

**INFORMATION, COMMUNITY, AND CHANGE:
A CALL FOR A RENEWED CONVERSATION ABOUT FIRST
AMENDMENT RATIONALES**

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I. INTRODUCTION

The information individuals consume creates a world for them. As a world-making, raw material used for constructing each person's reality, the nature of information plays a profound role in our *being in the world*.¹ When we think of information in this way, as a building block of reality, the flow of information and the rationales we construct for freedom of expression are of crucial concern. Yet, as the nature of information, how it reaches each person, its content, and its form, as well as the ways people interact with others and understand themselves, have shifted in fundamental ways in the twenty-first century, our understandings and rationales for freedom of expression have remained primarily rooted in Enlightenment-funded assumptions about the interaction that occurs between individuals, information, and society.²

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¹ See MARTIN HEIDEGGER, BEING & TIME 26–27 (John Macquarrie & Edward Robinson, trans., 1962). Heidegger referred to being as *Dasein*. *Id.* Castells explained, “Meaning is constructed in society through the process of communicative action.” See MANUEL CASTELLS, COMMUNICATION POWER 12 (2009).

² See Toni M. Massaro, Helen Norton & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2489–91 (2017); see also Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009). Both articles, which deal with technology and the First Amendment, associate Enlightenment assumptions with contemporary free expression rationales.

There is good reason for this. The United States' free expression tradition, the precedential history of which finds itself one hundred years old this year, was born of certain assumptions and constructed via a long, gradual march of precedents.³ The Framers of the nation's founding documents were children of the Enlightenment.⁴

Similarly, the Supreme Court's most powerful and most used tool for rationalizing First Amendment safeguards for free expression, the marketplace of ideas metaphor, has come to embody Enlightenment-based assumptions about the nature of truth and the rationality of individuals. As Justice Holmes explained, "the best test of Truth is the power of the thought to get itself accepted in the competition of the market."⁵ He referred to this assumption as the "theory of our Constitution."⁶ While Justice Holmes was more influenced by pragmatism than the

³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See also *Reno v. ACLU*, 521 U.S. 844 (1997); *Texas v. Johnson*, 491 U.S. 397 (1989); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. Minnesota*, 283 U.S. 697 (1931), for examples of the gradual development of free expression rationales.

⁴ Fred S. Siebert, *The Libertarian Theory*, in *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO*, 40–41 (Fred S. Siebert, Theodore Peterson, and Wilbur Schramm, eds., 1956); Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 *HOFSTRA L. REV.* 1, 2 (2012); Lyrrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 *U. ILL. L. REV.* 799, 811 (2010).

⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

⁶ *Id.*

Enlightenment,⁷ his marketplace concept has become associated with Enlightenment though.⁸ The assumptions of Enlightenment ideas, which emphasize the rationality of the individual, the generally universal nature of truth, and the construction of a society that benefits the individual, align with a democratic approach to government that is based on the principle that rational people can govern themselves. These assumptions have been much-used tools as the Supreme Court's most famed free-expression-focused justices, such as Justices Holmes, Black, Brennan, and Douglas, wove them into the landmark rationales for First Amendment protections.⁹

Such assumptions about the necessity of information for rational individuals and its sanctity as a public good have become almost sacrosanct. They have become so set apart that as the nature of the information that constructs our worlds changes, it is almost as if we must ask permission to lift the veil, gaze upon the foundations of these First Amendment principles

⁷ M. H. Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, 39 J. PHIL. 85, 85 (1942); Paul L. Gregg, *Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 262, 262 (1943).

⁸ RICHARD A. SCHWARZLOSE, *THE MARKETPLACE OF IDEAS: A MEASURE OF FREEDOM OF EXPRESSION 1* (1989); Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMM. 151, 153–54 (1999).

⁹ See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). See also *Texas v. Johnson*, 491 U.S. 397 (1989); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Black, J., concurring); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Dennis v. United States* 341 U.S. 494, 579 (1951) (Black, J., dissenting), 581 (Douglas, J., dissenting), for examples of opinions that supported free expression by these justices.

and ask if these are still the bedrock assumptions on which to construct a free society. This is particularly true in legal circles, where many often find any suggestion that the existing paradigm might require revision blasphemous. First Amendment scholarship has, in many ways, constructed high walls around a series of rationales. Such rationales are not the First Amendment itself, but reasons, assumptions, and ideas that have been constructed as interpretations of the amendment's meanings. While the forty-five words that comprise the First Amendment have never changed, the interpretations and the reasons that are used to support them have—and they can do so again.

This essay outlines the parameters for a conversation that lowers these walls and examines how free expression has come to be rationalized. It asks that we, in an era of revolutionary change in communication, community, and self, dig down to the foundations of our free expression rationales and ask if they are still the bedrock on which to construct a free society. In an era when a reality television star is President, hate groups flourish

online,¹⁰ hate crimes are increasing,¹¹ artificially intelligent actors are influencing human discourse,¹² and falsity travels six times faster than truth in virtual spaces, how should free expression be rationalized?¹³ If we were forced to start anew, would we devise the same system? Are the changes that have taken place merely incremental shifts, which do not warrant revisions to how free expression is understood or are they substantive enough to call for new rationales for First Amendment safeguards? Europe has gone a different way, promising similar safeguards to free expression, but rationalizing them in substantially different ways.¹⁴ At the same time, Justice Elena Kagan concluded at the end of the Supreme Court's 2018 term that conservatives were "weaponizing the First

¹⁰ Michael Edison Hayden, *US Civil Rights Groups Worry Anti-Muslim Sentiment is Fueling Right-Wing extremism*, ABC NEWS (June 12, 2017), <https://abcnews.go.com/US/us-civil-rights-groups-worry-anti-muslim-sentiment/story?id=47840271>; Liam Stack, *Over 1,000 Hate Groups Are Now Active in United States, Civil Rights Group Says*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/hate-groups-rise.html>.

¹¹ Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, FBI Reports*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html>.

¹² Yuriy Gorodnichenko, Tho Pham & Oleksandr Talvera, *Social Media, Sentiment and Public Opinions: Evidence from #Brexit and #USElection*, NAT'L BUREAU OF ECON. RES. (May 2018), <http://www.nber.org/papers/w24631>.

¹³ Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146 (2018) (discussing the speed at which falsity travels online).

¹⁴ See e.g., *Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06 Eur. Ct. H.R. 20 (2012); *Hertel v. Switzerland*, App. No. 59/1997/843/1049 Eur. Ct. H.R. 32 (1998).

Amendment,” expanding its scope so it can be used to strike down economic and social policies.¹⁵

This essay does not contend that the foundational assumptions for democratic discourse *must* be changed. It does, however, emphasize that paradigmatic shifts in how individuals communicate and understand others and themselves requires that the heralded foundational rationales of free expression be reevaluated. Such an effort is not concerned with policy questions, such as the place of Communications Decency Act Section 230 or whether the government should regulate deepfakes. These are important symptoms for which *how* we rationalize free expression is central to the discussion, but here the focus is on foundational assumptions. Are the rationales that were developed in the eighteenth century and applied to free expression rights in the twentieth century still the building blocks needed to safeguard democratic discourse in the twenty-first century?

To set the parameters for such a discussion, this essay lays out three areas around which such a discussion can be centered. Part II considers changes in the flow of information and how individuals have come to understand themselves and others in

¹⁵ *Janus v. AFSCME*, 138 S. Ct 2448, 2501 (2018) (Kagan, J., dissenting).

the networked era. Part III examines the foundational assumptions of the marketplace of ideas rationale for freedom of expression. As the Supreme Court's primary tool for communicating why it has understood the First Amendment as safeguarding free expression, its building blocks are crucial to the discussion. Part IV briefly considers European rationales for free expression, thus providing fodder for different perspectives regarding the meaning of freedom of expression.

II. CHANGE

The development and widespread adoption of networked communication tools has fundamentally changed the way individuals communicate. By placing what amounts to a printing press within the reach of anyone with access to an Internet connection, information has moved from a relatively rare, commonly professionally provided and localized resource to something that is abundant and often globally sourced. Such a change has meant information shifted from a “professional structuring of worldview,”¹⁶ which was the case when news organizations acted as gatekeepers to provide relatively common sets information to audiences, to a participatory culture where each person engages in a constant series of “voluntary,

¹⁶ CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 65 (2008).

temporary, and tactical affiliations, reaffirmed through common intellectual enterprises.”¹⁷

In this sense, individuals have entered a choice-rich environment that has come to shift how they interact with others and understand themselves. The explosion of information sources, particularly since the emergence of social media during Web 2.0, has made information and network decisions a significant part of citizens’ lives.¹⁸ Faced with countless potential information sources through which to garner world-building information, individuals have constructed generally homogenous, echo chamber intentional networks, thus limiting their exposure to broad spectrums of people, ideas, and organizations.¹⁹ As a result, individuals have come to understand others and themselves in fundamentally different ways than they did in the twentieth century.

¹⁷ HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 27 (2006).

¹⁸ Younghee Noh, *Imagining Library 4.0: Creating a Model for Future Libraries*, 41 J. ACAD. LIBRARIANSHIP 786, 789–90 (2015). Web 1.0 was characterized by massive information searchability and availability. Web 2.0 added increased content creation opportunities for citizen publishers, particularly via social media outlets. Web 3.0, the current wave, built upon these advancements, simpler connections between data and knowledge. Web 4.0, the symbiotic web, will be characterized by increasingly meaningful interactions between humans and AI.

¹⁹ MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 3–4 (2d ed. 2000); W. Lance Bennett & Shanto Iyengar, *A New Era of Minimal Effects? The Changing Foundations of Political Communication*, 58 J. COMM. 707, 720 (2008); Itai Himelboim, Stephen McCreery & Marc Smith, *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-MEDIATED COMM. 154, 166–71 (2013).

A. Community

The nature of communities, how they are defined and their characteristics, have shifted in the networked era. Traditional community groups, such as bowling leagues, Lions Clubs, Boy Scouts, and veterans' organizations, have seen their memberships decline.²⁰ Church, synagogue, and mosque membership has dropped twenty percent in the U.S. since 1998.²¹ As these foundational, socializing institutions have struggled, individuals have become parts of countless online groups.²² Such a shift from physical, local groups to global, virtual communities brings a wave of crucial changes in the ways individuals understand themselves and others. Scholars have found online groups do not accrue the same amount of social capital as in-person groups.²³ If social capital is the primary currency that flows through and holds together communities, then the conclusion that physical communities generate more trust, relationship, reciprocity, and meaningful human engagement

²⁰ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 15–17 (2000).

²¹ Jeffrey M. Jones, *U.S. Church Membership Down Sharply in Past Two Decades*, GALLUP (April 18, 2019), <https://news.gallup.com/poll/248837/church-membership-down-sharply-past-two-decades.aspx>.

²² JENKINS, *supra* note 17, at 26–28; Meredith Conroy, Jessica T. Feezell & Mario Guerrero, *Facebook and Political Engagement: A Study of Online Political Group Membership and Offline Political Engagement*, 28 *COMPUTERS HUM. BEHAV.* 1535, 1539 (2012).

²³ Caroline Haythornthwaite, *Strong, Weak, and Latent Ties and the Impact of New Media*, 18 *THE INFO. SOC'Y* 385, 386 (2002); PUTNAM, *supra* note 20, at 18–21.

than online communities is significant.²⁴ This is particularly true in a democratic social structure that assumes that generally rational individuals will engage with one another as part of self-government. Something important happens when the relationships individuals hold with one another are diminished in trust and reciprocity and, at the same time, broadened in potential scope by the global and instantaneous networks. As media scholar Henry Jenkins explained, “The new knowledge culture has arisen as our older forms of social community are breaking down, our rooting in physical geography is diminished, . . . our allegiances to nation-states are being redefined.”²⁵

Jenkins lauded the potential for knowledge communities to benefit from collective intelligence to come together online and solve problems and address concerns.²⁶ What he did not account for, however, was the fragmented nature of online spaces. When individuals have the power to curate the information sources they encounter and the individuals they connect with online, the potential pools of knowledge that communities hold can be winnowed to only answers that align with dominant beliefs and “truths” in that virtual group. By

²⁴ PUTNAM, *supra* note 20, at 19.

²⁵ JENKINS, *supra* note 17, at 27.

²⁶ *Id.* at 27–28.

tailoring the people, ideas, and information they encounter, individuals also reduce the potential collective intelligence within their communities. Thus, rather than deep pools of community intelligence from which to draw from in discourse with others, many virtual communities have turned into mostly vacant marketplaces where only a limited range of ideas are available.

Historically, traditional news organizations have worked as “general-interest intermediaries,” which provided the public with a set of common information.²⁷ From that provision of general information, individuals could conduct discourse and come to conclusions about the world around them. In place of these intermediaries, individuals structure echo-chamber-based networks that generally reinforce their existing beliefs.²⁸ Thus, it has become possible for communities to believe significantly different truths. On social media, it is possible to find entire communities that believe President Obama was born in Kenya, and therefore never legally president. At the same time, many other groups concluded the “birther” movement was a conspiracy. The two groups believe fundamentally different

²⁷ CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 41 (2017).

²⁸ Himelboim, McCreery & Smith, *supra* note 19, at 166–71; CASTELLS, *supra* note 19, at 3–4; Bennett & Iyengar, *supra* note 19, at 720.

truths and order their worlds based upon those opposing realities. This ability to tailor information flows, thus narrowing the range of potential ideas and “truths,” combined with the diminished social capital, raises questions about traditional rationales for free expression. These changes in communication lead to communities that are more extreme and less tolerant. Sociologist Manuel Castells concluded this type of breakdown in interaction and trust means “social groups and individuals become alienated from each other, and see the other as a stranger, eventually as a threat. In this process, social fragmentation spreads, as identities become more specific and increasingly difficult to share.”²⁹ Legal scholar Cass Sunstein communicated similar concerns, but added that such online community dynamics tend to lead to extreme behavior. He explained, “Repeated exposure to an extreme position, with the suggestion many people hold it, will predictably move those exposed, and likely predisposed, to believe in it.”³⁰

This concern has been magnified by the growing presence of bots within virtual spaces. The bots, which frequently cannot be discerned from human actors, can artificially amplify certain ideas, making them seem more prominent and more accepted.

²⁹ CASTELLS, *supra* note 19, at 3.

³⁰ SUNSTEIN, *supra* note 27, at 77.

They can also drown out human ideas by the sheer number of bot-based accounts and the volume of messages they communicate. Bots frequently capitalize on the echo chambers intentional networks individuals create, sharing false and misleading information that is likely to be accepted as truthful because it aligns with accepted narratives within the community.³¹

Finally, Castells' and Sunstein's concerns are buttressed by the solidarity that those who hold extreme views find online. Absent networked technologies, those who have held extreme views have often been ostracized in their physical, geographic communities. The global, instantaneous nature of virtual communities allows these individuals to find solidarity and support for their ideas with others online. Once emboldened by this newfound online solidarity, those who hold extreme views act out these identities in local, physical spaces.³²

³¹ Samuel Woolley, *We're Fighting Fake News AI Bots by Using More AI. That's a Mistake*, MIT TECH. REV. (Jan. 8, 2020), <https://www.technologyreview.com/2020/01/08/130983/were-fighting-fake-news-ai-bots-by-using-more-ai-thats-a-mistake/>; *How Fake Twitter Accounts Spread Misinformation and Distort Conversation*, MARKETPLACE (Aug. 19, 2019), <https://www.marketplace.org/shows/marketplace-tech/how-fake-twitter-accounts-spread-misinformation-and-distort-conversation/>.

³² MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE 5–7 (2015) .

B. Self

Networked technologies are changing how individuals understand themselves in democratic society. These changes manifest in different ways, but each of them influences how individuals encounter, understand, and engage with information and expression with others. Sociologist and psychologist Sherry Turkle has raised concerns about the ways networked technologies are changing people's perceptions of themselves and of others.³³ She explained that networked communication tools give the impression that each person is instantaneously connected with others, but those interactions are less meaningful than how individuals have communicated in the past.³⁴ Further, "Face-to-face conversation unfolds slowly. It teaches patience. We attend to tone and nuance. When we communicate on our digital devices, we learn different habits."³⁵ She found people simplify their statements when communicating via networked technology. Nuance is limited because "we dumb down our communications."³⁶ Other habits include a lack of empathy and people's inability to present themselves as they are, since texting and social-network-based messages allow individuals to carefully

³³ SHERRY TURKLE, *ALONE TOGETHER* 1–17 (2011).

³⁴ *Id.*

³⁵ SHERRY TURKLE, *RECLAIMING CONVERSATION* 35 (2015).

³⁶ *Id.*

craft how they represent themselves to others in ways that have not been possible in physical spaces. She explained, “[W]e are tempted to present ourselves as we would like to be. Of course, performance is part of any meeting, anywhere, but online and at our leisure, it is easy to compose, edit, and improve as we revise.”³⁷

Communication scholar Zizi Papacharissi termed this alternative version of the physical identity the “networked self.”³⁸ She emphasized that online forums allow individuals to create profiles, including a chosen name and image, and create a dynamic where the self is validated via intentionally selected virtual communities.³⁹ Efforts to project a certain version of the self online are encouraged not only by the ability to edit and revise messages, but by the architectures of networked spaces themselves. Social media firms construct their spaces to maximize interaction and engagement, via joining or following individuals or groups and “liking” or “favoriting” content.⁴⁰ By doing so, the companies increase the amounts and types of data

³⁷ *Id.* at 4.

³⁸ Zizi Papacharissi, *Conclusion: A Networked Self*, in *THE NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 304 (Zizi Papacharissi ed., 2010).

³⁹ *Id.* at 304–05.

⁴⁰ JOSÉ VAN DIJCK, *THE CULTURE OF CONNECTIVITY* 31 (2013).

they can sell or use for advertising. Such architectures, however, have social consequences.⁴¹

In terms of Facebook, new media scholar José van Dijck explained, “Facebook wants you to share information with as many people as possible . . . Facebook’s protocols guide users through its preferred pathways; they impose hegemonic logic onto a mediated social practice.”⁴² These virtual forum designs encourage more shallow interaction and incentivize individuals to communicate content that will receive more affirmation. Thus, certain behaviors, particularly those that are seen as encouraged by the virtual communities a person is part of, are likely to be repeated and even exaggerated, while ideas that are not perceived as popular will not be posted. While such social temperature-taking occurs in physical spaces, the commonly homogenous nature of online networks can lead individuals to go to greater extremes in their efforts to cultivate their networked identities.

Papacharissi concluded self-representation becomes challenging in social networks because individuals, while they control their immediate connections, cannot know their

⁴¹ *Id.*

⁴² *Id.* at 31. See also, Erving Goffman, *The Presentation of Self in Everyday Life*, in *SOCIOLOGY: EXPLORING THE ARCHITECTURE OF EVERYDAY LIFE* 128-39 (David M. Newman and Jodi O’Brien, eds., 2013).

secondary audiences.⁴³ Individuals might also struggle to craft nuanced messages that will align with the perceived expectations within the multiple communities in which they take part. Papacharissi found, “The process of self-presentation is complicated in the context of SNSs that combine a variety of audiences, of variable privacy or publicity, into a single crowd of spectators observing the same performance, but from a variety of vantage points.”⁴⁴ As a result, individuals frequently limit the depth of their ideas, trading nuance for simplified versions that are more likely to succeed across their different communities. While such a shift might appear minor, repeating this process countless times each day, as well as receiving messages from others via these circumstances, can lead to changes in how individuals think of themselves and engage with others.

Finally, consistent exposure to ideas that a person’s virtual communities frame as negative or harmful can lead individuals to construct defensive identities. Castells found such identities “function as a refuge and solidarity, to protect against a hostile outside world.”⁴⁵ Thus, people turn their online communities into communes, which become safe places that

⁴³ Papacharissi, *supra* note 38, at 307–08.

⁴⁴ *Id.*

⁴⁵ MANUEL CASTELLS, *THE POWER OF IDENTITY* 68 (2010).

reinforce identity-forming characteristics of faith, nationhood, and ethnicity against what is perceived as a deconstruction of the world as they understand it.⁴⁶ Within the online echo chambers, narratives are often rewritten to reinforce dominant beliefs, thus leading to religious fundamentalism, nationalism, and racism.⁴⁷ Castells emphasized these communities “do not reason, they believe.”⁴⁸ Thus, online discourses represent a departure from the types of expectations of rationality and the assumptions of community that are traditionally found within the free-expression rationales discussed in the next section.

III. THE MARKETPLACE

Since Justice Holmes introduced the marketplace concept into the Supreme Court’s lexicon in 1919, the metaphor has become justices’ primary tool for communicating how they understand freedom of expression.⁴⁹ Justices from a variety of judicial philosophies, across several decades, have employed the metaphor in a broad spectrum of First Amendment cases.⁵⁰ In

⁴⁶ *Id.* at 68–69.

⁴⁷ *Id.* at 68–70.

⁴⁸ *Id.* at 69–70.

⁴⁹ Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 *GEO. WASH. L. REV.* 161, 188–89 (1972).

⁵⁰ W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 *JOURNALISM & MASS COMM. Q.*, 40, 40 (1996).

this regard, the marketplace approach has become foundational to *how* the First Amendment has been interpreted in the United States. The approach's cornerstone place in free expression, however, has not included a definition from the Court. Justices have never explicitly defined its meaning, though it is generally understood as assuming that truth will succeed and falsity will fail when rational citizens have access to information that is substantially unmolested by the government.⁵¹

Such a definition places significant trust in Enlightenment-based assumptions regarding human rationality, the nature of truth, and the place of the individual in society. Similar ideas are at the foundations of Enlightenment thinker John Milton's work. In *Areopagitica*, he wrote, "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."⁵² He also contended "opinion in good men is but knowledge in the making," thus carving out crucial building blocks of what has become contemporary marketplace theory.⁵³ Enlightenment

⁵¹ *Id.* See also, LOUIS MENAND, *THE MARKETPLACE OF IDEAS* 13–14 (2010); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6 (1989).

⁵² JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* 50 (George H. Sabine ed., 1951).

⁵³ *Id.* at 45.

thinkers assumed rational individuals are generally capable of making sense of the world around them and truth will be discovered when people and ideas are free. Such assumptions have come to be married to the marketplace approach— a construct that has in many ways become synonymous with free expression in the United States.

A. The Marketplace and the Court

While Enlightenment assumptions have come to form the bedrock of marketplace theory, justices have seldom directly associated the two in the Court's decisions. In *Central Hudson Gas & Elec. Co. v. Public Service Commission*, however, a skeptical Chief Justice Rehnquist explicitly cited Milton, as well as Adam Smith, in his dissent, which questioned the Court's wisdom in the commercial speech case.⁵⁴ He contended, "From the Court's frequent reference to the 'marketplace of ideas,' which was deemed analogous to the commercial market in which a laissez-faire policy would lead to optimum economic decision-making under the guidance of the 'invisible hand.'"⁵⁵

In many instances, however, justices have inferred Enlightenment assumptions in their uses of the marketplace approach to rationalize their reasoning. In *Lamont v. Postmaster*

⁵⁴ 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

⁵⁵ *Id.*

General in 1965, Justice Brennan contended postal service guidelines threatened the free exchange of ideas. He explained, “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.”⁵⁶ Similarly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* in 1991, the Court used the marketplace metaphor to rationalize striking down a state law that limited the ability of criminals to profit from book deals that discussed their crimes.⁵⁷ The Court reasoned the law “raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace The First Amendment presumptively places this sort of discrimination beyond the power of the government.”⁵⁸ Similarly, in a 1953 case in which a House committee sought records of who purchased large quantities of a controversial author’s book, Justice Douglas characterized the publisher as bidding “for the minds of men in the market place of ideas.”⁵⁹ In each of these instances, justices struck down laws that they understood as government intrusions

⁵⁶ *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

⁵⁷ 502 U.S. 105, 116 (1991).

⁵⁸ *Id.*

⁵⁹ *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

upon the flow of information. Justices communicated that such limitations would impede generally rational individuals' search for truth.

In other situations, justices explicitly associated the marketplace as the embodiment of the First Amendment's free expression safeguards. In its decision to uphold the FCC's fairness doctrine in 1969, the Court reasoned, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."⁶⁰ Justice White, dissenting in *First National Bank of Boston v. Bellotti* in 1978, contended that the Court's decision to strike down a law that limited corporate speech risked "seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas."⁶¹ Finally, in the Court's deeply divided *Citizens United v. FEC* decision in 2010, both Justice Kennedy's opinion for the Court and Justice Stevens' dissent called upon the marketplace approach.⁶² Justice Kennedy contended that the federal law that limited "electioneering communications"⁶³ during certain periods could keep important ideas *from* the marketplace, thus

⁶⁰ *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

⁶¹ 435 U.S. 765, 810 (1978) (White, J., dissenting).

⁶² 558 U.S. 310 (2010).

⁶³ *Id.* at 321.

robbing citizens of the chance to evaluate the ideas.⁶⁴ Conversely, Justice Stevens found the law *protected* the marketplace.⁶⁵ Stevens reasoned the law, “reflects a concern 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.”⁶⁶ In these cases, justices communicated understandings that they conceptualized the marketplace as an embodiment of the free-expression promises made in the First Amendment.

B. Problems and Criticisms

Despite widespread judicial support for understandings that place the marketplace and its assumptions at the center of how the First Amendment is conceptualized, legal scholars have identified significant concerns within the foundational building blocks of the theory. Many of these concerns provide important fodder for discussions about how the First Amendment can or should be understood in the networked era. Most of the criticisms deal with the Enlightenment-based assumptions that have become the foundations of the theory. Historian David

⁶⁴ *Id.* at 335–36 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

⁶⁵ *Id.* at 473–75 (Stevens, J., dissenting).

⁶⁶ *Id.* at 473.

Hollinger, in weighing the contributions and problems with Enlightenment thought, encapsulated many of the criticisms of marketplace theory. He explained, the Enlightenment “blinded us to uncertainties of knowledge by promoting an ideal of absolute scientific certainty.”⁶⁷ He continued, “the Enlightenment, it seems, has led us to suppose that all people are pretty much alike.”⁶⁸ Legal scholar Jerome Barron was less circumspect in criticizing the marketplace and its assumptions. He concluded, “Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the ‘marketplace of ideas’ is freely accessible.”⁶⁹ He concluded, if a marketplace of ideas once existed, it was long gone.⁷⁰

Marketplace theory critics have delved specifically into these concerns. First Amendment scholar C. Edwin Baker emphasized, “the assumptions upon which the classic marketplace of ideas theory rests are almost universally rejected.”⁷¹ He emphasized “truth is not objective.”⁷² Absent the objective truth assumption, the theory struggles and, thus, the

⁶⁷ David E. Hollinger, *The Enlightenment and the Genealogy of Cultural Conflict in the United States*, in *WHAT’S LEFT OF THE ENLIGHTENMENT* 7, 8 (Keith Michael Baker & Peter Hanns Reill eds., 2001).

⁶⁸ *Id.* at 9.

⁶⁹ Jerome A. Barron, *Access to the Press--A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

⁷⁰ *Id.*

⁷¹ BAKER, *supra* note 51, at 12.

⁷² *Id.*

marketplace's Enlightenment-funded rationales for First Amendment-based free-expression safeguards falter. Legal scholar Stanley Ingber explained, "In order to be discoverable, however, truth must be an objective rather than subjective, chosen concept."⁷³ He continued, "if truth is not [objective], the victory of truth in the marketplace is but an unprovable axiom."⁷⁴

Legal scholar Frederick Schauer communicated similar concerns about the truth assumptions of the theory, explaining, "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"⁷⁵ Finally, Baker explained, "if truth is subjective, if it is chosen or created, an adequate theory must explain why and how the usually unequal advocacy of various viewpoints leads to the 'best choice.'"⁷⁶

The fundamental criticisms about the truth rationales of the marketplace approach connect with related concerns about the rationality and social structure assumptions that were imported from Enlightenment thought and baked into the

⁷³ Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15 (1984).

⁷⁴ *Id.*

⁷⁵ Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 777 (1986).

⁷⁶ BAKER, *supra* note 51, at 6.

foundations of the theory. People do not receive messages in the same ways. Information and “truth” do not reach communities, particularly in the twenty-first century, with the same frequency and intensity. Similarly, individual and community identity characteristics, such as ethnic, national, socioeconomic, and faith influences, as well as traits that develop as part of individuals’ networked-selves, make it unlikely, even if presented with significant evidence, that certain groups will agree with others regarding *the* truth.⁷⁷ Taken together, these concerns about the marketplace approach’s foundational assumptions raise questions regarding the theory’s ability to persist, as is, as the primary tool for how the Supreme Court articulates how it rationalizes free expression.⁷⁸

C. The Holmes Truth

Finally, Justice Holmes, though he introduced the marketplace concept into the precedential record, did not generally accept Enlightenment-founded assumptions regarding truth.⁷⁹ Justice Holmes, on numerous occasions, explicitly

⁷⁷ See *infra* Part II.B.

⁷⁸ 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, 103–04 (2018); Jared Schroeder, *Marketplace Theory in the Age of AI Communicators*, 17 *FIRST AMEND. L. REV.* 22, 60–64 (2018).

⁷⁹ See Prina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 *J.L. & POL.* 451, 456–58 (1988); see also, Jared Schroeder, *The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth*, 7 *BR. J. AM. LEG. STUD.* 169, 177–80 (2018).

rejected the existence of absolute truth. In a letter to friend and political theorist Harold Laski in 1929, Justice Holmes concluded, “absolute truth is a mirage.”⁸⁰ Eleven years earlier, the year before his historic opinions in cases such as *Schenck v. U.S.* and *Abrams v. U.S.*, he wrote, “Certitude is not the test of certainty. We have been cock-sure of many things that were not so.”⁸¹ Rather pragmatically, Justice Holmes instead conceptualized truth as transitory, something shaped by experience and the individual’s best efforts to make sense of the world.

Late in his life, in letters to friends, Justice Holmes declared he was a “bettabilitarian.”⁸² He explained that the best any person can do is *bet* on what is true and therefore order their lives around such wagers.⁸³ Justice Holmes used similar language in his dissent in *Abrams*, concluding, “Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”⁸⁴ Thus, while Justice Holmes did not include any citations in the dissent in which he

⁸⁰ OLIVER WENDELL HOLMES, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 107 (Richard A. Posner ed., 1992).

⁸¹ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

⁸² HOLMES, *supra* note 80, at 108; David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 474, n. 78 (1994); Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 12 (1948).

⁸³ HOLMES, *supra* note 80, at 108; Cohen, *supra* note 82, at 12 (1948).

⁸⁴ *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting).

introduced the marketplace concept into the Court's vocabulary, his other writings indicate he did not accept foundational building blocks of the Enlightenment assumptions that have come to be the primary assumptions of the approach. Such a recognition, alongside how the Court has used the metaphor and scholarly concerns regarding its assumptions provide substantial fodder for discussing how free expression is conceptualized in the twenty-first century.

IV. EUROPE'S APPROACH

The Supreme Court has constructed a series of rationales for how we should understand the forty-five-word, absolutely phrased First Amendment. While other human rights documents make similar promises regarding free expression,⁸⁵ jurists in other regions have come to construct substantially different rationales for such safeguards. The existence of alternately constructed conceptualizations of free expression provide yet another avenue through which conversations regarding how

⁸⁵ *See, e.g.*, European Convention on Human Rights, Sept. 3, 1953, art. 10 [hereinafter ECHR]; Universal Declaration on Human Rights, Dec. 10, 1948, Preamble; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 19; Convention on the Elimination of All Forms of Racial Discrimination, art. 5, March 7, 1966.

rationales for such safeguards can be situated in light of twenty-first-century changes in information, community, and self.

In this regard, the European Union's system provides a useful contrast to US conceptualizations of free expression. The United States shares significant philosophical influences with the bloc, and both have strong statements regarding free expression in their foundational documents. Article 10 of the European Convention of Human Rights promises "[e]veryone has the right to freedom of expression," including the right "to hold opinions and to receive and impart information and ideas without interference by public authority."⁸⁶ Unlike the First Amendment, however, a second section of the article indicates such freedoms come with "responsibilities," including those that "are necessary in a democratic society."⁸⁷ The second section, along with the historical forces that led to its inclusion, has led EU courts to come to significantly different free-expression rationales, particularly in the twenty-first century.

Article 10 was written "[i]n the context of effective political democracy *and* respect for human rights"⁸⁸ Such a

⁸⁶ ECHR, art. 10, § 1.

⁸⁷ ECHR, art. 10, § 2.

⁸⁸ Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, COUNCIL OF EUROPE 1, 6 (2004), <http://rageuniversity.org/PRISONESCAPE/UK%20ANTI-TERROR%20LAW/Freedom%20of%20Expression%20European%20Rights.pdf> (emphasis added).

two-fold concern for democracy and human rights illustrates the alternative foundational assumptions the EU model is constructed upon. Within such a context and wording, European jurists have constructed free expression rationales that account for human dignity, pluralism, and public safety.⁸⁹ They have also positioned the government as more of a custodian of the information marketplace than as an unwelcome participant.⁹⁰ The European Court of Human Rights (“ECtHR”) in 2013, for example, upheld a UK law that allowed the government’s Broadcast Clearance Centre “(BACC”) to limit advertisements that were “wholly or mainly of a political nature.”⁹¹ The ECtHR reasoned the law’s intent, “to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process,” acted in the best interest of society and was a “minimum impairment of the right of expression.”⁹²

The year before, in *Mouvement Raëlien Suisse v. Switzerland*, the ECtHR upheld the right of Swiss officials to deny a

⁸⁹ *Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06, Eur. Ct. H.R. 20 (2012); *Hertel, v. Switzerland*, App. No. 59/1997/843/1049, Eur. Ct. H.R. 32 (1998); *Animal Defenders International v. United Kingdom*, App. No. 48876/08 Eur. Ct. H.R. 39 (2013).

⁹⁰ *Steel and Morris v. U.K.*, App. No. 68416/01 Eur. Ct. H.R. 30 (2005); *Mouvement Raëlien Suisse*, No. 16354/06 Eur. Ct. H.R. at 9 (quoting ¶ 5.6 from the Swiss Federal Court’s decision to dismiss the appeal in 2005); *Instytut Ekonomichnykh Reform v. Ukraine*, App. No. 61561/08 Eur. Ct. H.R. 13 (2016).

⁹¹ *Animal Defenders*, No. 48876/08 Eur. Ct. H.R. at 3.

⁹² *Id.* at 5–6.

controversial religion the right to place its posters in public.⁹³ While the posters did not involve any illegal material, the Internet address it displayed, the court reasoned, could lead people to ideas that worked against public health and morals. The court reasoned Article 10 allows state officials to limit “matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.”⁹⁴ The court articulated similar concerns in *Hertel v. Switzerland* in 1998. In *Hertzlel*, a commercial appliance group sought an injunction against a researcher who published conclusions that microwaves were dangerous to public health. In rejecting the appliance group’s request, the court emphasized, “Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.”⁹⁵ The court continued, however, by considering the consumer groups’ arguments, that the “demands of pluralism, tolerance, and broadmindedness without which there is no ‘democratic society.’”⁹⁶ Thus, in rationalizing its decision to uphold the author’s rights, the court

⁹³ *Mouvement Raëlien Suisse*, No. 16354/06 Eur. Ct. H.R. at 4.

⁹⁴ *Id.* at 20.

⁹⁵ *Hertel, v. Switzerland*, App. No. 59/1997/843/1049, Eur. Ct. H.R. 32 (1998).

⁹⁶ *Id.*

communicated concern for not only the flow of information, but the well-being of society.

Hertel also illustrates the ECtHR's expectation that information be a public good. Such an approach, which is different than the U.S. courts' assumption that information is generally *inherently* a public good, marks a significant contrast between the systems' approaches. In *Hertel*, the court explicitly concluded Article 10's statement that limitations that are "necessary in a democratic society" means the government must present a 'pressing social need'" in order to limit expression.⁹⁷ In other words, if the information is found to harm, rather than benefit, society, it can be limited. In *Aquilina v. Malta*, a 2011 defamation application involving a journalist, the court emphasized the importance of a free press, but qualified those conclusions explaining "the press must not overstep certain bounds" and journalists' "duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities— information and ideas on all matters of public interest."⁹⁸

Six years earlier, in *Steel and Morris v. U.K.*, the court rationalized protecting activists' rights to circulate negative, controversial information about a corporation because, "[t]he

⁹⁷ *Id.* at 31–32.

⁹⁸ *Aquilina & Others v. Malta*, App. No. 28040/08, Eur. Ct. H.R. 10 (2011).

issues raised in the leaflet were matters of public interest and it was essential in a democracy that such matters be freely and openly discussed.”⁹⁹ Similarly, in *Instytut Ekonomichnykh Reform v. Ukraine* in 2016, the court upheld a publisher’s right to communicate negative information about political leaders during a Constitutional crisis. In doing so, the court reasoned that “[f]reedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any section of the community.”¹⁰⁰ Ultimately, the outcomes in all three applications were likely exactly as they would have been in similar situations in US courts. Crucially, however, the rationales were different. The ECtHR jurists considered public health, community, and society at large, as well as the information’s nature as a public good—something valuable to discourse or an informed public.

⁹⁹ *Steel & Morris v. U.K.*, App. No. 68416/01 Eur. Ct. H.R. 27 (2005).

¹⁰⁰ *Instytut Ekonomichnykh Reform v. Ukraine*, App. No. 61561/08 Eur. Ct. H.R. 13 (2016).

V. CONCLUSIONS

Absent information, democracy cannot function. This essay, in light of the world-building characteristics of information and the paradigmatic shift in its nature in the networked era, as well as substantial changes in the natures of community and self, contends, however sacrosanct, it is time to re-examine *what* free expression means in the United States. Such a conversation does not suggest we take an editor's pen to the First Amendment. Instead, this essay has examined a series of concerns that, ideally, could represent the parameters of a constructive discussion about the future of *how* we understand freedom of expression.

Importantly, the forty-five words of the First Amendment have always required interpretation. Within those interpretations are potential shades of meaning. Such competing potential interpretations were evidenced in the Court's opinions in *Citizens United*. Justice Kennedy contended the law must be struck down because it *limited* the flow of information.¹⁰¹ Justice Stevens, in his dissent, contended the law *protected* freedom of expression.¹⁰² Similarly, in *Central Hudson*, Chief Justice Rehnquist questioned the court's wisdom in extending First Amendment protections to

¹⁰¹ *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

¹⁰² *Id.* at 473 (Stevens, J., dissenting).

commercial speakers.¹⁰³ He emphasized, “Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one.”¹⁰⁴ He continued, “The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement”¹⁰⁵ Thus, this essay’s contention that significant change in communication and, as a result, community and individual understandings, is merely a call to lay bare differences in understandings that have long existed.

A. A Conversation About Change, Not Tech

Unlike differences between judicial philosophies, this discussion is catalyzed by the liquid nature of networked technologies’ development and the fundamental aspects of the revolution they represent.¹⁰⁶ New networked technology-related advancements are appearing, one after the other, before law or our legal philosophies have any chance to conceptualize the changes they bring about. At no point during the networked era

¹⁰³ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 595 (1980) (Rehnquist, C.J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 598.

¹⁰⁶ This metaphor is influenced by ZYGMUNT BAUMAN, LIQUID MODERNITY 2–6 (2000).

have technological advancements solidified long enough to allow for a period of reflection and reconstitution of legal rationales. Adding to the impact of this constant-change dynamic, the present revolution is characterized by information. Castells compared the networked revolution to the Industrial, rather than to other advancements in communication technology. He explained, “What characterizes the current technological revolution is not the centrality of knowledge and information, but the application of such knowledge and information to knowledge generation . . . in a cumulative feedback loop.”¹⁰⁷

As with the Industrial Revolution, the current shift constitutes a change that goes beyond simple technological advancements. Instead, it represents shifts in society, community, and self that are comparable to the Industrial Revolution changes that affected individuals’ relationships as they moved from more pastoral communities to large cities where customs, relationships, and norms were less known.¹⁰⁸ It was during the same period, 1880 to 1920, that the Supreme Court provided its initial interpretation of the First Amendment,

¹⁰⁷ CASTELLS, *supra* note 19, at 31.

¹⁰⁸ Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution From 1880 to 1920*, 38 SOC. SCI. RES. 897, 897 (2009).

as well as introduced the marketplace of ideas metaphor.¹⁰⁹ For these reasons, conversations regarding free-expression rationales in the networked era should be framed as parts of massive *social* rather than *technological* change.

B. Focus Attention on the Marketplace

As the Court's most dominant tool for rationalizing free expression safeguards, adjustments to the metaphor's primary building blocks could help revise and rationalize free expression safeguards in light of the massive changes in communication, community, and self in the networked era. The marketplace theory's assumptions, which evolved alongside free expression rationales during the twentieth century, have come to be founded in Enlightenment assumptions about truth, rationality, and the structure of society.¹¹⁰ Scholars have questioned the validity of these assumptions, particularly the expectation that generally rational individuals will identify objective truth, which will emerge and succeed as falsity fails. Replacing these assumptions with approaches that recognize individuals encounter information and make meaning differently, and that truth *emerges* via discourse, could help refocus free expression rationales on

¹⁰⁹ See *Schenck v. United States*, 249 U.S. 47 (1919); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹¹⁰ See *supra* Part III.

safeguarding the flow of information, rather than protecting a competition between truth in falsity and that generally assumes each person is similar and receives information in comparable ways.¹¹¹

Though scholars have long communicated concerns regarding the theory's underlying foundations, networked communication tools have made each of the problems more concerning. The fragmented, polarized nature of the choice-rich networked environment makes it even less likely that individuals will encounter a range of ideas or come to the same "truth." The networked environment creates a multiverse of ideologically, rather than governmentally, limited marketplaces where only certain ideas are available in the competition between truth and falsity. Furthermore, Justice Holmes, though he introduced the marketplace concept into the nation's legal lexicon, did not ascribe to Enlightenment assumptions. His ideas regarding truth and rationality related far more closely to pragmatism, which understands truth to be personal and subjective, rather than generally universal and objective. Such an approach, a shift to a more pragmatic, discourse-based approach to the Court's

¹¹¹ See Jared Schroeder, *Toward a Discursive Marketplace of Ideas: Reimagining the Marketplace Metaphor in the Era of Social Media, Fake News, and Artificial Intelligence*, 52 *FIRST AMEND. STUD.* 38, 53–55 (2018).

primary tool for communicating how it understands freedom of expression is an example of the type of adjustments that might come from a conversation about how the First Amendment should be understood in the networked era.

C. Consider Elements of European Approaches

Finally, conversations about how free expression is rationalized in the United States would benefit from discussing the approaches that have taken hold in the European Union. While accounting for public health and morals, and arranging free-expression rationales so they consider, rather than assume, whether information is generally a public good, might seem unlikely candidates in the US system, their presence in the EU has created a more malleable system that is capable of adapting to technological change. This adaptability is the fruit of the public health and morals approaches, as well as the place of the government as a custodian, rather than an unwanted actor, within the flow of information. While present American rationales do not allow for significant action regarding AI, particularly deepfakes, for example, and their influence on

political discourse, the EU model has allowed the bloc to begin to safeguard its discourse from such non-human actors.¹¹²

While this essay does not endorse any one idea, it does contend that information is a world-building material for citizens in a democratic society and, thus, changes to that information and how individuals understand themselves and others require that we carefully consider how free expression is rationalized. To that end, this essay has not advocated for a specific new theory of the First Amendment, but has instead outlined potential avenues that might guide constructive discussion. Each of the avenues discussed bears the potential to inform and guide important questions about how free expression should be rationalized in the United States in the twenty-first century.

¹¹² European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rule on Robotics, EUR. PARL. DOC. P8_TA(2017)0051 (2017).