonment not just of the more speech-protective standards of *Tinker* but also

110 See *id.* 403, 405, 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (internal quotation marks omitted).

111 *Id.* at 423 (Alito, J., concurring) (emphasizing narrowness of majority opinion).

112 *Id.* at 423–24.

113 *Id.* at 406 (majority opinion) (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002)) (internal quotation marks omitted).

114 See *id.* at 408.

115 *Id.* at 425 (Alito, J., concurring).

116 *Id.* at 424.

117 *Id.* at 425.

118 *Id.* at 435 (Stevens, J., dissenting).

119 *Id.* at 445.

120 *Id.*

of the core fundamental principles of the First Amendment. The Court has held it now will defer to a school's reasonable interpretations of speech; allow schools to prohibit lewd language on school grounds, even when not in the classroom; and prohibit speech whenever the audience might "reasonably perceive" the speech as bearing the school's imprimatur. Outside of the school context, the Court has never permitted the government to make judgments about what is and is not political speech (or even what speech is valuable and is not valuable, outside of categories of unprotected and lesser-protected speech).

The Court's willingness to give broad authority to K-12 schools to restrict student speech may in part rest on the minority status of their students, but a similar watering down of the rights of students in higher education suggests other reasons are at work. To be clear, the Court has waxed poetic about the importance of the marketplace of ideas in the university setting.<sup>121</sup> In fact, in *Rosenberger v. Rector & Visitors of University of Virginia*, Kennedy wrote the opinion for a 5-4 Court holding that the University of Virginia could not bar student groups speaking from a "religious perspective" from receiving support from the student activity fund.<sup>122</sup> Viewing a student activity fund as a sort of "public forum," Kennedy applied the viewpoint-neutral requirements of the public forum doctrine to hold the exclusion unconstitutional.<sup>123</sup> He argued that such a ban constituted viewpoint discrimination—something the dissent rejected—and risks "the suppression of free speech and creative inquiry in one of [its] vital centers for the Nation's intellectual life, its college and university campuses."<sup>124</sup> Kennedy's conclusion that restrictions on speech from a "religious perspective" is a viewpoint-based speech restriction is in keeping with his conclusion in *Matal v. Tam* that restrictions on "offensive" speech are viewpoint based. In both instances, it is not obvious that the restrictions are viewpoint based, but in both cases, Kennedy—ever vigilant for inappropriate interference with the marketplace of ideas—concluded that they are.<sup>125</sup> Furthermore, Kennedy also rejected the University's claim that it has a right to deference in making educational decisions as irrelevant in *Rosenberger*. He explained, "[w]hen the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."<sup>126</sup> In the context of a student

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121 See, e.g., *Healy v. James*, 408 U.S. 169, 180-81 (1972).

122 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

123 *Id.* at 829-30 ("The [Student Activity Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

124 *Id.* at 836.

125 See *id.* at 831 ("The dissent's assertion that no viewpoint discrimination occurs because the [g]uidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech.").

126 *Id.* at 833.

activity fund, however, the University was not entitled to this deference because it was not the one speaking and was instead “expend[ing] funds to encourage a diversity of views from private speakers.”<sup>127</sup>

The Court’s most recent decision in this area, however, suggests that the Court’s jurisprudence in the higher education setting may be on the same path as that of the K–12 setting. In *Christian Legal Society v. Martinez*,<sup>128</sup> the Court held, in a slim 5–4 opinion authored by Justice Ginsburg and joined by Kennedy, that Hastings College of the Law’s policy that all student groups accepting school funds had to abide by an “all-comers” rule requiring them to accept anyone as a member was constitutional. In the case before the Court, the Christian Legal Society had argued that it should not be required to accept members who approved of same-sex relationships. The Court concluded that the general freedom of association principles the Court had developed in cases like *Boy Scouts of America v. Dale*<sup>129</sup> did not apply in this context because it was a subsidy case where the student group faces “only indirect pressure to modify its membership policies.”<sup>130</sup> The Court reasoned that it could apply a “less restrictive limited-public-forum analysis” because “Hastings, through its [registered student organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition.”<sup>131</sup> Not content to rest its decision on these grounds alone, the Court went on to explain how the “special characteristics of the school environment”<sup>132</sup>—a phrase we see over and over again in the K–12 setting—warranted deference to the expertise of university administrators and its asserted educational goal to promote “tolerance, cooperation, and learning among students.”<sup>133</sup>

The majority attempted to console those disappointed with its decision with its reassurance that the policy was content neutral and did not permit the school to engage in viewpoint-based discrimination. Kennedy’s concurring opinion emphasized the same point, that there was no showing that the policy was designed with the purpose or effect of disadvantaging student groups based on its views.<sup>134</sup> But the Court’s willingness to embrace a deferential attitude to public officials potentially demonstrated a dramatic abandonment of its commitment to the university as the quintessential marketplace of ideas. This opinion arguably leaves open the possibility of deference to the university on a much broader range of decisions impacting the freedom of speech.<sup>135</sup>

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127 *Id.* at 833–34.

128 561 U.S. 661 (2010).

129 530 U.S. 640, 659 (2000).

130 *Christian Legal Society*, 561 U.S. at 682.

131 *Id.* at 683.

132 *Id.* at 686 (quoting *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981)) (internal quotation marks omitted).

133 *Id.* at 689 (quoting Joint Appendix Volume II of II at 349, *Christian Legal Society*, 561 U.S. 661 (No. 08-1371)) (internal quotation marks omitted); see *id.* at 685–90.

134 *Id.* at 706 (Kennedy, J., concurring).

135 See Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1833 (2017).

### B. *Government Employees*

The trajectory of the First Amendment rights of government employees follows a path that closely resembles that of K–12 student rights. Unlike the student speech context, however, Kennedy authored one of the Court’s major opinions in this area that clawed back free speech rights, *Garcetti v. Ceballos*,<sup>136</sup> and significantly limited the ability of public employees to make meaningful contributions to the marketplace of ideas.

As in the public school context, the rights of public employees appeared robust in the late 1960s when the Court decided *Pickering v. Board of Education*.<sup>137</sup> In that case, the Court held that a schoolteacher could not be fired for criticizing the budget process of the local school board in a letter to the editor.<sup>138</sup> The school board contended that this letter contained false statements, undermined the reputations of the board members and school administrators, and “would tend to foment ‘controversy, conflict and dissension’ among teachers, administrators, the Board of Education, and the residents of the district.”<sup>139</sup> The Court first made clear that the government lacks unbridled authority to condition employment upon the abridgement of its employees’ expressive rights.<sup>140</sup> But just as *Tinker* recognized the “special characteristics of the school environment,”<sup>141</sup> *Pickering* recognized that the government “has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>142</sup> Seeing two competing interests at stake, the Court embraced a balancing test considering “the interests of the [employee], as a citizen, in commenting upon matters of public concern” against “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>143</sup>

Although the Court embraced a balancing test and refused to set forth any “general standard” due to the “enormous variety of fact situations,”<sup>144</sup> the Court embraced some of the fundamental principles of the marketplace of ideas. Echoing Holmes’s admonition that the government should not bother with “puny anonymities,” the Court made clear that the Board was not entitled to punish *Pickering*’s opinion that had no impact or effect on the operation of the schools (“beyond its tendency to anger the Board”) or on *Pickering*’s ability to do his job.<sup>145</sup> The Court noted that the record lacked evidence to support the Board’s argument that *Pickering*’s speech was disruptive. Indeed, the Court stated, “[s]o far as the record reveals, *Pickering*’s

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136 547 U.S. 410 (2006).

137 391 U.S. 563 (1968).

138 *Id.* at 564–65.

139 *Id.* at 567.

140 *Id.* at 568.

141 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

142 *Pickering*, 391 U.S. at 568.

143 *Id.* at 568.

144 *Id.* at 569.

145 *Id.* at 571–73.

letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief.”<sup>146</sup>

The Court also rejected the Board’s argument that it was entitled to punish Pickering for his “false” speech. Invoking the idea that the answer to false speech is more speech, the Court explained, “[t]he Board could easily have rebutted appellant’s errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise.”<sup>147</sup> The Court also emphasized the important contribution public employees can make to the marketplace of ideas, noting that they are the ones “most likely to have informed and definite opinions” on matters of public concern.<sup>148</sup> Even if a government employee defames a public official, the Court concluded, the usual actual malice standard from *New York Times Co. v. Sullivan* applies because “[t]he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great.”<sup>149</sup>

Although the plaintiff in *Pickering* prevailed, the Court made clear that the result was limited to the facts of that case. For example, the Court emphasized that the speech at issue was not directed to Pickering’s immediate supervisors and did not undermine workplace harmony.<sup>150</sup> By emphasizing that no one took Pickering’s op-ed seriously and that it had no impact, the Court ironically suggested that more persuasive speech could be punished.<sup>151</sup> Furthermore, the Court made clear that there might be cases where it is not so easy to correct any false or misleading statements an employee makes.<sup>152</sup> It is therefore no real surprise that when lower courts have applied the *Pickering* balancing test, courts tend to overvalue the government employer’s interest in restricting and punishing its employee’s speech and undervalue the value of the speech.<sup>153</sup>

But if the balancing test the Court announced in *Pickering* was not the best news for government employees, things have only gotten worse for them since that time. Just as it clawed back the expressive rights given students in *Tinker*, the Court has dramatically clawed back the expressive rights of government employees. In *Connick v. Myers*,<sup>154</sup> the Court declared that the First

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146 *Id.* at 570.

147 *Id.* at 572.

148 *Id.*

149 *Id.* at 573.

150 *Id.* at 569–70.

151 *Id.* at 570–73.

152 *Id.* at 572 (“We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher’s presumed greater access to the real facts.”).

153 For further discussion of these problems in more detail, see, for example, Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597 (2012); Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117.

154 461 U.S. 138, 146 (1983).

Amendment protects only speech on matters of public concern. The Court defined “public concern” extraordinarily narrowly and quite inconsistently with the way it had defined that term in other First Amendment cases.<sup>155</sup> In *Connick*, the plaintiff was an assistant district attorney who had circulated a questionnaire at work asking her colleagues about various workplace issues.<sup>156</sup> The Court expressed concern that extending the First Amendment in this context would ultimately “constitutionalize” every employee grievance.<sup>157</sup> As the four dissenting Justices pointed out, “[i]t is hornbook law, however, that speech about ‘the manner in which government is operated or should be operated’ is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment.”<sup>158</sup> The upshot of *Connick* is that it permits the government to punish employee speech without making any showing whatsoever that the speech interfered with the operation of government functions.<sup>159</sup> *Connick*’s cramped view of the First Amendment does not fit with the marketplace of ideas theory, which “protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness.”<sup>160</sup>

Things only got worse for government employees after Kennedy joined the Court. Rather than expressing concern that the government might suppress employee speech that it does not like, or recognizing the important contribution to the marketplace of ideas public employees can uniquely make, Kennedy authored the majority opinion *Garcetti v. Ceballos*, which held that an employee has no First Amendment rights when speaking pursuant to their “official duties.”<sup>161</sup> Although Kennedy noted that “[t]he Court has acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion,”<sup>162</sup> he ultimately did not balance the competing interests at stake. Instead, he embraced a bright-line rule that that when an employee speaks as an *employee* rather than a *citizen*, the First Amendment does not apply at

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155 See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (concluding that a protest outside of a funeral concerned matter of public concern).

156 *Connick*, 461 U.S. at 141 (noting that the questionnaire covered “office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns”).

157 *Id.* at 154 (characterizing the claim as an attempt to “constitutionalize” an employee grievance).

158 *Id.* at 156 (Brennan, J., dissenting) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

159 See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“If the [speech is not a matter of public concern], the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.” (citing *Connick*, 461 U.S. at 147)).

160 *Connick*, 461 U.S. at 165 (Brennan, J., dissenting).

161 *Garcetti*, 547 U.S. at 421 (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

162 *Id.* at 419.

all.<sup>163</sup> Kennedy reasoned that excluding the employee's speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created."<sup>164</sup> Remarkably, he seemed unconcerned that limiting government employee speech rights so dramatically would undermine the marketplace of ideas by exposing government employees to retaliation if they question government action. Furthermore, he failed to address how this standard would apply to professors and the idea of academic freedom.<sup>165</sup> As Stevens said in dissent, the answer to whether a government employee's speech is constitutionally protected in a given case should be "[s]ometimes," not "[n]ever."<sup>166</sup> Rather than balancing the competing interests, as the Court had done in *Pickering*, Kennedy imposed a new bright-line rule that dramatically reduced the First Amendment rights of public employees.

It is difficult to reconcile the Court's commitment to the marketplace of ideas and its jurisprudence relating to schools and government employees. Kennedy attempted to provide an explanation in *Citizens United*, where the Court held that speaker-based bans are just as bad as content-based speech restrictions. There, he said: "The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions."<sup>167</sup> Yet in these areas, Kennedy and the Court more generally have permitted the government to restrict far more speech than necessary to protect government functioning.

### C. Government Speech Doctrine

In *Matal v. Tam*, Alito, writing for the majority, asserted that the government speech doctrine "is a doctrine that is susceptible to dangerous misuse."<sup>168</sup> As he explained, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, govern-

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163 *Id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

164 *Id.*

165 Justice Souter raised this concern in his dissent. *Id.* at 438–39 (Souter, J., dissenting). Kennedy merely responded on behalf of the majority that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence" and that therefore "[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425 (majority opinion).

166 *Id.* at 426 (Stevens, J., dissenting) ("The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is 'Sometimes,' not 'Never.'" (citation omitted) (quoting *id.* at 413 (majority opinion))).

167 *Citizens United v. FEC*, 558 U.S. 310, 341 (2010).

168 *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

ment could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.”<sup>169</sup>

Alito’s words of caution are well taken. As it stands today, the government speech doctrine is like a “get out of jail free” card. The Court has made clear that its foundational First Amendment principles do not apply when the government itself is speaking. Although the idea of the government speech doctrine makes a lot of sense, however, the Court has struggled to flesh out the doctrine in any sort of clear and understandable way. Instead, we see the Court lashing back and forth from case to case, sometimes finding that the government speech doctrine is implicated, and sometimes finding that it is not.

The Court recently decided two cases that illustrate the utter chaos of this doctrine. In *Walker v. Sons of Confederate Veterans*, a 5–4 majority held that the Texas Department of Motor Vehicles Board could reject a specialty license plate request submitted by the Sons of Confederate Veterans because the presence of a Confederate flag violated its policy against “offensive” license plates.<sup>170</sup> Justice Breyer wrote the opinion for the majority, joined by the other progressive Justices as well as Thomas. Breyer suggested a whole host of factors might be relevant to determining whether government speech is at issue,<sup>171</sup> but ultimately settled on three factors as the most relevant in this particular case: (1) the history of the program, (2) the government’s control over speech, and (3) the perception of a reasonable person.<sup>172</sup> The Court ultimately determined, in an entirely unconvincing analysis,<sup>173</sup> that this program constituted government speech. Alito, not necessarily known as the Court’s most rabid defender of free speech, ripped Breyer’s opinion in dissent. He particularly had fun with the idea that a reasonable person would think that Texas was speaking through a specialty license plate that said, “Remax Realtors,” “Drink Dr. Pepper,” or “Go Gators” (as in the University of Florida mascot).<sup>174</sup>

Just two years after *Walker*, however, the Court took *Tam*, the offensive trademark case, and suddenly Alito was writing the majority. In an opinion that tracks very closely to his dissent in *Walker*, Alito all but ridicules the government speech argument. Alito concluded that extending the government speech doctrine to cover trademarks “would constitute a huge and dangerous extension of the government-speech doctrine.”<sup>175</sup> Alito also rejected the

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169 *Id.*

170 *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243–45 (2015).

171 Breyer noted that the Court looked at other factors in *Pleasant Grove City v. Summit*, 555 U.S. 460 (2009), that were not relevant in this case, such as the limited availability of space in the public park at issue in that case. *Walker*, 135 S. Ct. at 2249.

172 *Walker*, 135 S.Ct. at 2248–49.

173 For an extensive criticism of Breyer’s analysis, see Mary-Rose Papandrea, *The Government Brand*, 110 Nw. L. Rev. 1195 (2016).

174 *See Walker*, 135 S. Ct. at 2257.

175 *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017).

government's argument that trademark registration is a government program that subsidizes speech. The government does not give program participants any money; instead, they must pay the government substantial fees.<sup>176</sup> Notably, Alito lumped the trademark program into the group of many government benefits that involve the expenditure of funds, "like police and fire protection, as well as services that are utilized by only some, e.g., the adjudication of private lawsuits and the use of public parks and highways."<sup>177</sup>

Kennedy reached the same conclusions as Alito in *Walker* and in *Tam*, but he did not accept Alito's entire line of reasoning. Specifically, while he joined the portion of Alito's opinion in *Tam* rejecting the applicability of the government speech doctrine, he did not join the second part of the majority opinion discussing subsidized speech. Instead, Kennedy wrote his own concurrence arguing that a ban on "offensive" marks—or, as he rephrased it, a requirement of "positivity"—constituted impermissible viewpoint discrimination.<sup>178</sup>

In the two cases highlighted above, Kennedy is not at fault for the Court's flip-flop. Indeed, he appears to have gotten it "right" in both cases. These cases are nevertheless disconcerting, however, because they demonstrate what happens when the Court engages in flimsy balancing tests that are not guided by broader principles.

Furthermore, Kennedy hardly has clean hands when it comes to the government speech doctrine. This doctrine pops up throughout the Court's First Amendment jurisprudence, although the Court's invocation of it is not always obvious. For example, in *Garcetti*, Kennedy embraced the government speech doctrine when he held that the government has absolute power to control what its employees say when performing their job duties because they are simply mouthpieces for the government.<sup>179</sup> He has also suggested that he approves of *Hazelwood's* holding that schools can restrict student speech when a reasonable person would believe that the speech bears the school's imprimatur.<sup>180</sup>

He has also inconsistently rejected the government's attempts to use the government speech doctrine to justify content-based speech restrictions. Most notably, he was a crucial vote in *Rust v. Sullivan*.<sup>181</sup> In that case, the Court relied on the government speech doctrine in upholding a federal regulation that prohibited recipients of Title X family planning funds from counseling patients about abortion or referring them to abortion providers.<sup>182</sup> The Court rejected the argument that the regulation violated the First Amendment, reasoning that "[t]his is not a case of the Government

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176 *Id.* at 1761.

177 *Id.*

178 *Id.* at 1766 (Kennedy, J., concurring).

179 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

180 *See Morse v. Frederick*, 551 U.S. 393, 422–23 (2007) (Alito, J., concurring, joined by Kennedy, J.) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

181 500 U.S. 173 (1991).

182 *Id.* at 179–80.

‘suppressing a dangerous idea,’ but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.”<sup>183</sup> Given Kennedy’s passionate objections to any government interference with the marketplace of ideas, it is hard to understand how Kennedy could sign onto an opinion with this statement. After all, the clear intent of the regulation was to restrict information about abortion; in addition, the law directly interfered with the ability of doctors to communicate medical information to their patients.

#### CONCLUSION

As the Court struggles to apply traditional First Amendment doctrine, many scholars have called for a rethinking of these rules.<sup>184</sup> As it turns out, however, the Supreme Court has already abandoned its usual approach to the First Amendment in a number of important but overlooked contexts. This Article’s examination of these contexts—public school students, public employees, and the government speech doctrine—demonstrates the continuing importance of the marketplace of ideas theory of the freedom of expression. In these contexts, the Court has abandoned its antipathy for content-based and even viewpoint-based rules in favor of balancing tests and multifaceted inquiries. The abandonment of the Court’s usual skepticism of the government’s reasons for restricting speech comes with real costs for individual liberty interests as well as informed public debate, as these often-overlooked areas of the law illustrate.

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183 *Id.* at 194.

184 Post, *supra* note 12.