THE MARKETPLACE OF IDEAS AND THE PROBLEM OF NETWORKED TRUTHS

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ABSTRACT

We have entered the era of networked truths. In other words, how truth is constructed in the networked era has shifted as people increasingly make conclusions about the world around them based on realities formed from algorithmically and bot-influenced information environments and ideologically chosen group identifications. The dominant rationale for expansive free expression protections, however, is founded upon a much different understanding of truth. This article examines the factors that influence the shift in truth in the networked era, particularly in regard to social capital, identity, and how online spaces encourage a different type of expression. This article also establishes three important factors regarding the marketplace concept. First, its history tells us it is dynamic, rather than static in its meaning. Second, Justice Holmes did not create the marketplace of ideas in his dissent in *Abrams* and instead rejected the assumptions about truth that have come to undergird it. Third, Enlightenment-based ideas about truth and human rationality were added over time to rationalize expansive protections and create a conceptual space for human discourse. The article concludes that the networked-truth era requires a protected, rather than expansive, marketplace and an understanding of truth that safeguards the truth-formation process, rather than a battle between truth and falsity.

Key Words: First Amendment, Artificial Intelligence, Marketplace of Ideas, Networked Communication

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INTRODUCTION

Truth, the foundational building block upon which justices have constructed expansive First Amendment free-expression rationales, is not what it used to be. Networked technologies, and the alternative intelligence (hereinafter AI) actors that flow throughout them, have changed the way people come to understand and make sense of the world.[1] The era has introduced algorithms that sort and categorize the ideas and individuals people come into contact with.[2] Beyond algorithms, exponentially greater choice regarding information and association allows people to form idea-based communities where truths are based on accepted beliefs and individuals exchange little social capital.[3] At the same time, bots interact freely—often anonymously—within democratic discourse, artificially influencing the marketplace of ideas by flooding the space with certain ideas and pushing human speakers out.[4] False and misleading information, communicated by bots *and* humans, flows freely in virtual spaces. Furthermore, it finds ready acceptance in idea-based communities that are primed for such ideas.[5] As a result, people are becoming more ideologically distanced from those they disagree with; hate crimes are increasing as individuals act out the extremist ideas they find supported in online communities; and conspiracy theories and false information thrive.[6] In other words, these continually evolving networked-era changes have already become substantial concerns for democratic discourse and the traditional legal assumption that, in a free exchange of ideas, rational individuals will identify

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1. *See* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 57 (2017); SHERRY TURKLE, ALONE TOGETHER 11-13 (2011); MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 3 (2d ed. 2000).

2. *See* Eytan Bakshy, Solomon Messing & Lada A. Adamic, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 384 SCIENCE 1130, 1130-31 (2015); Philip M. Napoli, *What if More Speech is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 77-79 (2018).

3. *See* HENRY JENKINS, CONVERGENCE CULTURE 27 (2006); Caroline Haythornthwaite, *Strong, Weak, and Latent Ties and the Impact of New Media*, 18 INFO. SOC'Y 385, 388-90 (2002); ROBERT D. PUTNAM, BOWLING ALONE 18-23 (2000).

4. *See, e.g.*, Molly K. McKew, *How Twitter Bots and Trump Fans Made #ReleaseTheMemo Go Viral*, POLITICO (Feb. 4, 2018), https://www.politico.com/magazine/story/2018/02/04/trump-twitter-russians-release-the-memo-216935; Tess Owen, *Nearly 50% of Twitter Accounts Talking About Coronavirus Might Be Bots*, VICE (Apr. 23, 2020, 1:07 PM), https://www.vice.com/en_us/article/dygnwz/if-youre-talking-about-coronavirus-on-twitter-youre-probably-a-bot. *See also* Jared Schroeder, *Marketplace Theory in the Age of AI Communicators*, 17 FIRST AMEND. L. REV. 22, 29-35 (2018).

5. *See* Toby Hopp, Patrick Ferrucci & Chris J. Vargo, *Why Do People Share Ideologically Extreme, False, and Misleading Content on Social Media?*, 46 HUM. COMMC'N RSCH. 357, 362-63 (2020); Philip Ball, *'News' Spreads Faster and More Widely When It's False*, NATURE (Mar. 8, 2018), https://www.nature.com/articles/d41586-018-02934-x; Kate Starbird, *Disinformation's Spread: Bots, Trolls and All of Us*, NATURE (July 24, 2019), https://www.nature.com/articles/d41586-019-02235-x.

6. *See* CASTELLS, *supra* note 1, at 3; Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 7, 2019, 3:51 PM), https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons. *See also*, *e.g.*, Kevin Roose, *What is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), https://www.nytimes.com/article/what-is-qanon.html.

truth and eschew falsity.[7] These changes have undermined the traditional rationalizations for expansive free-expression safeguards and all lead back to one crucial inflection point in how justices have rationalized and understood free expression—truth.

The concept of truth has a very particular meaning in the U.S. legal system, one that the emergence and massive adoption of networked technologies and the increasing influence of AI actors has called into question. Essentially, the Supreme Court constructed its rationales for expansive protections for freedom of expression using Enlightenment-funded assumptions that people are generally rational and truth is objective and universal for all.[8] This selection of Enlightenment understandings of truth, rather than those from other philosophical approaches, has directed the installation of almost every subsequent building block regarding *why* First Amendment safeguards for free expression mean what they have come to mean. Perhaps justices interwove their understanding of Enlightenment-based truth and free expression most succinctly in their decision in *Red Lion v. FCC* in 1969. The Court reasoned, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[9]

Since *Red Lion*, and other crucial cases from the 1960s and 70s progressing into the networked era, justices have only leaned more heavily on Enlightenment truth assumptions, expanding free-expression safeguards for intentionally false information and commercial and corporate speech, for example.[10] In *United States v. Alvarez*, a law was struck down that criminalized lying about earning military honors, the Court reasoned: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[11] Similarly, the Court rejected a federal law that limited corporate and union contributions to political campaigns in *Citizens United v. Federal Election Commission* because the law limited certain speakers, dismissing concerns that these non-human speakers had the power to distort the conceptual space.[12] With

7. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (rationalizing free expression using the marketplace concept); Robert Schmuhl & Robert G. Picard, *The Marketplace of Ideas*, *in* THE PRESS 141, 141-47 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (providing a definition and history of the marketplace).

8. Steven D. Smith, *Recovering (from) Enlightenment*, 41 SAN DIEGO L. REV. 1263, 1264-66 (2004); R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1074-76 (1995).

9. *Red Lion Broad. Co.*, 395 U.S. at 390.

10. *See*, *e.g.*, United States v. Alvarez, 567 U.S. 709 (2012); Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *See also* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 802-03 (2011) (expanding First Amendment protections to video games); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784-86 (1978) (extending free expression rights to corporations).

11. *Alvarez*, 567 U.S. at 727 (citing Whitney v. California, 274 U.S. 357, 377 (1927)).

12. Citizens United v. FEC, 558 U.S. 310, 392-93 (2010) (Scalia, J., concurring) (citing *Bellotti*, 435 U.S. at 777) (noting the conformity of the Court's opinion with the original meaning of the First Amendment, which reinforced and extended the Court's emphasis from *Bellotti* that corporate speakers can contribute to the marketplace).

each decision like these, justices have placed increasing pressure on the tenuous Enlightenment truth assumptions that make up the foundations for *why* we have free expression. Problematically, however, these flawed Enlightenment foundations increasingly threaten the future of democratic discourse. They might also be, at least partially, the result of a terrible misreading of the first Supreme Court opinion in which a justice explained what the First Amendment safeguards for free expression mean.[13]

Justice Holmes's ideas about truth, which were permanently chiseled into the Court's thinking in his opinion in *Schenck v. United States* in spring 1919 and the famous *Abrams v. U.S.* dissent that followed that fall, have had an outsized influence on how justices rationalize free expression.[14] Justice Holmes's dissent in *Abrams*, which contended 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

was immediately associated with Enlightenment thought.[15] Harvard Law professor and future justice Felix Frankfurter wrote Justice Holmes, his mentor, days after the opinion was handed down, concluding the ideas from the dissent will "live as long as the *Areopagitica*."[16] Fellow Harvard Law professor Roscoe Pound, according to Frankfurter's letter, agreed that Justice Holmes's opinion shared common characteristics with Enlightenment thinker John Milton's impassioned argument against government controls on publishing from *Areopagitica*. The common association between Justice Holmes and Enlightenment thought encounters two crucial problems, however.

First, Enlightenment assumptions that truth is generally static and the same for all and that people are rational and will come to similar conclusions about the world around them carry substantial philosophical baggage.[17] Legal scholars and philosophers alike have concluded Enlightenment ideas about truth fail to account

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13. *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2005) (reinforcing the idea that Justice Holme's dissent in Abrams v. U.S., 250 U.S. 616, 630 (1919) was far from a complete theory of the First Amendment). Justice Holmes's dissents in the case represented the first opinion in which a justice argued that a law conflicted with the First Amendment).

14. *See* Schenck v. United States, 249 U.S. 47 (1919); *Abrams*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); *See also* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (reinforcing and communicating further ideas about truth); Blasi, *supra* note 13, at 2 (describing the *Abrams* dissent as "canonical").

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

16. Letter from Felix Frankfurter, Sup. Ct. Just., to Oliver W. Holmes, Sup. Ct. Just. (Nov. 26, 1919) (on file with Harvard Law School Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:42879149$17i. Written by John Milton in 1644, *Areopagitica* is a seminal Enlightenment work. In particular, it emphasizes the victory of absolute, discoverable truth over falsity in a free exchange of ideas among rational individuals). *See* JOHN MILTON, AREOPAGITICA AND OF EDUCATION: WITH AUTOBIOGRAPHICAL PASSAGES FROM OTHER PROSE WORKS 50 (George H. Sabine ed., 1951).

17. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3-7 (1989); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15–18 (1984); *See generally* WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907) (providing examples of criticisms based on the Enlightenment assumptions about truth and human rationality).

for human diversity and make unsupportable assumptions about the universal nature of truth.[18] First Amendment scholar C. Edwin Baker concluded, "truth is not objective," contending "people individually and collectively choose or create rather than 'discover' their perspectives, understandings, and truths."[19] In her own way, German thinker Hannah Arendt rejected absolute, objective certainty, explaining, "The need of reason is not inspired by the quest for truth but by the quest for meaning. And truth and meaning are not the same."[20] In short, Enlightenment assumptions have always been suspect and have become glaringly problematic in the networked era. Non-human entities increasingly influence human discourse, misinformation and disinformation are readily accepted by like-minded communities, and threatening and hateful language online increasingly manifests itself in the physical word.[21] The Enlightenment truth-and-rationality assumptions are not up to the task of acting as a philosophical foundation for a system of expansive free-expression rationales. A new system is needed.

Second, and equally as problematic, Justice Holmes's credentials as an Enlightenment thinker are limited. His opinion in *Abrams* is the primordial ancestor to how justices have come to understand freedom of expression. The problem is, as crucial as the opinion is, the association between Justice Holmes's philosophy and Enlightenment thought is misguided, tenuous at best, and, perhaps more accurately, erroneous. Most of his personal, scholarly, and judicial writings conflict with any such conclusion.[22] Justice Holmes concluded objective truth was a "mirage."[23] In *Natural Law*, which he published in 1918, the year before his opinions in *Schenck* and *Abrams*, Justice Holmes concluded, "[c]ertitude is no test of certainty. We have been cock-sure of many things that were not so."[24] Passages

18. *See* David A. Hollinger, *The Enlightenment and the Genealogy of Cultural Conflict in the United States*, *in* WHAT'S LEFT OF ENLIGHTENMENT?: A POSTMODERN QUESTION 7, 8-9 (Keith Michael Baker & Peter Hanns Reill eds., 2001); BAKER, *supra* note 17, at 12-17 (for examples).

19. BAKER, *supra* note 17, at 12-13.

20. HANNAH ARENDT, THE LIFE OF THE MIND 15 (1978).

21. *See, e.g.*, McKew, *supra* note 4; Starbird, *supra* note 5 (regarding non-human entities' influence on human discourse); *See also* SUNSTEIN, *supra* note 1, at 69-71; Schroeder, *supra* note 4, at 37-38 (discussing how like-minded audiences are more likely to accept false or misleading information). *See also* Adrienne LaFrance, *The Facebook Papers: 'History Will Not Judge Us Kindly'*, ATLANTIC (Oct. 25, 2021), https://www.theatlantic.com/ideas/archive/2021/10/facebook-papers-democracy-election-zuckerberg/620478/ (leaks and reports about YouTube for conclusions that social media spaces encourage extremism); Casey Newton, *How Extremism Came to Thrive on YouTube*, VERGE (Apr. 3, 2019, 6:00 AM), https://www.theverge.com/interface/2019/4/3/18293293/youtube-extremism-criticism-bloomberg.

22. *See, e.g.*, Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 27, 1929), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 107 (Richard A. Posner ed., 1992); Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Aug. 30, 1929), *in* THE ESSENTIAL HOLMES, *supra*, at 108; Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918); Letter from Oliver W. Holmes to William James (Mar. 24, 1907) (on file with Harvard Law School Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:43006888$37i.

23. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 11, 1929), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 107 (Richard A. Posner ed., 1992).

24. Holmes, *supra* note 22, at 40.

such as these have led many to classify Justice Holmes as a pragmatist rather than an Enlightenment thinker. Though he explicitly rejected the label, its timing fits as American pragmatism reached its zenith during Justice Holmes's time on the Supreme Court.[25] Indeed, Justice Holmes's old friend from Boston, William James, is the father of American pragmatism, a subject the two wrote thoughtfully about in letters to one another.[26] Justice Holmes's conclusions about truth, including his contention that it is human-made and varies based on a person's experience, find overlaps with pragmatic assumptions about truth.[27]

This article examines how the marketplace-based rationale for free expression should be revised in light of the new type of truth: *networked truth*. To do so, this article begins by defining and exploring the networked-truth phenomenon, particularly in regard to the changing natures of community, identity, and communication in virtual spaces. The article continues by exploring the development of the marketplace as an Enlightenment-based rationale for expansive free expression, placing an emphasis on the dynamic nature of the conceptual space and misconceptions about Justice Holmes's role in the theory's creation. Ultimately, this article draws the conceptual building blocks about the networked-truth concept and the development of the marketplace as a conceptual space for human discourse, reconstructing the space in a way that allows for a different understanding of truth and a protected, rather than expansive space.

I. NETWORKED TRUTHS

Truth in the networked era is constructed via a substantially different set of conditions than those outlined by seventeenth and eighteenth-century Enlightenment thinkers and was gradually installed into the foundations of the marketplace concept.[28] Enlightenment-based thinking assumes truth is external, meaning it exists outside of human control. In this sense, truth is universal, the same for all, and simply awaits discovery.[29] Of course, such a discovery of static, external truth can only occur because Enlightenment thought assumes people are rational and can discern truth from falsity.[30] Justices have constructed expansive

25. *See* Letter from Justice Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 29, 1917), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 37 (Richard A. Posner ed., 1992).

26. *See* Letter from Oliver W. Holmes to William James (Mar. 24, 1907), *supra* note 22; WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING § vii (1978).

27. *See e.g.*, Holmes, *supra* note 22, at 43 (where he concluded that "[m]en"Men to a great extent believe what they want to") *Cf.* JAMES, *supra* note 26, at 38-42. *See* Jared Schroeder, *The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth*, 7 BR. J. AM. LEGAL STUD. 169, 173-77 (2018) (for a fuller discussion on Justice Holmes and pragmatism).

28. *See infra* Part II.A-C regarding how Enlightenment assumptions came to be the foundation of the marketplace approach.

29. *See* Fred S. Siebert, *The Libertarian Theory of the Press*, *in* FOUR THEORIES OF THE PRESS 40 (Fred S. Siebert et al. eds., 1956); Gerald F. Gaus, CONTEMPORARY THEORIES OF LIBERALISM 2–3 (2003); Peter J. Gade, *Postmodernism, Uncertainty, and Journalism*, *in* CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES 64 (Wilson Lowrey & Peter J. Gade eds., 2011).

30. *See* Fred S. Siebert, *The Libertarian Theory of the Press*, *in* FOUR THEORIES OF THE PRESS 40 (Fred S. Siebert et al. eds., 1956); Gerald F. Gaus, CONTEMPORARY THEORIES OF LIBERALISM 2–3

free-expression rationales upon these assumptions.[31] Importantly, the marketplace model was not designed to rationalize free expression in a diverse society in which everyone, including non-human actors, has the power to contribute ideas.[32] Quite the opposite, the primordial aspects of the theory find their roots in a period when thinkers spoke of *natural* human rights and equality, but few had the ability or power to communicate.[33] Enlightenment thinkers concluded rational people will generally discover the same truth because they viewed people as being largely the same. Historian David Hollinger highlighted this as a problem with Enlightenment thought. He explained, the "Enlightenment, it seems, has led us to suppose that all people are pretty much alike."[34] He found it "blinded us to uncertainties of knowledge by promoting an ideal of absolute scientific certainty."[35]

A different version of this contradiction between speaking of natural rights and equality while having few who can access or participate in the marketplace persists in the networked era. The crucial expanse between the idealized, cobble-stoned, egalitarian, pastoral marketplace the Supreme Court has conjured, and the reality of a highly stratified space dominated by those with the most resources has only intensified in the networked era. Justices did not acknowledge this concern in *Reno v. ACLU*, the first case in which the Court addressed free expression on the Internet, and instead relying on the same hopeful assumptions about an egalitarian marketplace.[36] Justices celebrated networked communication as a massive, democratizing force.[37] The Court reasoned:

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.[38]

Since the 1997 decision, a different reality has emerged. The capacity for widespread access to publishing tools has expanded, but the architecture and flow

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(2003); Peter J. Gade, *Postmodernism, Uncertainty, and Journalism*, *in* CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES 64 (Wilson Lowrey & Peter J. Gade eds., 2011).

31. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); United States v. Alvarez, 567 U.S. 709, 718 (2012). *See* Jared Schroeder, *Fixing False Truths: Rethinking Truth Assumptions and Free-Expression Rationales in the Networked Era*, 29 WM. & MARY BILL RTS. J. 1097, 1133-40 (2021) (for more complete discussion).

32. *See* Schmuhl & Picard, *supra* note 7, at 152; HOLLINGER, *supra* note 18, at 7-9.

33. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT) AND A LETTER CONCERNING TOLERATION 44-47 (J.W. Gough ed., 1976). *See also* Christopher Hamel, *The Republicanism of John Milton: Natural Rights, Civil Virtue and the Dignity of Man*, 34 HIST. POL. THOUGHT 35, 39-41 (2013).

34. HOLLINGER, *supra* note 18, at 8-9.

35. *Id.*

36. *See generally* Reno v. ACLU, 521 U.S. 844 (1997).

37. *Id.* at 870.

38. *Id.*

of information within the spaces have shifted in ways that favor polarization, fragmentation, and extremism. These virtual spaces exacerbate the longstanding power and access problems marketplace theory has long ignored.[39] Sociologist Manuel Castells characterized networked spaces as evolving into "walled gardens" where "network operators, with respect to their specific business interests, imposed fundamental constraints upon the expansion of new digital culture."[40] Thus, the Court's Enlightenment-constructed blinders led them to see an open space for human discourse in the Internet, rather than the fragmented, economically motivated structure. Ultimately, emerging, networked technologies, and the ways people use them, have led citizens to understand themselves and others differently than in past eras, fundamentally shifting the makeup of a conceptual space for human discourse, altering how people decide what is true, and highlighting long-standing flaws in the marketplace's construction.

A. Friends and Others

The information and ideas people encounter are the building blocks for their realities—how they construct the world around them.[41] During previous eras, individuals generally received information from what legal scholar Cass Sunstein termed "general-interest intermediaries."[42] These are essentially newspapers, magazines, and broadcasts that seek to reach mass audiences with a broad spectrum of useful information. This same concept about the discourse-nourishing role of news sources is central to another understanding of a conceptual space for human discourse—Jürgen Habermas's construction of the public sphere.[43] His explanation of the sphere's failure includes the shift of general-interest news sources from providing important information to becoming a commodity that sought to publish what sold newspapers rather than nourished and informed the public.[44] He explained, "rational-critical debate had a tendency to be replaced by consumption, and the web of public communication unraveled into acts of individuated reception."[45] His conclusions about the failure of a conceptual space for discourse align with the cracks and fissures that have formed in the marketplace's foundations in the twenty-first century. The emergence of networked technologies has created a choice-rich information environment where each person is tasked with customizing their information streams.[46] Scholars have

39. *See* Jerome A. Barron, *Access to the Press–A New First Amendment Right*, 80 HARV. L. REV. 1641, 1676-78 (1967); Ingber, *supra* note 17, at 36-40 (discussion regarding access and power in the marketplace).

40. MANUEL CASTELLS, COMMUNICATION POWER 107 (2009).

41. CLAY SHIRKY, HERE COMES EVERYBODY 17 (2008).

42. SUNSTEIN, *supra* note 1, at 41-44.

43. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 14-18 (Thomas Burger & Frederick Lawrence trans., MIT PRESS 1989) (1962).

44. *Id.* at 169.

45. *Id.* at 161.

46. *See* ZIZI PAPACHARISSI, A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 306 (2010); Itai Himelboim et al., *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-

found, when given these choices, individuals generally tend to flock to like-minded others.[47]

The combination of massive choice in customizing information and the formation of like-minded groups has powerful effects on how people understand themselves and others. Sunstein explained, "Members of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens… or if they see one another as enemies or adversaries in some kind of war."[48] Similarly, Sunstein later concluded: "When society is fragmented, diverse groups will tend to polarize in a way that can breed extremism, and even hatred and violence."[49] In other words, when individuals primarily only encounter information that reinforces their existing views, they can only become more extreme, not more open-minded. The emergence of such a powerful current that sweeps people toward more extreme, rather than more conciliatory, conclusions represents one of the reasons the nature of truth has substantially shifted in the twenty-first century, ultimately undermining a marketplace of ideas rationale undergirded by Enlightenment assumptions.

Envisioning virtual communities as primarily intentional, homogenous spaces does not fully explicate the transformation in how information flows and truth functions in the networked era. As people construct intentional, often like-minded groups, they also understand themselves and others in fundamentally different ways. Scholars have found online interactions yield weaker ties than in-person relationships.[50] Media scholar Henry Jenkins explained, "these new communities are defined through voluntary, temporary, and tactical affiliations, reaffirmed through common intellectual enterprises and emotional investments."[51] In other words, interactions in virtual spaces are far more transactional than they are relational. Weaker ties mean individuals are less likely to construct trusting relationships with others or to engage in meaningful, nuanced interactions.

Another way of conceptualizing this shift is in terms of social capital. Scholars have found online communities generally lack social capital.[52] As political scientist Robert Putnam explained, "social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them."[53] Thus, communication in networked spaces not only encourages polarization and fragmentation on a macro scale, but also leads people to understand themselves and others in less meaningful and connected

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MEDIATED COMMC'N 154, 166-71 (2013); W. Lance Bennett & Shanto Iyengar, *A New Era of Minimal Effects? The Changing Foundations of Political Communication*, 58 J. COMMC'N 707, 724-25 (2008) (discussing selection and identity choices in online environments).

47. *See* Himelboim et al., *supra* note 46, at 166–71; SUNSTEIN, *supra* note 1, at 1-3.

48. SUNSTEIN *supra* note 1, at IX.

49. *Id.* at 57.

50. *See* Haythornwaite, *supra* note 3, at 386; JENKINS, *supra* note 3, at 26-27; Mario Luis Small, *Weak Ties and the Core Discussion Network: Why People Regularly Discuss Important Matters with Unimportant Alters*, 35 SOC. NETWORKS 470, 481 (2013).

51. JENKINS, *supra* note 3, at 27.

52. *See generally* QUAN-HAASE & WELLMAN, HOW DOES THE INTERNET AFFECT SOCIAL CAPITAL? (2004) (arguing internet reduces social capital).

53. *Id.* at 19.

ways. Sociologist Sherry Turkle communicated these concerns in a different way, emphasizing that networked technologies have made us more connected to each other than ever, and at the same time, more alone.[54] She explained, "in the half-light of virtual communities, we may feel utterly alone."[55] What happens when human discourse shifts from an in-person space, where individuals exchange greater trust and empathy, to forums where interactions lack these attributes or face substantially diminished levels of these building blocks of human interaction? Expression becomes less nuanced and more extreme as people live out identities that reflect lower empathy, trust, and social capital in virtual environments.[56] In virtual spaces filled with such interactions, the information building blocks people use to construct their realities about the world, their truths, depart greatly from the informed, rational debate model at the center of the pastoral, Enlightenment-based marketplace model.

B. Performance and Truth

Turkle, along with other scholars, is also concerned with identity in the networked era. She emphasized people construct *performative identities* in social media spaces.[57] These identities are more carefully curated than in-person identities because they can be.[58] Platform providers, which encourage users to earn "likes," "shares," "followers," and "favorites," incentivize constructing more outlandish and extreme personalities, because they receive the most attention and interactions.[59] Internal Facebook documents, which were made public in fall 2021, reinforce this conclusion.[60] The company found extremism and falsity succeed as a result of the behaviors Facebook encourages.[61] They found, "We also have compelling evidence that our core product mechanics, such as virality, recommendations, and optimizing for engagement, are a significant part of why

54. TURKLE, *supra* note 1, at 10-13.

55. *Id.* at 11-12.

56. Eden Litt & Eszter Hargittai, *The Imagined Audience on Social Network Sites*, 2 SOC.SOCIAL MEDIA + SOC'Y, Jan.–Mar.SOCIETY, Feb. 2016, at 8-9 (2016) (the authors examined how people perform identities to "imagined audiences," which are audiences constructed from the authors' assumptions about who will receive their messages.); *See also* SHERRY TURKLE, RECLAIMING CONVERSATION: THE POWER OF TALK IN A DIGITAL AGE 21-25 (2015); PAPACHARISSI, *supra* note 46, at 307-08.

57. TURKLE, *supra* note 56, at 83-85.

58. Jenny L. Davis, *Curation: A Theoretical Treatment*, 20 INFO. COMMC'N & SOC'Y 770, 771-72 (2016); PAPACHARISSI, *supra* note 46, at 307.

59. *See* JOSÉ VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 31-35 (2013) (describing internal structures of social media platforms and how they guide users to desired activities); DIPAYAN GHOSH, TERMS OF DISSERVICE 59-60 (2020); Zizi Papacharissi, *A Networked Self: Identity Performance and Sociability on Social Network Sites*, in FRONTIERS IN NEW MEDIA RESEARCH 209-210 (Francis L.F. Lee et al. eds., 2013).

60. LaFrance, *supra* note 21; *See generally The Facebook Papers*, https://apnews.com/hub/the-facebook-papers, (collection of all the reporting by the Associated Press about the internal documents that were leaked by former product manager Frances Haugen in October 2021).

61. Mike Isaac, *Facebook Wrestles with the Features it Used to Define Social Networking*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/25/technology/facebook-like-share-buttons.html.

these types of speech flourish on the platform."[62] In other words, extremism and performative identities are baked into how most virtual spaces are designed. These performative networked identities take substantial effort to live out, however, as communicating online gives people less control over who sees or hears their messages as ideas move from community to community, often without context. Communication scholar Zizi Papacharissi explained, "The individual must then engage in multiple mini performances that combine a variety of semiological references so as to produce a presentation of the self that makes sense to multiple audiences."[63] The result is people often oversimplify messages. Ideas become less nuanced than they would be in in-person communication, a phenomenon compounded by the lack of body language and social cues generally present in in-person interactions. The built-in incentive to perform acceptable or popular identities, thus receiving affirmation from others, and the pull toward simplifying messages, work together to encourage a different type of identity in virtual spaces than what traditionally exists in in-person situations. Problematically, over time, people begin to forget the virtual and in-person identities are different and start to live out the conjured version of themselves. Turkle explained, "lines blur and it can be hard to keep them straight."[64]

Such shifts in the flow of information, the formation of communities, and how people understand themselves and others, paint a substantially different picture of the marketplace of ideas than is generally portrayed by justices or within Enlightenment thinker's constructions of the space. These factors create the conditions for *networked truths*, conclusions people make about the world around them based on realities constructed from algorithmically and bot-influenced information environments, as well as ideologically chosen group identifications. These truths are the results of interactions that lack trust and empathy and messages that are less nuanced and more performative, as people seek success within the different forums' systems. When considered in mass, rather than on an individual scale, how people understand themselves, others, and the world around them operates in far different ways than Enlightenment thinkers assumed. The networked self, as Papacharissi explained, is the result of users' newfound powers to construct and live out identities based on the unique conditions presented by online environments.[65]

These identities have important ramifications for the nature of truth. Truth becomes the result of countless interactions that generally encourage people to select from a limited spectrum of ideas pre-determined by the information sources and people they encounter and often unnuanced, performative messages.[66] In this sense, individuals do not generally discern *the* truth—a universal, static truth—from falsity in an open conceptual space that allows people to gather on equal terms. People instead gather in communities based upon pre-determined truths and surround themselves with information sources and others that reinforce those

62. *Id.* (quoting the internal documents).
63. Papacharissi, *supra* note 59, at 209.
64. TURKLE, *supra* note 56, at 84.
65. PAPACHARISSI, *supra* note 46, at 305-307.
66. *Id.* at 306-07.

understandings. Such a dynamic facilitates the success of conspiracy theories and intentionally false information that have found substantial footholds in certain communities. Members of idea-based communities are primed to accept information because it aligns with the dominant narratives within the group.[67] In these conditions, truth is selected based on the community's pre-determined ideas, rather than the outcome of a Miltonian battle where truth and falsity wrestle and truth vanquishes its opponent.[68] Networked truths preclude the need for any such battle, since only ideas that generally align with the community's beliefs are accepted.

C. New Neighbors

Concerns about community, identity, and the formation of networked truths omit important players in how the nature of truth has shifted in the twenty-first century. Algorithms and artificially intelligent entities play increasingly influential roles in determining the people and ideas individuals encounter, the frequency and intensity of messages they see, and their access to the conceptual space for democratic discourse. Importantly, these phenomena represent a relatively new set of actors in how information flows and how individuals encounter ideas.

In-person interactions and communities generally do not face the artificial influences of algorithmic predeterminations about the ideas and individuals people encounter, nor are they populated with non-human speakers. Legal scholar Jack Balkin labeled this phenomenon the "Algorithmic Society," essentially a communication environment based on decisions made by algorithms and bots.[69] These computer-based entities can be understood as supercharging the factors that already undermine the flow of information and the formation of truth in virtual spaces. Before people make choices about the users and information sources they wish to engage with online—the very building blocks of their realities—search engines and social media platform algorithms have already done substantial amounts of sorting.[70] Algorithms employ the massive amounts of data technology firms gather about users to present them with information that, at least according to the programming, people want to encounter.[71] Balkin referred to this phenomenon as "algorithmic nuisance," as technology firms' programs lead to "the

67. *See* SUNSTEIN, *supra* note 1, at 117-32; Jessica T. Feezell, *Agenda Setting Through Social Media: The Importance of Incidental News Exposure and Social Filtering in the Digital Era*, 71 POL. RSCH. Q. 482, 490-91 (2018); *See also* MANUEL CASTELLS, THE POWER OF IDENTITY 68-69 (2010) (regarding identity and information).

68. *See* MILTON, *supra* note 16, at 50 (for an explicit example of the truth-and-falsity assumptions found in the Enlightenment-era author's work); SUNSTEIN, *supra* note 1, at 120-129; Feezell, *supra* note 67, 490-491.

69. Jack M. Balkin, *2016 Sidley Austin Distinguished Lecture on Big Data Law and Policy: The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217, 1219 (2017).

70. *See* Urbano Reviglio & Claudio Agosti, *Thinking Outside the Black-Box: The Case for "Algorithmic Sovereignty" in Social Media*, 6 SOC. MEDIA + SOC'Y, Apr.–June 2020 at 1, 9; Natascha Just & Michael Latzer, *Governance by Algorithms: Reality Construction by Algorithmic Selection on the Internet*, 39 MEDIA, CULTURE & SOC'Y 238, 253-55 (2016).

71. *See* GHOSH, *supra* note 59, at 157-59; Just & Latzer, *supra* note 70, at 254-55.

socially unjustified use of computational capacities that externalizes costs onto innocent others."[72]

Importantly, these predeterminations about what people encounter, and what they do not, have a substantial influence on how truth is formed. Not only do they predetermine the people and ideas users encounter, they also tend to channel people toward progressively more extreme content.[73] Both Facebook's and YouTube's algorithms, for example, have been found to encourage extremism.[74] The information and connections they offer users, often in the form of suggested communities and videos, lead people down rabbit holes into progressively more and more extreme content.[75]

Scholars have characterized algorithms as a new form of gatekeeper, an entity that screens and selects information for audiences.[76] While this description bears some resemblance to how gatekeeping theory originally characterized the work of editors, algorithms present important departures from the traditional gatekeeping model. First, they are not programmed to select information as part of their perceptions of journalism's traditional public-service role to inform audiences with fact-based, accurate information.[77] Rather, they are oriented toward increasing interactions, which are the foundation of the big-data, online economy.[78] As a result, they often push untrue or extremist messages. Second, algorithms, despite careful efforts to leverage people's data to customize what they see, often fail to account for individual differences. Two technology scholars found, "Nowadays personalization algorithms in social media tend to represent individuals and society as a body without contradictions and complexities, entities that can be reduced to a calculation to assure profitability."[79] They continued, "The outlined risks are fundamentally threatening individual progress and societal cohesion."[80]

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72. Balkin, *supra* note 69, at 1233.

73. *See* Zeynep Tufekci, *YouTube, the Great Radicalizer*, N.Y. TIMES (Mar. 10, 2018), https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html; Luke Darby, *Facebook Knows it's Engineered to "Exploit the Human Brain's Attraction to Divisiveness"* GQ (May 27, 2020), https://www.gq.com/story/facebook-spare-theshare#:~:text=One%20in%20particular%20from%202018,This% 20dovetailed%20with%20some%20of.

74. Tufekci, *supra* note 73.

75. *See* Brendan Nyhan, *YouTube Still Hosts Extremist Videos. Here's Who Watches Them*, WASH. POST (Mar. 10, 2021), https://www.washingtonpost.com/outlook/2021/03/10/youtube-extremist-supremacy-radicalize-adl-study; Kevin Roose, *The Making of a YouTube Radical*, N.Y. TIMES (June 8, 2019), https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html; Ryan Mac & Cecilia Kang, *Whitle-Blower Says Facebook 'Chooses Profits Over Safety'*, N.Y. TIMES, https://www.nytimes.com/2021/10/03/technology/whistle-blower-facebook-frances-haugen.html (Oct. 27, 2021; *Id.*

76. Reviglio & Agosti, *supra* note 70, at 1-12; *See also* Julian Wallace, *Modelling Contemporary Gatekeeping*, 6 DIGIT. JOURNALISM 274, 288-89 (2017) (identifying algorithms as among the archetypes of twenty-first-century gatekeeping).

77. Reviglio & Agosti, *supra* note 70, at 1-12. *See* PAMELA J. SHOEMAKER & STEPHEN REESE, MEDIATING THE MESSAGE IN THE 21ST CENTURY: A MEDIA SOCIOLOGY PERSPECTIVE 178-80 (2014) (regarding traditional gatekeeping).

78. *See* VAN DIJCK, *supra* note 59, at 31-35; GHOSH, *supra* note 59, at 59-60; Papacharissi, *supra* note 59, at 209-10.

79. Reviglio & Agosti, *supra* note 70, at 9.

80. *Id.*

Ultimately, while truth continues to be constructed based on the information and individuals people interact with, any discussion regarding truth in the networked era must also account for algorithmic determinations.

Similarly, bots pose a substantial concern for the flow of information in virtual spaces.[81] Social media spaces are populated by hundreds of millions of bots, making up between ten and fifteen percent of Twitter's user population, for example.[82] They perform a variety of roles, with some automatically aggregating and spreading certain content, such as posts that include particular hash tags or keywords.[83] Others are programmed to inform, such as the @MuseumBot, which publishes images from the Metropolitan Museum of Art on Twitter.[84] Many bots, however, are used to share false and misleading information or to publish massive amounts of posts about a certain topic.

These activities within the flow of human discourse raise two primary concerns. First, their fundamentally non-human nature allows a single person to create thousands of AI communicators that can, often posing as human speakers, publish countless messages in support of a single idea during a short period of time.[85] In this sense, bots have the power to overwhelm the marketplace of ideas, making it appear that a certain truth has found widespread support, when in reality, a majority of the discourse was orchestrated by a single puppet master.[86] Second, bots have the power to push human speakers from the marketplace. Unlike people, bots do not become tired or emotional. They can publish countless messages, making human ideas like needles in a haystack of bot-based messages. In both instances, bots have the power to fundamentally influence the structure and content of democratic discourse.

In a study of bot activity during the 2016 and 2018 U.S. elections, as well as the 2017 election in France, data scientist Emilio Ferrara concluded political bots fostered as many interactions as human communicators and "conservative bots played a central role in the highly-connected core of the retweet network."[87] Similarly, a group of researchers who studied the flow of false information during the 2016 U.S. election found bots act as a tool for supercharging partisans groups' power to artificially boost messages, true and false, into the marketplace of ideas.[88] Computational scientist Samuel Woolley concluded these uses of AI do more than

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81. *See* Emilio Ferrara et al., *The Rise of Social Bots*, 59 COMMC'NS ACM 96, 96 (2016).

82. *Id.*; Guido Caldarelli et al., *The Role of Bot Squads in the Political Propaganda on Twitter*, COMMC'NS PHYSICS, May 11, 2020, at 2.

83. Ferrara et al., *supra* note 81, at 96; *See also* Caldarelli, *supra* note 82, at 8-9 (regarding the power of the entities to push certain ideas).

84. *See generally* Museum Bot, (@MuseumBot*)*, TWITTER, https://twitter.com/museumbot?lang=en (last visited July 23, 2022).

85. *See* EMILIO FERRARA, BOTS, ELECTIONS, AND SOCIAL MEDIA: A BRIEF OVERVIEW, *IN* DISINFORMATION, MISINFORMATION AND FAKE NEWS IN SOCIAL MEDIA 95, 107-109 (Kai Shu et al. eds., 108 (2020).

86. *See* Schroeder, *supra* note 4, at 60-61; Molly K. McKew, *How Twitter Bots and Trump Fans Made #ReleasetheMemo Go Viral*, POLITICO MAG. (Feb. 4, 2018), https://www.politico.com/magazine/story/2018/02/04/trump-twitter-russians-release-the-memo-216935/.

87. FERRARA, *supra* note 85, at 108.

88. Ahmed Al-Rawi et al., *What the Fake? Assessing the Extent of Networked Political Spamming and Bots in the Propagation of #fakenews on Twitter*, 43 ONLINE INFO. REV. 53, 65 (2019).

take advantage of virtual environments provided by social media firms.[89] He explained, "The goal here is not to hack computational systems but to hack free speech and to hack public opinion."[90]

Finally, deepfakes, as well as photo and audio clips that are altered in misleading ways, threaten to undermine the flow of information and the development of truth, particularly in an era when individuals are primed to believe false information because it aligns with the ideological norms of their online communities. Deepfakes are characterized by believable audio and video clips that portray people saying and doing things they never said or did.[91] They are often made by using Generative Adversarial Networks, which pair a creator neural network and a testing neural network.[92] One system learns from data provided and, using a large data set of images and videos, works to create a believable clip. The testing system, using images and footage of the real person, evaluates the creating system's efforts to create the deepfake.[93] The systems continue to interact until the deepfake is fully refined. In October 2021, a group of thieves stole $35 million from a bank by creating an audio clip that replicated a company director's voice.[94] In August 2020, in the run up to the U.S. election, a deepfake that portrayed former Vice President Joe Biden sleeping while a TV anchor was trying to interview him circulated on social media.[95] The video was pieced together using images from a 2011 interview in which singer Harry Belafonte really did fall asleep and images and video clips of Biden.[96]

The Brexit campaign in the U.K. in 2016 included multiple instancesmisleading video clips that, used out of context, purported to document migrants assaulting people in London.[97] Images of empty grocery store shelves

89. Craig Timberg, *As a Conservative User Sleeps, His Account is Hard at Work*, WASH. POST (Feb. 5, 2017), https://www.washingtonpost.com/business/economy/as-a-conservative-twitter-user-sleeps-his-account-is-hard-at-work/2017/02/05/18d5a532-df31-11e6-918c-99ede3c8cafa_story.html.

90. *Id.*

91. John Villasenor, *Artificial Intelligence, Deepfakes, and the Uncertain Future of Truth*, BROOKINGS (Feb. 14, 2019), https://www.brookings.edu/blog/techtank/2019/02/14/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/.

92. *See* Abdulqader M. Almars, *Deepfakes Detection Techniques Using Deep Learning: A Survey*, 9 J. COMPUT. AND COMMC'N 20, 24-27 (2001).

93. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1759-1760 (2019).

94. Thomas Brewster, *Fraudsters Cloned Company Director's Voice in $35 Million Bank Heist, Police Find*, FORBES (Oct. 14, 2021), https://www.forbes.com/sites/thomasbrewster/2021/10/14/huge-bank-fraud-uses-deep-fake-voice-tech-to-steal-millions/?sh=5b39e43d7559.

95. *Fact Check: Video Showing Joe Biden Falling Asleep During Live Interview is Manipulated*, REUTERS (Sept. 1, 2020), https://www.reuters.com/article/uk-factcheck-biden-asleep-altered/fact-check-video-showing-joe-biden-falling-asleep-during-live-interview-is-manipulated-idUSKBN25S63S.

96. David Moye, *White House Posts Fake Vide of Joe Biden 'Sleeping' During TV Interview*, Huffpost (last updated Sep. 1, 2020), https://www.huffpost.com/entry/joe-biden-fake-dan-scavino-harry-belafonte_n_5f4d5c9dc5b697186e39e177.

97. Benjamin Kentish, *Pro-Brexit Leave.EU Group Accused of Faking Videos and Forging Images of Migrants Committing Crimes*, INDEPENDENT (Apr. 16, 2019), https://www.independent.co.u

circulated on social media in October 2021 to blame supply chain problems on "Biden's America."[98] Of course, the images were from Australia in 2012 and South Carolina after a hurricane in 2018. Crucially, these types of deceptive, photo, audio and video clips, and the cruder versions, which are sometimes termed "cheapfakes," represent another development that requires a revised set of rationales for *why* free expression is protected.[99] Ultimately, the growing presences of these AI-based entities, whether they are determining the ideas people encounter, overwhelming the space for human discourse, or producing believable, but false, representations of information, fundamentally shift the nature of how information flows and truth is formed. In particular, they undermine the structure justices have constructed, upon Enlightenment foundations, to rationalize expansive free expression protections.

II. A PROBLEMATIC, IMAGINED SPACE

The marketplace approach, constructed upon Enlightenment assumptions about human rationality and universal, discoverable truth, is ill equipped to explain free expression in an era when the spaces for human discourse are substantially sorted and categorized by algorithms, populated by non-human speakers, and deceived by high and low-quality photographs, audio, and video. Essentially, these new actors alter the structure of the marketplace in fundamental and important ways.

A. Empty Cobblestone Streets

The Supreme Court has never provided blueprints for the marketplace of ideas. It is a conceptual space largely structured upon how justices have described it. While Part III examines the theoretical construction of the space within the Court's thinking, here we establish how networked technologies have fundamentally altered the space. Justices have generally conjured a type of marketplace that resembles what was present when Enlightenment thinkers discussed a free exchange of ideas and the types of public houses that fostered free expression before the Revolutionary War.[100] In *Reno*, justices characterized

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k/news/uk/politics/brexit-leave-eu-faking-forging-videos-images-illegal-migrants-violent-crime-aaron-banks-a8873461.html.

98. McKenzie Sadeghi, *Fact Check: Photos of Bare, Fully Stocked Grocery Store Shelves Shared Online to Support False Claim*, USA TODAY (Oct. 20, 2021, 10:55 AM), https://www.usatoday.com/story/news/factcheck/2021/10/20/fact-check-bidens-america-grocery-store-image-taken-2018/8521707002/.

99. *See, e.g.*, Hannah Denham, *Another Fake Video of Pelosi Goes Viral on Facebook*, WASH. POST (Aug. 3, 2020, 2:52 PM), https://www.washingtonpost.com/technology/2020/08/03/nancy-pelosi-fake-video-facebook/ (reporting that while social media platforms have created policies regarding manipulated content, it often circulates widely before it is removed); *Synthetic and Manipulated Media Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/manipulated-media (last visited July 23, 2022).

100. *See, e.g.*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); Reno v. ACLU, 521 U.S. 844, 844 (1997); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (19

fledgling networked spaces as allowing "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox."[101] Similarly, Justice Brennan, in his dissent in *Columbia Broadcasting Systems v. Democratic National Committee* in 1973, contended free expression requires a shared space for discourse.[102] He explained, "On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency."[103] In the *McCullen v. Coakley* and *Snyder v. Phelps* decisions, Chief Justice Roberts emphasized the importance of public streets and sidewalks as historically protected places for free expression.[104] In *McCullen,* he concluded, "It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir."[105] In particular, justices have drawn from the Court's 1939 decision in *Hague v. Committee for Industrial Organization*, in which justices concluded:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[106]

Taken together, these references to physical spaces reserved for human discourse construct a very particular type of in-person marketplace. The conceptual space justices conjure becomes vibrant and shared by all who seek to participate. Well-intended individuals who come to one another to discuss crucial matters as equals populate the space. The speakers and listeners encounter each other, whether they choose to or not. Legal scholar Jerome Barron criticized this type of rosy picture of the space when he called the marketplace of ideas a "romantic conception of free expression."[107]

Importantly, the twenty-first-century exchange of ideas takes place in a fundamentally different type of conceptual space. Such virtual spaces can either be described as a *multiverse of marketplaces*, countless smaller, interconnected and ideologically limited shared spaces for discourse, or as a *vacant marketplace*,

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73) (Brennan, J., dissenting); McCullen v. Coakley, 573 U.S. 464, 496-497 (2014); Snyder v. Phelps, 562 U.S. 443, 458 (2011).

101. *Reno*, 521 U.S. at 870.

102. *Columbia Broad. Sys., Inc*., 412 U.S. at 193.

103. *Id.*

104. *McCullen*, 573 U.S. at 496-97; *Snyder*, 562 U.S. at 458.

105. *McCullen*, 573 U.S. at 476.

106. *Hague*, 307 U.S. at 515 (this passage is cited in Perry Educ. Ass'n v. Perry Loc. Educators Ass'n, 460 U.S. 37, 37 (1983) and the Frisby v. Schultz, 487 U.S. 474, 474 (1988) abortion protest case. Justices also drew this passage into Pleasant Grove v. Summum, 555 U.S. 460, 469 (2009) and *McCullen*, 573 U.S. at 476 (2014)).

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

where the conceptual space is abandoned for countless specialty stores located in adjacent alleys and side streets. In either scenario, the conceptual space shares no resemblance with how justices describe it in their opinions.[108] The contrast is significant, as justices continue to build rationales upon a space based on what they imagine it to be, not as it is. Such disconnect between what is imagined and what is real illustrates a crucial part of the overall problem Enlightenment-based, objective-truth-justified free expression rationales face in the networked era.

B. Structural and Foundational Problems

These contemporary flaws in the marketplace's structure join a host of foundational problems that have plagued marketplace theory since before it emerged as the Court's dominant tool for rationalizing expansive free-expression safeguards.[109] Legal scholars have cautioned for decades that the truth and rationality assumptions that hold the marketplace approach together are faulty. Baker characterized the entire theory as a "failure of assumptions," explaining, "the assumptions on which the classic marketplace of ideas theory rests are almost universally rejected."[110] Chief Justice Rehnquist drew from Baker's concerns in his dissent in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[111] Citing Baker, Chief Justice Rehnquist explained, "there is no reason for believing that the marketplace of ideas is free from market imperfections."[112] Baker's concerns echoed problems Barron identified in the 1960s and 70s.[113] Barron concluded, "the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition."[114] He continued, "The world in which an essentially rationalist philosophy of the First Amendment was born has vanished and what was rationalism is now romance."[115] Legal scholars have been particularly concerned with the Enlightenment-based truth and human rationality

108. BRIAN MCNAIR, CULTURAL CHAOS: JOURNALISM, NEWS AND POWER IN A GLOBALISED WORLD 137 (2006) (The multiverse and vacant space ideas find origins in different sources. Journalism scholar Brian McNair constructed the twenty-first-century public sphere as "a virtual, cognitive multiverse of spheres within spheres"); *See* MANUEL CASTELLS, THE POWER OF IDENTITY 68-69 (2d ed. 9 (2010) (Sociologist Manuel Castells's ideas regarding networked communication and the reconstr u-ction of personal identity also contribute). *See*, Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (regarding how justices have described the marketplace. Justice Brennan, for example, contended a "barren marketplace of ideas that had only sellers and no buyers").

109. *See* JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA xiii–xiv (1973); Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" as Faulty Metaphor*, 89 TUL. L. REV. 383, 431-33 (2014); BAKER, *supra* note 17, 12-14, 16 (for examples of critiques of the marketplace metaphor's assumptions). *See also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 592-93 (1980) (Rehnquist, C.J., dissenting) (critiquing marketplace assumptions).

110. BAKER, *supra* note 17, at 12.

111. *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 592.

112. *Id.*

113. *See* Barron, *supra* note 107, at 1641; BARRON, *supra* note 109, at xiii-xiv.

114. *See* Barron, *supra* note 107, at 1678.

115. *Id.*

pillars. Baker emphasized human rationality is informed by personal interests, desires, and experiences, leading people to value different factors when they evaluate ideas.[116] In other words, critics of the marketplace's Enlightenment foundations do not contend people are irrational. Instead, they find personal experiences make people *differently rational* from one another. Different rationalities lead to different truths, undermining assumptions regarding objective, discoverable truth.

Legal scholar Frederick Schauer approached his concerns about Enlightenment-based rationality claims in a somewhat different way than Baker, finding, "Our increasing knowledge about the process of idea transmission, reception, and acceptance makes it more and more difficult to accept the notion that truth has some inherent power to prevail in the marketplace of ideas."[117] Similarly, legal scholar Derek Bambauer emphasized that "research in cognitive psychology and behavioral economics shows that humans operate with significant, persistent perceptual biases that skew our interactions with information. These biases undercut the assumption that people reliably sift data to find truth."[118] Each of these critiques of the marketplace's foundational assumptions draws together concern for the oversimplified nature of Enlightenment-based human rationality conceptualizations and expectations that truth is objective and generally the same for all. In other words, scholars have taken these assumptions as an intertwined pair, rather than separately problematic assumptions. In this regard, Baker explained, "People cannot use reason to comprehend a set reality because no set reality exists for people to discover."[119]

These critiques of foundational assumptions of marketplace theory find substantial support from Justice Holmes, who is simultaneously the originator of the marketplace concept within the Court's vocabulary and was adamantly against absolute truth and characterizations of rationality that treated human behavior as a monolith.[120] Justice Holmes contended truth is made, rather than found.[121] He formulated truth as an outgrowth of each person's experience, which marks a

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116. BAKER, *supra* note 17, at 13.

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

118. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 651 (2006).

119. BAKER, *supra* note 17, at 14.

120. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (regarding the origins of the concept); *See also* Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 27, 1929), *supra* note 22, at 107; Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Aug. 30, 1929), *supra* note 22, at 108; OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881); Holmes, *supra* note 22, at 43 (for examples of Justice Holmes questioning objective truth and human rationality).

121. In a letter from Oliver W. Holmes to William James (March 24, 1907) (on file with Harvard Law School Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:43006888$37i (he explained: "Truth then, as one, I agree with you, is only an ideal – and assumption." In his "The Soldier's Faith" address, he said, "I do not know what is true"); *See* Oliver W. Holmes, Jr., *The Soldier's Faith*, (May 30, 1895) (on file with Harvard Law School Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:43006888$37i; *See also*, Holmes, *supra* note 22, at 40-41; HOLMES *supra* note 22, at 107, 115, 117 (for examples).

substantial departure from Enlightenment assumptions and finds significant overlap with the criticisms legal scholars have outlined regarding what have become the marketplace's foundational assumptions. In "Natural Law," an article he published in *Harvard Law Review* in 1918, a year before he introduced the marketplace concept in *Abrams*, Justice Holmes rejected universal truth.[122] He explained, "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."[123] He emphasized in the article that where a person is from, their experiences, religious beliefs, and interests, have a far greater influence on what a person believes to be true than any pre-existent, universally shared truth. Later in the article, he emphasized, "Men to a great extent believe what they want to."[124]

These ideas, rather than Enlightenment assumptions, played an often underrecognized role in the *Abrams* opinion, where, following the much-heralded marketplace concept, Justice Holmes, explained, "Every year if not every day we have to *wager* our salvation upon some prophecy based upon imperfect knowledge."[125] Such a conclusion reflects Justice Holmes's reasoning that it is not possible to know the truth.[126] The best anyone can do is guess, or wager, based on what they think they know. In introducing the "free trade in ideas" passage, Justice Holmes averred that those who believe in absolute truth might seek to "sweep away all opposition."[127] These perspectives were reinforced about six months after *Abrams*, when Justice Holmes explained in a letter, which was written to his dear friend Harold Laski, a professor at the London School of Economics, that truth "is an ideal and as such postulates itself as a thing to be attained, but like other good ideals it is unattainable and therefore may be called absurd."[128] Ultimately, the critique of Enlightenment ideas did not begin with twentieth-century legal scholars' questions about how plausible truth and rationality assumptions were as pillars for rationalizing expansive free-expression safeguards. Instead, Justice Holmes's legal writings, scholarship, and personal correspondence include ideas about truth and human rationality that substantially conflict with Enlightenment assumptions.

Taken within the context of emerging, disruptive, and transformative communication technologies, these critiques of fundamental assumptions that have become foundational to marketplace theory raise substantial questions about the future of the Court's dominant tool for rationalizing free expression and, more broadly, the role truth plays in justifying such protections. As Justice Holmes's

122. Holmes, *supra* note 22, at 40-41.

123. *Id.* at 40.

124. *Id.* at 43.

125. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

126. Holmes, *supra* note 22, at 115.

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

128. Holmes, *supra* note 22, at 115. Laski lectured briefly at Harvard and Yale, but his socialist ideas were unpopular in post-World War I America. This led him to relocate to London. During his time in Cambridge, he became friends with Justice Holmes, as well as Frankfurter, Walter Lippmann, and Charles Beard. *See* Letter from Oliver W. Holmes to Harold Laski (June 1, 1919) in Holmes, *s u-pra* note 22, at 109-10; Letter from Oliver W. Holmes to Harold Laski (July 1, 1927) in Holmes, *s u-pra* note 22, at 44.

constructions of truth and rationality from when he wrote his dissent in *Abrams* indicate, the marketplace approach did not begin with Enlightenment foundations.[129] They were installed over a series of decades, thus conveying two important ideas. First, the marketplace concept has never had a static meaning or set of assumptions. Second, the role of absolute truth, as it has come to be understood, was not original to the marketplace approach.

III. IMAGINARY RATIONALES FOR AN IMAGINARY SPACE

One ninety-word passage in a dissent from 1919 changed the entire role of truth and the course of free expression in the U.S.[130] Oddly, it did so not because the author, Justice Holmes, put forth a comprehensive, truth-based set of rationales for why free expression should be protected, rather, because it introduced an unpopular idea; those who followed him used it to construct expansive rationales for free-expression safeguards. Justice Holmes essentially introduced an idea for a conceptual space for human discourse—the *marketplace* of ideas. The passage, however, does not contain footnotes or references to what Justice Holmes had in mind, especially regarding truth. If anything, he put in place a blank canvas. Of course, *who* created the blank canvas—one of the most revered legal minds of his time and in American history, as well as a war hero and the son of a well-respected Boston aristocrat—perhaps provided staying power and attention to an otherwise unsupported line of reasoning.

As noted, legal scholars from the period immediately associated the passage with Milton's *Areopagitica*.[131] The overlap in ideas between Justice Holmes's argument and Milton's, at least on the surface, is significant. In *Areopagitica*, a seminal Enlightenment-era work published in 1644, Milton argued, "Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"[132] Justice Holmes was almost certainly aware of this passage. The catalogue from his vast personal library, completed after his death in 1935, had ten books by Milton, including an edition of collected works, and another ten by John Stuart Mill.[133] The inventory also lists "Famous Pamphlets," which lists *Areopagitica* as among other short works in a 316-page book.[134]

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

130. *Id*.

131. *See* MILTON, *supra* note 16, at 50. Regarding connections between *Abrams* and Areopagitica, *see* Letter from Felix Frankfurter to Oliver W. Holmes (Nov. 26, 1919) (on file with Harvard Law School Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:42879149$17i.

132. MILTON, *supra* note 16, at 50.

133. ESTATE OF JUSTICE HOLMES: THE LIBRARY 435–36 (on file with Harvard Law School Library Digital Suite), http://library.law.harvard.edu/suites/owh/index.php/item/42864698/59 (the Milton works in Justice Holmes's collection included collected works, which could have included *Areopagitica* or passages from it).

134. ESTATE OF JUSTICE HOLMES: THE LIBRARY 195 (on file with Harvard Law School Library Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:42864693$29i. The "Famous Pamphlets" entry from his library refers to an 1886 book that included Areopagitica, among other works. Justice Holmes wrote his name on the first page.

Absent an explicit connection with Enlightenment thought, or any other philosophical approach in the opinion, a letter written just days after Justice Holmes heard the *Abrams* appeal reinforces the idea that he did not have a specific philosophy in mind, especially not Enlightenment thought, as he approached his dissent.[135] In fact, his thinking about free expression appeared to be quite a mess as he was writing his dissent in *Abrams*. In a letter to Laski dated October 26, 1919, four days after the Court heard arguments in the case, Justice Holmes rejected free expression "as a theory."[136] He wrote his friend, "I hope I would die for it and I go as far as anyone whom I regard as competent to form an opinion."[137] He continued, however, by communicating ambivalence about free-expression rights. The letter conveys he was far from constructing a fleshed-out theory of free expression.[138] Late in the letter, he attempted to clarify his views, writing, "When I say I don't believe in it as a theory, I don't mean I do believe in the opposite as a theory."[139] The somewhat scattered thoughts, particularly when considering Justice Holmes's generally masterful, witty, and organized correspondence, reinforces the idea that there was no grand set of philosophical assumptions behind the *Abrams* dissent's reasoning. Thus, the absence of a clear set of supporting theoretical assumptions in the dissent, alongside his scattered thoughts in the letter, indicate the reference to truth and the market was an aberration, rather than a philosophical argument for expansive free-expression rights. Absent explicit associations between Justice Holmes's marketplace of ideas and Enlightenment thought in the *Abrams* dissent, or in his correspondence, we look to other decisions for connections. However, there are none.

Importantly, *Abrams* marked the first and last time Justice Holmes mentioned the marketplace concept in an opinion. The marketplace approach, and Enlightenment thought, if it was present in *Abrams* in the first place, essentially disappeared from the Court's thinking.[140] Instead, Justice Louis Brandeis took the lead on most First Amendment-related opinions after 1919.[141] Justice Holmes provided only one more in-depth discussion of freedom of expression in an opinion, which came in his dissent in *Gitlow v. New York* in 1925. The paucity of further First Amendment opinions from Justice Holmes was not a result of limited opportunities. Within six months of announcing the *Abrams* decision, the Court

135. *See* Letter from Oliver W. Holmes to Harold Laski (Oct. 26, 1919) (on file with Harvard Law School Digital Suite), http://library.law.harvard.edu/suites/owh/index.php/item/42885054/9.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Justice Brandeis's concurring opinion in *Whitney v. California*, 274 U.S. 357, 376-80 (1927), which Justice Holmes joined, is often categorized as an Enlightenment-founded argument. Scholars have rejected such conclusions. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 671-76 (1988); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 182 (1995).

141. Justice Brandeis wrote in a 1923 letter to Felix Frankfurter, who he mentored, that he regretted joining Justice Holmes's opinions in *Schenck* and *Debs*. *See* Letter from Louis Brandeis to Felix Frankfurter (Aug. 8, 1923), *in* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations,* 1985 SUP. CT. L. REV, 299, 323-24 (1985).

decided three similar cases.[142] The Court upheld convictions in all three cases and Justice Brandeis dissented in each instance. Justice Holmes joined him in two dissents and concurred, without writing an opinion, in the third. In 1921, Justices Holmes and Brandeis dissented separately when the Court concluded the postmaster general, using the Espionage Act, could change a newspaper's mailing status based on its content, thus exacting financial punishments on publications that shared unpopular ideas.[143]

Justice Holmes made his final statement about truth and free expression in his dissent in *Gitlow*.[144] Eschewing the marketplace concept and Enlightenment ideas, he communicated understandings more associated with a dynamic, self-made truth.[145] He concluded, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[146] He provided more insight about his thinking roughly five weeks after the opinion was handed down in a letter to Lewis Einstein, a diplomat.[147] He explained, "I had my whack on free speech some years ago in the case of one Abrams, and therefore did no more than to lean to that and add that an idea is always an incitement."[148] He continued, "The usual notion is that you are free to say what you like if you don't shock *me*. Of course the value of the constitutional right is only when you do shock people."[149] Much as with his letter to Laski before the *Abrams* dissent, Justice Holmes indicated he was far from constructing an intentional, Enlightenment-based theory for freedom of expression in *Gitlow*. The dissent contends for free expression, as does the dissent in *Abrams*, but does not construct a framework based on any clear line of thinking, Enlightenment-based or otherwise.

A. Unprecedented Decisions

If it's an error to credit Justice Holmes with constructing an Enlightenment-based foundation for free-expression rationales via the marketplace concept, where did the theory and its assumptions come from? Initial Enlightenment foundations were constructed by justices who sought rationales to support expanding free expression protections. The precedential record was thin. The *Abrams* dissent in 1919 marked the first instance when a Supreme Court justice argued for free expression, essentially making it, along with the *Gitlow* dissent in 1925, the only opinions justices could draw from when seeking to rationalize expanding free-

142. *See generally* Pierce v. United States, 252 U.S. 239 (1920); *see generally* Schaefer v. United States, 251 U.S. 466 (1920); *see generally* Gilbert v. Minnesota, 254 U.S. 325 (1920); *see generally* United States *ex. rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921).

143. *United States ex rel. Milwaukee Soc. Democratic Publ'g Co., 255 U.S.* at 436-38 (1921) (Holmes, J., dissenting).

144. Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

145. *Id.* at 673.

146. *Id.*

147. Letter from Oliver W. Holmes to Lewis Einstein (July 11, 1925) in Holmes, *supra* note 22, at 322.

148. *Id.*

149. *Id.*

expression safeguards.[150] Facing this dearth of precedent, justices melded history and early American thought to create initial rationales for free expression. The move to draw these influences into the precedential record introduced substantial Enlightenment-truth-related elements into the Court's rationales for *why* free expression should be protected.

The paucity of existing precedent was clear in *Near,* which marked the first instance in which justices overturned a law because it violated the First Amendment.[151] Chief Justice Hughes, in writing for the Court, drew from colonial and revolution-era writings.[152] The rhetoric from that period was infused with Enlightenment thought, particularly the concept of *natural* rights.[153] The Framers were children of the Enlightenment.[154] Alexander Hamilton, John Adams, Benjamin Franklin, Thomas Jefferson and James Madison were all heavily influenced by Enlightenment ideas.[155] Historian Jack Rakove concluded the Framers' ideas regarding how to build the new nation were premised upon "their absorption in the political theory of the Enlightenment."[156] John Locke's ideas, in particular, undergirded much of the Framer's thinking.[157] Locke contended each person has a right to "life, liberty, and estate," and emphasized natural human rights.[158] Thomas Jefferson wrote nearly the same phrase into the *Declaration of Independence*, explaining each person had certain natural rights, including "life, liberty, and the pursuit of happiness."[159] Earlier in the document, he referred to "the Laws of Nature and of Nature's God."[160]

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150. *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting) (the only Supreme Court opinions that argued laws should be struck down because they violated the First Amendment when the Court heard Near v. Minnesota, 283 U.S. 697 (1931)).

151. *Near*, 283 U.S. at 697.

152. *Id.* at 714-17.

153. *See supra* Part I.

154. *See* R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1074-76 (1995); Steven D. Smith, *Recovering (From) Enlightenment*, 41 SAN DIEGO L. REV. 1263, 1264-66 (2004).

155. *See* DARREN STALOFF, HAMILTON, ADAMS, JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 3-4 (2005).

156. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 13 (1996).

157. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see, e.g.*, LOCKE, *supra* note 33, at 38-39 (both pieces overlap in places). Also, similarities between Locke, *supra* note 33, and THOMAS JEFFERSON, *First Inaugural Address*, *in* THE PAPERS OF THOMAS JEFFERSON, VOLUME 33: 17 FEB. TO 30 APR. 1801, at 148 (2006), https://jeffersonpapers.princeton.edu/selected-documents/first-inaugural-address-0. *See also* Roy Branson, *James Madison and the Scottish Enlightenment*, 40 J. HIST. IDEAS 235, 236 (1979); Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869, 869-70 (2002); *see* CHRISTOPHER J. BERRY, DAVID HUME, *in* 3 MAJOR CONSERVATIVE AND LIBERTARIAN THINKERS 20 (John Meadowcroft ed., 2013); Donald Livingston, *Hume and America*, 4 KY. REV. 15, 16 (1983).

158. LOCKE, *supra* note 33, at 38.

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

160. *Id.* at para. 1.

Chief Justice Hughes's opinion in *Near* wrote these particular assumptions about human rights into the fresh cement of First Amendment precedent—they dried there and became a solid block. His opinion included a seventy-word passage from John Dickinson's "A Letter to the Inhabitants of the Province of Quebec" from 1774.[161] The letter encouraged settlements north of the colonies to support the U.S. if England attacked, and outlined, in a form clearly associated with Enlightenment thought, a set of *natural* rights, including freedom of the press.[162] Dickenson, who wrote the "Olive Branch Petition" a year later, was the former president of Pennsylvania and Delaware, a member of the Constitutional Congress, and one of the initial drafters of what became the First Amendment.[163] Dickinson also explicitly supported Enlightenment ideas, particularly Locke's, which he cited in his writing.[164] Chief Justice Hughes also included a more than 250-word passage from James Madison, who helped draft the Constitution and Bill of Rights and was substantially influenced by Scottish Enlightenment thinkers, such as David Hume and Adam Smith.[165] The selection of these ideas, written into the first precedent in which justices struck down a law because it limited free expression, planted the seeds for a very specific approach to the nature of truth and the role it plays in rationalizing First Amendment safeguards. Essentially, the initial Enlightenment foundations of the fledgling marketplace rationale were constructed using historical building blocks and inserted into the precedential records in *Near*. This approach was not a foregone conclusion, and it did not settle the matter of how justices would rationalize expansive free-expression safeguards. Ultimately, absent any reference to the marketplace, free expression took a turn toward Enlightenment thought in Chief Justice Hughes's decisions to draw Dickenson and Madison into the *Near* precedent. With Enlightenment ideas and the marketplace written into crucial "first" opinions, *Abrams* and *Near*, what was left was to merge them.

B. The Enlightenment Marketplace Takes Shape

The Court did not use the phrase "marketplace of ideas" until *Lamont v. Postmaster General* in 1965 and did not fully merge the Enlightenment rationales with the metaphor until later that decade.[166] The gradual move to an Enlightenment

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161. Near v. Minnesota, 283 U.S. 697, 717-18 (1931) (quoting *Letter to the Inhabitants of the P-rovince of Quebec* (October 1774)); *see* John R. Vile, *Continental Congress: Letter to the Inhabitants of the Province of Quebec*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/862/continental-congress-letter-to-the-inhabitants-of-the-province-of-quebec (discussing the history of the Letter to the Inhabitants of the Province of Quebec).

162. JOHN DICKINSON, A LETTER TO THE INHABITANTS OF QUEBEC 41-43 (1774).

163. *See* Vile, *supra* note 161.

164. *See* JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 53-54 (1774).

165. Branson, *supra* note 157, at 258. Branson contended Princeton president John Witherspoon, who had come from Scotland, helped expose Madison to these thinkers. Madison placed Hume's and Smith's works on the first list of books for the Library of Congress.

166. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring). *See* Red L-ion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 390 (1969), where

truth-founded marketplace reinforces both the dynamic, rather than static, nature of the marketplace concept's assumptions and that other ideas about the nature of the conceptual space found substantial, if not majority, support along the way. In *Thornhill v. Alabama* and *Bridges v. California*, in 1940 and 1941, the Court took steps toward bringing Enlightenment assumptions into marketplace theory's foundations, essentially sketching a picture of the conceptual space on the relatively blank slate Justice Holmes created in *Abrams*. The decisions came from a new generation of justices, with Justices Holmes, Brandeis, and Chief Justice Hughes all having left the Court. In their place, Justices Black, Douglas, and Frankfurter—all Franklin Roosevelt appointments—debated how to rationalize free expression for the next two decades.

In *Thornhill*, the Court expanded upon the Enlightenment-based foundations justices started in *Near* in 1927.[167] Citing both *Near* and Milton, the Court reasoned Alabama's limitations on picketing provided "no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[168] The Court continued, "The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."[169] Importantly, the emphases justices placed on testing ideas and the expectation of a rational public were not a given in this case. Justices could have selected alternative tools for explaining *why* the state law was unconstitutional. Selecting this particular set of rationales added more foundational bricks to what the Court set in place in its substantially history-based precedent in *Near*.[170]

A year later, in *Bridges*, justices were less focused on Enlightenment rationales when they overturned contempt-of-court rulings against a union leader and several newspapers.[171] Justice Black, writing for the Court, did not explicitly employ Enlightenment reasoning in the Court's opinion.[172] Instead, he returned to the absolute nature of the First Amendment's wording and the historical context of its creation in rationalizing justices' reasoning for favoring free expression over concerns about publications' influences on judicial proceedings.[173] He reasoned, "[T]he First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language…."[174] Justice Black's decision to call upon a different set of rationales, those other than marketplace and Enlightenment-associated reasoning, reinforces that the rationales that have come to be synonymous with expansive free-expression safeguards are not inherent in the First Amendment. They were added and represent a particular approach to truth as a rationale for free expression rights. Justice Frankfurter, in his dissent in *Bridges*,

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the Court, quite explicitly, reasoned, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."

167. *See generally* Thornhill v. Alabama, 310 U.S. 88 (1940). Regarding *Near*, *supra* Part III.A.

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

169. *Id.* at 104.

170. *See supra* Part III.A.

171. *See generally* Bridges v. Smith, 314 U.S. 252 (1941).

172. *Id.* at 258-78.

173. *Id.* at 263-65.

174. *Id.* at 263.

returned to *Near* and the marketplace concept.[175] He contended, "A trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'"[176] Thus, Justice Frankfurter, as was his tendency, selected a more nuanced path that distinguished between a courtroom and a marketplace, emphasizing the context of the speech matters.[177]

Ultimately, *Thornhill* and *Bridges* represent steps along the Court's process of adopting Enlightenment truth and rationality assumptions as the foundations for justifying expansive free-expression safeguards. They reinforce that the marketplace concept was not created as a complete approach in *Abrams*.

Similar dynamics rationalizing free expression, including half-measure uses of the marketplace concept and potential Enlightenment-based foundations, were at play a decade later in *Dennis v. United States* and *United States v. Rumely*, decided in 1951 and 1953 respectively. In those cases, Justice Frankfurter employed substantially different approaches than his nemeses, Justices Black and Douglas.[178] In *Dennis*, Justice Frankfurter concurred, including a thirty-one-page appendix, with the Court's decision to uphold Communist Party leaders' convictions under the Smith Act.[179] He emphasized the importance of free expression, noting, "The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality."[180] Despite this acknowledgment, he rejected any approaches that would establish a dominant rationale for free expression. Instead, he advocated for a case-by-case approach. He explained, "the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument."[181] He made only a passing reference to truth and the marketplace of ideas, in the appendix, contending, "But the group in power… may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."[182] Similarly, in *Rumely*, a case involving a publisher and political activist's refusal to supply information to a House Committee, Justice Frankfurter wrote for the Court, but did not construct a First Amendment argument for why justices concluded Congress

175. *Id.* at 282-83 (Frankfurter, J., dissenting).

176. *Id.* at 283.

177. *See* Jared Schroeder, *Justice Frankfurter's Contextual Marketplace*, 74 RUTGERS L. REV. 523, 545 (2022).

178. Justices Frankfurter, Black, and Douglas, all appointed by Franklin Roosevelt, had substantial personal and legal disagreements during their more than two decades on the Court together. *See* ME-LVIN I. UROFSKY, THE DOUGLAS LETTERS 73 (1987), who devoted an entire section of the book to "Felix…" and JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 67 (1975), for more about the differences.

179. Dennis v. United States, 341 U.S. 494, 516-561 (1951) (Frankfurter, J., concurring).

180. *Id.* at 520-21.

181. *Id.* at 523.

182. *Id.* at 557.

had overstepped its boundaries in requiring the information.[183] In this sense, the absence of a rationale reinforces that the long-dominant, Enlightenment-funded marketplace approach was neither original nor static in the Court's thinking about free expression. Essentially, Justice Frankfurter, as he did in *Bridges*, eschewed creating an overarching rationale for free expression.

Justice Douglas's dissent in *Dennis* mixed Enlightenment assumptions and marketplace reasoning with the safety-value theory of the First Amendment.[184] He explicitly rationalized free expression's value as existing because "the high service it has given our society."[185] He continued, "The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents."[186] In this instance, Justice Douglas drew together, in passing, the marketplace concept and Enlightenment assumptions about human rationality. He echoed similar thinking two years later in his concurring opinion in *Rumely*. Going further than Justice Frankfurter's opinion for the Court, Justice Douglas concluded, "Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the marketplace of ideas."[187] He continued by drawing Enlightenment assumptions about human liberty, rationality and the discovery of truth. Justice Douglas explained, "[I]n a community where men's minds are free, there must be room for the unorthodox as well as the orthodox views."[188] Ultimately, into the 1950s, justices had not constructed a dominant rationale for free expression. The Court drew, at times, upon the marketplace, as well as Enlightenment assumptions. Yet, the two had not been integrated into a dominant tool for rationalizing expansive free expression rights.

C. Synergy and a Boost from Justice Brennan

Enlightenment truth *became* synonymous with the marketplace concept in the 1960s and 70s. The melding of the two created the Court's dominant rationale for *why* we have free expression. Certainly, the Court was progressing in this direction in preceding decades, but other rationales were competing alongside the marketplace approach and the concept itself did not have full Enlightenment foundations. That changed in the 1960s and 70s as, in true Miltonian fashion, the marketplace concept, and its newly installed Enlightenment assumptions, won out over other ideas in an exchange among justices. The synergy between the marketplace and Enlightenment thought, and their eventual dominance, was helped by the arrival of Justice Brennan on the Court in 1956.[189] Justice Brennan,

183. *See generally* United States v. Rumely, 345 U.S. 41 (1953) (regarding Frankfurter's overall approach in *Rumely*).

184. *Dennis*, 341 U.S. at 584-85. (Douglas, J., dissenting).

185. *Id.* at 584.

186. *Id.*

187. *Rumely*, 345 U.S. at 56 (Douglas, J., concurring).

188. *Id.* at 57.

189. Justice Brennan was the first to use the phrase "marketplace of ideas," in a Supreme Court opinion. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965). A year before, Justice Brennan's opinion in the landmark New York Times v. Sullivan, 376 U.S. 254, 269 (1964), ruling, Justice Bre-

perhaps more than any other justice, fused Enlightenment truth and rationality assumptions into compelling rationales for free expression. This was particularly evident in his opinions for the Court in *New York Times v. Sullivan* in 1964 and *Ginzburg v. United States* in 1966, as well as in his less-heralded concurring opinion in *Lamont v. Postmaster General* in 1965.[190] In the landmark *Sullivan* opinion, he famously concluded, "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[191] While the passage itself, at best, has only implied ties to Enlightenment trust in human rationality, surrounding passages feature three direct connections between Enlightenment thought and the marketplace concept.

First, Footnote 19, which appears about nine pages after the crucial "uninhibited, robust, and wide-open" passage, includes references to Milton's *Areopagitica* and John Stuart Mill's *On Liberty*, both crucial works in Enlightenment thought.[192] In the footnote, Justice Brennan quoted Mill's contention, "the clearer the perception the livelier impression of truth, produced by its collision with error."[193] The note cites the passage of *Areopagitica* that contends truth will defeat falsity in a "free and open encounter."[194] Second, quoting his opinion from *Roth v. United States*, Justice Brennan included a marketplace reference, contending the First Amendment requires an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[195] Such a passage knits together the marketplace metaphor and human rationality assumptions. Third, Justice Brennan drew from a 150-word passage from Justice Brandeis's concurring opinion in *Whitney v. California* and a decision by Judge Learned Hand, both of which are heavily laden with Enlightenment ideas

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nnan referred to Milton's *Areopagitica* and John Stuart Mill's *On Liberty*. Also, in *Sullivan*, he quoted his own words from Roth v. United States, 354 U.S. 476, 484 (1957), contending, the constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

190. *See Sullivan*, 376 U.S. at 279; Ginzburg v. United States, 383 U.S. 463, 475 (1966); Lamont v. Postmaster Gen., 381 U.S. at 306-308 (Brennan, J., concurring).

191. *Sullivan*, 376 U.S. at 270; *See also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 533 (1994). Newman called Brennan's opinion for the Court in Sullivan "one of the enduring landmarks of Constitutional law."

192. *See* MILTON, *supra* note 16, at 45, 50-51, for examples of central Enlightenment ideas in *Areopagitica*. *See* JOHN STUART MILL, ON LIBERTY 27 (1859) (an example of Enlightenment ideas). Mill wrote, "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it." *See* Christoph Bezemek, *The Epistemic Neutrality of the Marketplace of Ideas: Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159, 165-67 (2015).

193. *Sullivan*, 376 U.S. at 272 n.13 (quoting MILL, *supra* note 192, at 44) (Justice Brennan returns to Mill's *On Liberty* in note 19).

194. *Id.* at 279 note 19 (quoting MILTON, *supra* note 16, at 50).

195. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957) (Justice Brennan wrote the Court's opinion in *Roth*, which marked justice's first clear ruling about limitations on obscene speech).

about the nature of truth and human rationality.[196] They are also used to set up the famous "uninhibited, robust, and wide-open" passage, which immediately follows.[197] Justice Brennan drew from Judge Hand's reasoning in *United States v. Associated Press*, a 1943 district court decision.[198] He quoted Hand's conclusion that the First Amendment, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[199] Similarly, the passage from *Whitney* emphasizes Justice Brandeis's conclusion that more speech, rather than less, was the best approach because the framers believed "in the power of reason as applied through public discussion…."[200] Essentially, the landmark *Sullivan* decision made Enlightenment thought central to marketplace rationales.

That sentiment continued about a year later in *Lamont*, where the Court overturned a law that allowed the postmaster general to withhold and inspect unsealed mail that officials concluded was communist propaganda that originated outside the U.S.[201] Justice Douglas, with Justice Black and four others, wrote a short opinion for the Court, contending any such practice by the Postal Service violated citizens' First Amendment rights.[202] Justice Brennan concurred, writing separately to emphasize the importance of safeguarding the marketplace of ideas from government interventions that might limit the flow of ideas.[203] He reasoned, "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[204] Justice Brennan's concern for the well-being of the marketplace is founded upon a set of Enlightenment assumptions for a free exchange of ideas that included the self-righting ability to sift out falsities and errors allowing for the truth to emerge.[205] The concurring opinion quietly moves the courtship between Enlightenment ideas and the marketplace metaphor another step forward and, at the same time, introduces a concern for the well-being of the conceptual space. Justices continued this process in *Ginzburg v. United States* with Justice Brennan supporting

196. *Id.* at 270 (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)). In regard to Judge Hand's decision in United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), Justice Brennan referenced a passage that is built upon an assumption that truth will emerge in an expansive discourse that is generally free from government control.

197. *Id.* at 270.

198. *Associated Press*, 52 F.Supp. at 372.

199. *Id.*

200. New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (quoting *Whitney*, 274 U.S. at 375-76 (Brandies, J., concurring).

201. Lamont v. Postmaster Gen., 381 U.S. 301, 306-307 (1965).

202. *Id.* at 307.

203. *Id.* at 307-310 (Brennan, J., concurring).

204. *Id.* at 308.

205. *See* MILTON, *supra* note 16, at 45, 50 (one of the clearest explanations of the self-righting principle). *See also* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 159 (G.D.H. Cole trans., 1950), for another Enlightenment-based example.

limitations on minors' access to indecent material.[206] Justice Brennan, writing for the Court, contended limitations on such content were not a First Amendment concern because they represented "a use inconsistent with any claim to the shelter of the First Amendment."[207] In doing so, Justice Brennan constructed a more limited version of the conceptual space for discourse, contending some expression need not be protected because it does not contribute to the discovery of truth.[208]

Justices Black and Douglas, however, dissented, using slightly differing rationales for why free expression should be protected. Justice Black based his free-expression rationales upon an understanding of an expansive, protected exchange of ideas in which the government has almost no power to limit the flow of information.[209] He concluded, "I close this part of my dissent by saying once again that I think the First Amendment forbids any kind or type or nature of governmental censorship…."[210] Justice Douglas constructed his reasoning on a more Enlightenment-based contention that information should be protected so rational individuals can, on their own, discern truth from falsity. He explained, "the First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the 'good' and the 'bad.'"[211] He contended, "The theory is that people are mature enough to pick and choose, to recognize trash when they see it… and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas."[212]

While justices, particularly Justice Brennan, did substantial work moving Enlightenment assumptions into the marketplace concept's foundations in *Sullivan* and *Lamont*, the Court's leading First Amendment thinkers fractured along different lines of reasoning in *Ginzburg.* The move toward an Enlightenment-based marketplace, and the fractures in *Ginzburg* during this period, reinforce that even as a particular type of truth and rationales for free expression began to develop, competing understandings regarding *why* citizens should have First Amendment safeguards persists.

D. The Expansive Marketplace's Supremacy

While the very particular truth and human rationality assumptions that have come to guide how justices rationalize free expression have never been static, the Court completed the long process of installing Enlightenment ideas as the foundational assumptions that undergird the marketplace concept in the *Red Lion Broadcasting v. Federal Communication Commission* fairness doctrine decision in

206. Ginzburg v. United States, 383 U.S. 463 (1966). Justice Brennan wrote for the Court in the *Roth*, 354 U.S. 476, obscenity case in 1957 and this opinion comes after the landmark decision in *S-ullivan*, 376 U.S. 254, in 1964.

207. *Ginzburg*, 383 U.S. at 475.

208. *Id.* at 474-75.

209. *Id.* at 476-482 (Black, J., dissenting).

210. *Id.* at 481.

211. *Id.* at 491-92 (Douglas, J., dissenting).

212. *Id.* at 492 (Douglas, J., dissenting).

1969.[213] In communicating why a radio station could be compelled by the FCC to provide airtime to speakers the station otherwise would not invite, the Court explained, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[214] In choosing these rationales, Justice White, who wrote for a unanimous Court, drew an explicit line between Enlightenment assumptions about truth, the marketplace of ideas as a rationale for free expression, and the purpose of the First Amendment.[215] The passage is followed by references to *Abrams* and *Sullivan*, which played crucial roles in the gradual construction of an Enlightenment-based marketplace of ideas that acts as a rationale for *why* justices contend for expansive free expression rights.[216]

Of course, the facts of the *Red Lion* case, like the end of a Marvel movie, close one chapter but leave the door open for another. In the same passage Justice White drew a line between the Enlightenment, the marketplace, and the First Amendment, he continued, "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[217] Essentially, the Court concluded in *Red Lion* that, in the name of the marketplace of ideas, the government could compel a broadcaster to provide a forum for ideas it otherwise would not provide. In other words, the Court favored protecting the marketplace from limitations on the exchange of ideas over the rights of private radio operators to select the ideas they sought to communicate. This decision made up a crucial component of Barron's access theory.[218] He explained, "*Red Lion* launches the Supreme Court on the path of an affirmative approach to freedom of expression that emphasizes the positive dimension of the First Amendment."[219] The decision created the next battleground for the dynamic marketplace as the Court, beginning in the 1970s, fractured over whether the government could take steps to protect the marketplace from distortion and harm or if the conceptual space should be expansive and generally wide open.

At first, the protected versus expansive marketplace concerns overlapped, particularly in *New York Times v. United States* and *Healy v. James* in 1971 and 1972.[220] Essentially, the Court was protecting the marketplace when it ruled the

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213. *See* Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969).

214. *Id.*

215. *Id.*

216. *Id.* (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

217. *Id.* at 390.

218. *See generally* Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); *see generally* Jerome A. Barron, *Access – The Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970) (regarding the assumptions of access theory and the role the Fairness Doctrine played in his reasoning).

219. Barron, *supra* note 218, at 769.

220. *See generally* N.Y. Times v. United States, 403 U.S. 713 (1971); Healy v. James, 408 U.S. 169 (1972) (regarding justices' concern for both an expansive, open marketplace of ideas and a space that is protected from distortion).

government could not halt the publication of classified information about the Vietnam conflict.[221] Justice Stewart, authoring one of the decision's six concurring opinions, reasoned the hope for democracy is in "an enlightened citizenry—in an informed and critical public opinion…. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people."[222] Similarly, a year later, in *Healy*, justices unanimously overturned a public university president's decision to bar a left-wing group from campus.[223] Justice Powell, writing for the Court, explained, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[224] Again, justices protected an expansive marketplace by halting government efforts to limit certain ideas from taking part in the space.

The protected and expansive marketplace approaches started to diverge in *CBS v. Democratic National Committee* in 1973 as Justice Brennan, joined by Justice Marshall, dissented when the Court reasoned radio stations were not required to accept all paid political advertising.[225] The Court reasoned stations should not be forced to carry all requests for political adverting because, "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent."[226] In this sense, the Court reasoned the marketplace, and its pursuit of discoverable truth, must be protected from such dominance of paid-for ideas on the public airwaves. Justice Brennan rejected this thinking, favoring an expansive marketplace, and explained, "Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates."[227] The split between the protected and expansive marketplace broadened in *First National Bank v. Bellotti* and *Central Hudson Gas & Electric Corp v. Public Service Commission* in 1978 and 1980.[228] Faced with a choice between limiting some expression to protect the space from distortion and safeguarding the space from government interference, justices favored an expansive marketplace over a protected one in both instances. In *Bellotti*, the commonwealth reasoned limitations on corporate expression were necessary to preserve the integrity of the election process.[229] In other words, to safeguard the flow of ideas, corporate speakers should be limited in their access to the marketplace. In a 5-4 decision, the Court rejected this reasoning, supporting an

221. *See N.Y. Times*, 403 U.S. at 717-18 (Black, J., concurring) (providing an example of protec -ted-marketplace reasoning in the landmark decision).

222. *Id.* at 728 (Steward, J., concurring).

223. *Healy*, 408 U.S. at 194.

224. *Id.* at 180-81.

225. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 170-204 (Brennan, J., dissenting).

226. *Id.* at 123.

227. *Id.* at 189 (Brennan, J., dissenting).

228. *See generally* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); *see generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (for instances when the protected and expansive marketplace approaches diverged).

229. *Bellotti*, 435 U.S. at 788-89.

expansive approach and concluding, "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[230] Justice White, joined by Justices Brennan and Marshall, dissented, reasoning the law *benefits* the First Amendment.[231] He explained, "The Court's fundamental error is its failure to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment."[232] Ultimately, justices disagreed about the nature of the marketplace as a conceptual space for discourse.

The same divide appeared in *Central Hudson*, but Chief Justice Rehnquist was the lone dissenter. Faced with the question of whether the government could restrict a public utility from advertising, the Court concluded any such restriction would limit the range of ideas in the marketplace of ideas.[233] In other words, the Court again sided with the expansive marketplace, rather than one that is safeguarded. Chief Justice Rehnquist dissented, constructing an Enlightenment-supported argument for certain speech to be left out of the marketplace.[234] Referencing Adam Smith, John Stuart Mill, and John Milton, as well as Justice Holmes's dissent in *Abrams*, he reasoned, "Unfortunately, although the 'marketplace of ideas' has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions."[235] He concluded the marketplace would be better off if it was regulated to protect misuse.[236] Ultimately, as *Bellotti* and *Central Hudson* illustrate, the expansive view became part of how justices conceptualize the marketplace, though concern for the space has not disappeared. A similar debate about this divide appeared in *Citizens United v. Federal Election Commission* in 2010.[237] The Court, in a divided, 5-4 decision, again took the expansive marketplace path. Justice Kennedy, writing for the Court, explicitly addressed the campaign finance law's intent to protect the marketplace from distortion, concluding the line of thinking is "dangerous" and "unacceptable."[238] Justice Stevens, in his dissent, contended the law protected "the integrity of the marketplace for political ideas."[239] He emphasized the non-human nature of corporate speakers threatened the functionality of the marketplace as a space for human discourse.[240] Justice Stevens averred, the law "reflects a concern

230. *Id.* at 777.

231. *Id.* at 804 (White, J., dissenting).

232. *Id.* at 803-04 (White, J., dissenting).

233. *Central Hudson*, 447 U.S. at 569-72.

234. *Id.* at 596-97 (Rehnquist, C.J., dissenting).

235. *Id.* at 597 (Rehnquist, C.J., dissenting).

236. *Id.* at 597–99 (Rehnquist, C.J., dissenting).

237. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010) (regarding how the Court's opinions continued to include elements of the expansive-vs.-protected approaches.).

238. *Id.* at 351. See Austin v. Mich. State Chamber of Com., 494 U.S. 652, 658–59 (1990), for a similar case and another example where protecting the marketplace from distortion was an addressed by the Court.

239. *Citizens United*, 558 U.S. at 438 (Stevens, J., concurring in part and dissenting in part) (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986)).

240. *Id.* at 473-74 (Stevens, J., concurring in part and dissenting in part).

to *facilitate* First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves."[241]

The Court leaned further into the expansive, unprotected marketplace approach two years later in *United States v. Alvarez*.[242] The Court struck down the Stolen Valor Act, which criminalized making false claims of having earned military honors.[243] In constructing a rationale for striking down a law that criminalized intentional falsities, the Court returned to Enlightenment assumptions about truth and rationality, reasoning, "[t]he remedy for speech that is false is speech that is true."[244] The Court continued, "Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."[245] Ultimately, the supremacy of the expansive marketplace over a safeguarded conceptual space for human discourse aligns with the Enlightenment-based objective, discoverable truth assumptions the Court installed into the foundations of the theory. Importantly, this installation of Enlightenment ideas took about half a century and the continuing discourse about an expansive or protected marketplace continues. While important on their own, these themes also highlight the dynamic nature of the theory, a crucial observation as we examine whether the rationales, and their very particular assumptions about truth, can be reconciled with the emergence of networked truths.

IV. THE MARKETPLACE OF IDEAS IN THE NETWORKED-TRUTH ERA

The emergence of *networked truths*, conclusions people make about the world around them based upon realities constructed from algorithmically and bot-influenced information environments, as well as ideologically chosen group identifications, substantially reconfigure the very structure of the marketplace as both a justice-made space for human discourse and a rationale for *why* people benefit from expansive free-expression safeguards. This article has identified crucial conceptual building blocks, both within the nature of networked communication and the philosophical and assumption-based makeup of the marketplace of ideas. Taken together the components of both constructs present a compelling case for revising *how* the marketplace is constructed by justices and the rationales upon which it is founded. Crucially, such changes are supported by three important themes found in this article. First, the very nature of the conceptual space for discourse has been transformed, along with the flow of information and the way people understand themselves and others. Second, the marketplace concept has always lacked a definitive

241. *Id.* at 473.

242. United States v. Alvarez, 567 U.S. 709, 722-23 (2012).

243. *Id.* at 729-30.

244. *Id.* at 727 (citing Whitney v. California, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring)) (contending more speech, rather than less, is the best approach).

245. *Id.* at 728.

shape—primarily because it has existed only in justices' minds. It has been characterized by constant change and, until the late 1960s competed with other rationales for free expression. Third, Justice Holmes, who has often received outsized credit for the creation of the conceptual space, disagreed with the foundational assumptions that have become its foundation. Justice Holmes rejected absolute truth and questioned human rationality, ultimately contending it is impossible for anyone to identify the actual truth.

With these themes in mind, and *networked truth* and the marketplace broken down to their basic components, this article concludes the conceptual space for democratic discourse should be reconstructed in two fundamental and interrelated ways. First, Enlightenment truth and rationality assumptions must be revised to account for a fundamentally differently structured conceptual space for discourse. Second, a protected, rather than an expansive, marketplace is needed in the networked-truth era.

A. A New Foundation

The networked era and concerns about Enlightenment assumptions share a common rejection of objective, same-for-all truth. Long before networked technologies reshaped the conceptual space for discourse, legal scholars contended a model for free expression based on objective truth is inherently problematic.[246] The networked-truth era provides another set of reasons why an Enlightenment-funded marketplace is unworkable as a foundation for free-expression rationales. The flow of information has changed, as information and connections to others are sorted by algorithms before they reach people. From there, individuals further sort themselves into intentional communities. These communities are generally characterized by little trust and social capital and are dominated by certain pre-accepted truths. Within these communities, people compose less-nuanced, more performative messages and identities, which are incentivized by the architectures of the online spaces.

Ultimately, legal scholarship, Justice Holmes's personal writings, and scholars' constructions of how discourse takes place in the networked era, require truth be understood as something that is constructed based on each person's experiences.[247] Such an argument for a subjective, individual-based approach to truth aligns with the way individuals construct their realities in the algorithm and choice-rich networked environment. It also overlaps with Justice Holmes's conclusion that truth is contingent on human experience and individuals' best bet as to reality.[248] Allowing for individuals to be differently rational, rather than uniformly, and for truth to emerge, rather than be discovered, shifts the reasons *why* people have expansive free-expression rights. In this line of thinking, free

246. *See supra* Part II.B.

247. *See supra* Part I.A-C; Part II.B.; Part III.

248. *See* Holmes, *supra* note 22, at 38; Letter from Oliver W. Holmes to William James (March 24, 1907) (on file with Harvard Law School Digital Suite), https://iiif.lib.harvard.edu/manifests/view/drs:43006888$37i (explaining that "[t]ruth then, as one, I agree with you, is only an ideal–and assumption").

expression is not safeguarded so truth can vanquish falsity. Instead, it is protected so each person has an opportunity to contribute to and encounter the building blocks necessary to come to conclusions about the world around them. The emphasis in this scenario is upon protecting truth as it *becomes* rather than protecting discovery of something that *is*. This revision works with, rather than against, the contemporary, networked structure of human discourse, providing a foundation for the conceptual space that acknowledges the problems it faces. Such a shift is slight and nuanced, but it opens the door to the second change.

B. A Protected Marketplace

If the purpose of the marketplace in the networked-truth era is to safeguard the *emergence* of truth, then the wellbeing of the marketplace becomes paramount. An expansive marketplace makes sense when everything is staked on generally rational people discovering truth when it battles with falsity. When an emergent, personal truth is the goal of the marketplace and, thus, the rationale for free expression, safeguarding the process from manipulation and distortion becomes paramount. The protected-marketplace conclusion is built upon two substantial arguments. First, protecting the space from distortion or manipulation is nothing new. Justices in numerous cases have contended that, in order to safeguard the conceptual space, some limitations should be allowed. Four justices dissented in *Bellotti*, for example, contending corporate participation in political discourse endangered human discourse.[249] Similarly, four justices dissented in *Citizens United*, making a substantially similar argument.[250] Justice Stevens, dissenting in the case, emphasized the importance of "the integrity of the marketplace of political ideas."[251] He emphasized corporations have "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[252] Any move to a protected marketplace would find substantial support within the precedential records.

Second, beyond the existence of precedent for a protected marketplace, the conceptual space for discourse faces a far greater structural threat than in the past. The power to distort or manipulate the marketplace has increased exponentially when compared to concerns about corporate entities joining human discourse. Algorithms increasingly determine what individuals encounter and what they do not. Bots move seamlessly through online communities. Their non-human natures allow them to dominate discourse about import issues, making it seem particular ideas have vanquished falsity and ascended as truths, when in reality they are an army of bots programmed to dominate the space. In the process, the power of individuals to take part in discourse with others is lost in a sea of bot-based babble.

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249. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 803-28 (1978) (White, J., dissenting, with Brennan, J., and Marshall, J., and Rehnquist, C.J., dissenting).

250. *See generally* Citizens United v. FEC, 558 U.S. 310, 393-479 (2010) (Stevens, J., dissenting) (regarding how justices constructed an argument the space for discourse must be protected from distortion).

251. Citizens United v. FEC, 558 U.S. 310, 438 (2010) (Stevens, J., dissenting).

252. *Id.* at 438 (quoting Austin v. Mich. State Chamber of Com., 494 U.S. 652, 658-59 (1990)).

A protected conceptual space for discourse does not immediately cede free expression rationales to government control. As was seen in several previous cases, constructing the rationales in this manner, rather than using the expansive approach, allows the Court to consider the ability of human actors to participate in discourse, a role that is central to democracy. An expansive marketplace based upon Enlightenment, objective truth places overwhelming trust that individuals are generally the same in their rationality and they will *discover* the same truth. The networked-truth era, protected marketplace, which is based upon the emergent-truth foundations from the preceding section, places an emphasis on the need to protect the ability of citizens to take part in human discourse. Such an approach acknowledges and accounts for the distortive powers of algorithmic This predetermination and bot-based babble, as well as engagement, rather than truth, focused architectures of virtual spaces.

These two revisions to the conceptual space are not revolutionary or without support. In fact, they are substantially grounded in justices' opinions, longstanding concerns in legal scholarship, and Justice Holmes's own constructions of truth and the flow of information. These changes acknowledge the fundamentally different course and development truth takes in the networked era. Ultimately, they renew the marketplace rationale for free expression in the era of networked truths.