

**MARKETPLACE OF IDEAS 3.0? A FRAMEWORK FOR THE ERA
OF ALGORITHMS**

Garrett Morrow* & John P. Wihbey**

Cite as: Morrow & Wihbey, Marketplace of Ideas 3.0? A Framework for
the Era of Algorithms, 29 RICH. J.L. & TECH. 52 (2023).

* Ethics Institute; Department of Political Science, Northeastern University

** Ethics Institute, School of Public Policy; School of Journalism, Northeastern
University

ABSTRACT

For over a century, Supreme Court Justice Oliver Wendell Holmes' metaphor of the "Marketplace of Ideas" has been central to Americans' conceptualization of the First Amendment. However, the metaphor has evolved, and the today's marketplace looks much different than the marketplace of the early twentieth century. We argue that the Marketplace of Ideas is now a dynamic environment of information exchange that is distributed throughout the internet and private applications and is guided by algorithms. The modern Marketplace of Ideas frames discussion of freedom of expression and content moderation. An updated understanding of the metaphor allows for an improved public sphere of discussion where free thought can flourish, truth can be tested, and ideas can be productively exchanged. This paper articulates three central evaluative criteria against which a given contemporary marketplace regime can be judged: *instrumental value*; *epistemic value*; and *normative value*. In this paper, we explain how the metaphor has evolved into marketplace 3.0 and the criteria necessary for judging the usefulness of the Marketplace of Ideas.

I. TOWARDS A MARKETPLACE 3.0

[1] For more than 100 years, Americans have used the phrase “Marketplace of Ideas” as a metaphor for freedom of expression, to conceptualize First Amendment rights. Supreme Court Justice Oliver Wendell Holmes Jr. is credited with coining the phrase although he never used that exact language.¹ Recently, the free speech metaphor has been central to how social media platforms think about their role in modern communication and their approach to content moderation.² Equating communication and idea exchange to a marketplace suggests that purveyors of speech (i.e., speakers) are in competition with one another, trying to convince listeners to “purchase” or “adopt” their ideas versus another’s. Out of the free market-like exchange of ideas, some speech will prevail, and preferences will be revealed, if not maximized. Furthermore, the ideal way of finding and spreading truth is through universal free access to the marketplace (for both buyers and sellers), made possible through constitutionally protected freedoms of speech. Historical marketplaces took various forms: the physical town square, newspapers, pamphlets, and broadcasting, but it is often said that today’s modern “public square” is social media.³ However, social media is but one piece of the puzzle. Communication history, moderation practices, technological affordances, and the business of social media all structure the communication environment, including, how the Marketplace of Ideas functions, and the ordering of marketplace social values.

[2] There are several ways to conceptualize the marketplace metaphor and its suitability to speech. First, speech is not a marketplace and possibly never has been. Second, speech is a marketplace, but for goods or values

¹See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (condensing Justice Holmes’ discussion on the benefit of a “free trade in ideas” into the term of art “marketplace of ideas”).

² Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1621 (2018).

³ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 1737 (2017) (plurality opinion).

other than ideas. Third, speech is a Marketplace of Ideas, and the marketplace works fine. Fourth, speech is a Marketplace of Ideas, and regardless of whether it works well or not, the metaphor is problematic. Fifth, speech is a Marketplace of Ideas, and it is acceptable as a marketplace, but the marketplace has problems and requires intervention to correct it. Finally, speech is a Marketplace of Ideas, it is acceptable as a marketplace, there are problems, but there should not be intervention.

[3] This article argues that possibility number four is most accurate: the Marketplace of Ideas metaphor is useful as a metaphor, but the metaphor is problematic and needs to be contextualized for our current dynamic environment of information exchange that is distributed throughout the internet and guided by algorithms.⁴ Furthermore, this article argues for an evolution of the metaphor that reflects the contemporary networked information environment. In doing so, this paper explains the criteria necessary for judging the usefulness of the updated freedom of expression framework. In this article, we look at the history of the Marketplace of Ideas and conceptualize a framework for our dynamic and complex era that we are calling the “Marketplace of Ideas 3.0.” Technological affordances, network structure, and human behavior affect the social conditions online, and in turn, limit the usefulness of treating online interactions as a marketplace in its pure form. The neutral marketplace metaphor of careful deliberation, characterized by freedom of choice and access, is an aspirational hope for how we believe public discourse should happen. A recontextualized Marketplace of Ideas better frames society’s discussion of how freedom of expression, and by extension content moderation, should be conducted online.

[4] A Marketplace of Ideas 3.0 captures the newest phase in the historical conceptualizations of Holmes’ metaphor. The original Marketplace of Ideas (1.0) metaphor was imagined by Holmes in an era when print was the primary medium of communication. Accordingly, the Supreme Court case that spawned the metaphor was in response to printed

⁴ See B. Bodo et al., *Tackling the Algorithmic Control Crisis – The Technical, Legal, and Ethical Challenges of Research into Algorithmic Agents*, 19 YALE J.L. & TECH. 133, 171–72 (2017).

flyers.⁵ Marketplace of Ideas (1.0) reached its zenith, perhaps, with the telegraph or the moment that information conveyance was finally systematically separated from physical transportation systems.⁶

[5] The origins of the next phase of the Marketplace of Ideas (or 2.0) can be traced to the 1910s and 1920s with the origins of broadcast, which began to be consolidated by the Communications Act of 1934 and the creation of the Federal Communications Commission.⁷ The Marketplace of Ideas 2.0 saw several intermediate iterations (that we could call versions 2.1, 2.2, etc.) over the course of the 20th century as broadcast regulations, such as the Fairness Doctrine, came and went. Today, in the internet era, we are in a hybrid phase where information production has democratized and the once separate spheres of communication (e.g., public, private, broadcast, etc.) have collapsed into one ecosystem. It is this new hybrid phrase that characterizes the marketplace 3.0.

[6] In summary, this paper seeks to: 1) describe empirically the new Marketplace of Ideas, such as it is, in terms of its novel structure, flows, and parameters, set against the prior paradigms or regimes of the marketplaces of ideas of the past; 2) articulate evaluative criteria by which the new marketplace might be analyzed and judged. As will be explained, these evaluative criteria are three-fold. First, we propose judging the new marketplace in terms of *instrumental value*: how does the Marketplace of Ideas help orient persons in terms of understanding such things as the origin, source, and context of information? The second evaluative criterion is the *epistemic value* of the marketplace: to what extent do the structure, flows, and parameters help citizens make good judgments that represent, to the

⁵ See Timothy J. O'Neill, *Abrams v. United States (1919)*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/328/abrams-v-united-states> [<https://perma.cc/HG6Y-YXU8>].

⁶ See JAMES W. CAREY, *COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY* 157 (2d ed. 2008).

⁷ See Dean K. Cherchglia, *Changing Channels in Broadcast Regulation: Leaving Television Advertising to Containment by Market Forces*, 34 CASE W. RESRV. 465, 471–72 (1984).

extent possible, true justified beliefs? Finally, we propose the evaluative criterion along the lines of *normative value*: how are the seekers, sources, and subjects of ideas treated in terms of fairness, justice, and other ethical criteria? We conclude by noting emerging challenges to the Marketplace of Ideas 3.0 regime.

II. THE LONG TALE OF THE MARKETPLACE: AMERICAN HISTORY OR AMERICAN MYTH?

[7] Free speech assumptions are nothing if not resilient. For instance, “shouting ‘fire’ in a crowded theatre”⁸ is still used as a situation where speech may be dangerous and prohibited.⁹ The marketplace metaphor, having recently celebrated its centenary, has proven to be a popular conceptualization of the competition of ideas and speech and is frequently evoked in academia, the popular press, in think tanks, and among the public.¹⁰ In other words, the Marketplace of Ideas metaphor has a rich history, rooted in free speech and First Amendment law.¹¹

[8] Scholarship makes it clear that while freedom of expression rights and ideals have a rich history in Enlightenment thought, there was no legally effective, actively implemented protection of the freedom of speech in the

⁸ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁹ See Trevor Timm, *It’s Time to Stop Using the ‘Fire in a Crowded Theater’ Quote*, THE ATLANTIC (Nov. 2, 2012), <https://www.theatlantic.com/national/archive/2012/11/its-time-to-stop-using-the-fire-in-a-crowded-theater-quote/264449/> [<https://perma.cc/38YN-GXDM>].

¹⁰ See David Schultz & David L. Huston, *Marketplace of Ideas*, THE FIRST AMEND. ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/999/marketplace-of-ideas> [<https://perma.cc/5DMM-M3L4>] (last updated June 2017).

¹¹ See *Abrams*, 250 U.S. at 630.

United States.¹² The First Amendment of the United States Constitution reads, “Congress shall make no law...abridging the freedom of speech, or of the press...”¹³ Behind the words of the First Amendment is a history of free speech and founding fathers who were aware of such concepts of freedom. Most prominently in the minds of the founders was John Trenchard and Thomas Gordon’s *Cato’s Letters*, published in 1720, in which the two British pamphleteers discussed the relationship between free speech and free government.¹⁴ Trenchard and Gordon are part of a longer history of free speech thought, and we can go even earlier to John Milton’s *Areopagitica* to see actual marketplace-type language and competition being used to discuss free expression.¹⁵ However, like the founders’ descent into factionalism despite Madison’s and Washington’s warnings, the ideals

¹² BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 32 (Belknap Press, Enlarged ed. 1992); Geoffrey R. Stone, *Reflections on the First Amendment: The Evolution of the American Jurisprudence of Free Expression*, 131 PROC. OF THE AM. PHIL. SOC’Y 251, 252 (1987); SAM LEBOVIC, *FREE SPEECH & UNFREE NEWS* 1–2 (2016).

¹³ U.S. CONST. amend. I.

¹⁴ See JOHN TRENCHARD & THOMAS GORDON, *CATO’S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* (Ronald Hamowy ed., In Two Volumes ed.1995); see also BAILYN, *supra* note 12, at 38 (discussing Trenchard and Gordon’s backgrounds); LEBOVIC, *supra* note 12, at 2–3 (explaining the beginnings the freedom of the press movement in England); Jeffery A. Smith, *Freedom of Expression and the Marketplace of Ideas Concept from Milton to Jefferson*, 7 J. COMM’N INQUIRY 47, 53–54 (1981) (examining the popularity of *Cato’s Letters*).

¹⁵ See JOHN MILTON, *AREOPAGITICA AND OTHER WRITINGS* 211, 221, 231 (William Poole ed., 2014) (“Truth and understanding are not such wares to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks . . . [M]ore than if some enemy at sea should stop up all our havens and ports and creeks, it hinders and retards the importation of our richest merchandise, truth[.] . . . Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?”).

of free expression grew difficult to execute when they met the competitive and bitter political realities of the young republic.¹⁶

[9] Today, we view the First Amendment as an absolute protection of freedom of speech, but this was not always so. Even the country's founders did not intend for this protection to apply as modern Americans do now. The Adams administration signed the Sedition Act in 1798, restricting political speech and sending James Thomson Callender (among others) to prison for publishing political pamphlets.¹⁷ Such speech restrictions were not isolated to the Federalists either. Adams' political opponent, Thomas Jefferson, a Democratic-Republican, believed the press should be liable for "false facts" and defamation.¹⁸ As outlined below, through a process of hindsight bias and ideological backfilling, we have traced a historical line from Milton, through Trenchard and Gordon to John Stuart Mill, and up through *Abrams* to our current moment of First Amendment jurisprudence.¹⁹

[10] In 1919, Jacob Abrams and six other recently emigrated Russian Jews were arrested under the Espionage Act of 1917 for printing and distributing flyers that protested American involvement in World War One.²⁰ The case went to the U.S. Supreme Court, and although the case was

¹⁶ See THE FEDERALIST NO. 10 (James Madison) (1787); President George Washington, The Address of General Washington to the People of America on His Declining the Presidency of the United States in CLAYPOOLE'S AMERICAN DAILY ADVERTISER (Sept. 19, 1976).

¹⁷ See Gregg Costa, Note, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011, 1011, 1025, 1040 (1999).

¹⁸ Smith, *supra* note 14, at 58.

¹⁹ See John D. Peters, *The "Marketplace of Ideas": A History of the Concept*, in TOWARD A POLITICAL ECONOMY OF CULTURE 66–67, 79 (Andrew Calabrese & Colin Sparks eds., 2004); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 652 (2006).

²⁰ RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 47–49 (Cornell University Press ed., 1987).

decided against *Abrams*, the marketplace metaphor was born. “But when men have realized that time has upset many fighting faiths,” writes Oliver Wendell Holmes Jr. in his dissent, “they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth, is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”²¹ While the constitutionality of the defendants’ arrest was upheld, it is Holmes’ dissent that has had the lasting impact on American society.

[11] The Marketplace of Ideas metaphor has become a “legitimizing myth,” or an idealistic, unrealistic system that does more to maintain the status quo than to reveal truths or give power to the voiceless.²² Additionally, the modern application of the marketplace metaphor has twisted the historical record of free speech thinking from a method of checking the abuses of power and emphasizing the cultural value of free thinking, as emphasized by John Stuart Mill, to a method of achieving some kind of market equilibrium.²³

[12] After Holmes’ dissent in *Abrams* codified the metaphor, references to a “Marketplace of Ideas” were rare in Supreme Court cases from the 1920s through the 1950s and only began to become rhetorically dominant starting in the 1970s, about a half-century after Holmes’ dissent.²⁴ When the metaphor first began to be used more frequently, it was employed by Justices in favor of both communication regulation and deregulation.²⁵ For

²¹ *Abrams*, 250 U.S. at 630.

²² Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 31 (1984).

²³ Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1 (2004).

²⁴ W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM’N Q. 40, 41–42 (1996).

²⁵ See Peters, *supra* note 19, at 76–77.

example, the Marketplace of Ideas was used to justify continued application of the Fairness Doctrine.²⁶ Then during the Reagan administration, the balance tipped to the side of de-regulation and the Marketplace of Ideas was increasingly used to promote neoliberal deregulation in communication as well as other areas of life.²⁷ If the goal of First Amendment freedom of expression is to maximize the ability of Americans to speak and trade ideas, then the regulatory battle shows that the marketplace metaphor can be used by both sides of the same debate to justify their positions. Thus, the staying power of the metaphor has less to do with the expression being accurate or insightful, and more to do with the fact that the metaphor can legitimize one's own views. The history of communications regulation begins to reveal the contemporary freedom of expression framework: Marketplace of Ideas 3.0.

III. THE MARKETPLACE METAPHOR: FROM 1.0 TO 3.0

[13] The general structure of the marketplace 3.0 framework is characterized by the many technological affordances granted by the internet and a governance model that, in some part, is currently centralized among a few large social media companies.²⁸ Speech in the marketplace 3.0 is international, and there are a number of public and private governors involved in exercising control over speech.²⁹ Social media platforms extend beyond national jurisdictions and rely on infrastructure such as web hosting services, reverse proxies, internet service providers, payment processors,

²⁶ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“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.”).

²⁷ See Peters, *supra* note 19, at 78; P. M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMM’N 151, 154–55 (1999).

²⁸ Klonick, *supra* note 2, at 1662–63; Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1181–82 (2018).

²⁹ Balkin, *supra* note 28, at 1153.

and other services that form the backbone of the internet.³⁰ People have some power (however small) in exerting their preferences over the speech environment; this is the power of “exit, voice, and loyalty,” but in the international, centralized structure of the marketplace 3.0, governments and social media platforms exert the vast majority of control over speech governance.³¹

[14] What differentiates the Marketplace of Ideas 3.0 from previous iterations is technology. “Disinformation” is not a modern phenomenon, nor is overtly partisan or sensationalized speech (and responses to speech). This can be evidenced by the Adam’s era Sedition Act or the “yellow journalism” news coverage era characterized by falsehoods.³² Additionally, many of disinformation or propaganda tactics have been used as a means of political warfare throughout history.³³ That said, the erosion of the institutional foundations of democracy has made the marketplace 3.0 paradigm uniquely susceptible to disinformation—strategic attempts to market and disseminate falsehoods and lies, and to sow doubt as part of a propaganda strategy.³⁴

³⁰ *See id.* at 1174.

³¹ *See id.* at 1199–201.

³² *See* THOMAS E. PATTERSON, *INFORMING THE NEWS: THE NEED FOR KNOWLEDGE-BASED JOURNALISM* 7 (2013); Sharon McQueen, *From Yellow Journalism to Tabloids to Clickbait: The Origins of Fake News in the United States*, in *INFORMATION LITERACY AND LIBRARIES IN THE AGE OF FAKE NEWS* 14 (Denise E. Agosto ed., 2018); ANDIE TUCHER, *NOT EXACTLY LYING: FAKE NEWS AND FAKE JOURNALISM IN AMERICAN HISTORY* 25, 72 (2022).

³³ Renee Hobbs & Sandra McGee, *Teaching About Propaganda: An Examination of the Historical Roots of Media Literacy*, 6 *J. MEDIA LITERACY EDUC.* 56, 57–58; THOMAS RID, *ACTIVE MEASURES: THE SECRET HISTORY OF DISINFORMATION AND POLITICAL WARFARE* 6–8 (2020).

³⁴ W. Lance Bennett & Steven Livingston, *A Brief History of the Disinformation Age: Information Wars and the Decline of Institutional Authority*, in *THE DISINFORMATION AGE* 3, 3–4 (W. Lance Bennett & Steven Livingston eds., 2021).

[15] Following the centuries-long dominance of print as the primary communications medium of economically advanced societies, or marketplace 1.0, the advent of broadcast through radio, and later television, ushered in a marketplace 2.0 era. The evolution of the Marketplace of Ideas was accompanied by increased state regulation both in the United States and around the world.³⁵ The history of broadcast media in the United States began more than a century ago with a panic over the use of the airwaves to sow misinformation, precipitating a decision by the U.S. Congress to require licenses for radio under the Radio Act of 1912.³⁶ Through most of the twentieth century, rules governing speech content on radio and television, mandated allocation of time to certain subjects, and control over industry composition and ownership grew as common regulations across the world as new broadcast technologies changed the fundamental logics of communication in different societies.

[16] In the late 1980s and 1990s, however, cable and satellite television and eventually the internet began to produce cracks in the marketplace 2.0 paradigm. Regulation also began to wane, with the demise of regimes like the United States' Fairness Doctrine in 1987.³⁷

[17] Perhaps the most important factor driving the 3.0 era was a surge of powerful, free market inspired ideas that coalesced around new communication technologies. Scholars often call this the movement toward

³⁵ *Id.* at 13.

³⁶ CHRISTOPHER B. DALY, COVERING AMERICA: A NARRATIVE HISTORY OF A NATION'S JOURNALISM 204 (2012).

³⁷ *Id.* at 411–12.

the idea of “consumer sovereignty.”³⁸ The basic theory of consumer sovereignty is that citizens should have full choice over media goods that the private marketplace can and wants to provide and public policy should facilitate such choice.³⁹

[18] The deregulatory trend in the United States discussed above reached a logical conclusion with a signal event: the passage of Section 230 of the 1996 Communications Decency Act (CDA), which allows digital platforms to host user-generated content without themselves being liable for what is published.⁴⁰ Although Congress’ intention at the time was to empower companies to moderate speech without liability (allowing them to pick and choose policies and enforcement on their privately owned communications spaces), the net effect of Section 230 in the age of social media and algorithms was to allow individual speech to gather broadcast-level power and effects, without any necessary accountability or remedy from the state.⁴¹

[19] Despite this effect, marketplace 3.0 is not just distinguished by an increasing atmosphere of laissez-faire and the peculiar dynamics of algorithms and platforms. What also distinguishes the new era is the

³⁸ Barbara A. Cherry, *Consumer Sovereignty: New Boundaries for Telecommunications and Broadband Access*, 34 TELECOMMS. POL’Y. 11, 12–13 (2010); David Chang, *Selling the Market-Driven Message: Commercial Television, Consumer Sovereignty, and the First Amendment*, 85 MINN. L. REV. 451, 488–89 (2000) (demonstrating that television program corporations ultimately push toward consumer sovereignty by creating content they anticipate will achieve success in the marketplace). *See generally* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 264 (New ed. 2018) (providing examples for how new communication technologies can push toward the movement of consumer sovereignty).

³⁹ Cherry, *supra* note 38 (citing Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 722–23).

⁴⁰ 47 U.S.C. § 230.

⁴¹ JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 167–168 (2019).

emergent combination of intertwined economic, political, technological, and cultural shifts. These shifts can be traced through several aligned strands of scholarship. First, the rise of the “network society”—fundamental shifts not only in economic, political, and cultural relations but also a new relationship between the individual and society—forms the deep background to marketplace 3.0.⁴² Second, the ideological rise of consumer sovereignty creates new space in the structure of ideas. Third, we are fast moving into a new era of digital governance that is marked by notions of public and informational health; worries about the societal effects of the new technologies (e.g., hate speech and extremism, electoral interference, medical misinformation, political polarization, authoritarian populism) are producing an increasing demand for new technical and regulatory tools.⁴³

[20] Finally, the new marketplace paradigm structured by globally scalable communications technologies creates an essentially globalized media environment where nation states struggle to control their speech environments and multinational communications and media companies exercise unprecedented power.⁴⁴ As Zittrain states, “just as the course of history with respect to freedom of speech and press has been moved to national principles as issues have become more national in scope, so too must that happen on a global scale as the issues have become global in scope.”⁴⁵ The trend of internationalization has produced new demands for international norms, laws, and standards that can help make societies better able to cope with the onslaught of new technologies and the ideas that come with them, often from outside their borders.

⁴² MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 69 (2d ed. 2010).

⁴³ Jonathan Zittrain, *Three eras of digital governance*, VÖLKERRECHTSBLOG (Nov. 27, 2019), <https://voelkerrechtsblog.org/three-eras-of-digital-governance> [<https://perma.cc/9DR6-D62J>].

⁴⁴ See Lee C. Bollinger, *Preface* to *REGARDLESS OF FRONTIERS: GLOBAL FREEDOM OF EXPRESSION IN A TROUBLED WORLD* xiv–xv (Lee C. Bollinger & Agnes Callamard eds., 2021) (providing thoughtful examples of how the world may look differently under unique digital approaches).

⁴⁵ *Id.* at xvi.

[21] In sum, the evolution of the Marketplace of Ideas into version 3.0 began in the 1990s, but it is now reaching a more fully elaborated stage as multiple trends produce a new model for speech and expression. The new paradigm is marked by fundamental changes in relations between the individual and society (the “network society”); the rise of free market ideology with regard to communications technologies (“consumer sovereignty”); an increasing and countervailing regard for the health and civic externalities and effects produced by information communication technologies (a new “public health” era of digital governance); and the ongoing globalization of the speech environment, highlighting a vacuum at the level of international law and norms.

IV. THE VALUES OF SPEECH IN THE MARKETPLACE 3.0

[22] Marketplace of Ideas 3.0 represents a freedom of expression framework that captures the contemporary communication environment. The Marketplace of Ideas metaphor, including the 3.0 version, can be evaluated by a set of criteria or values that justify its usage as a freedom of speech metaphor. There are several reasons why we might want freedom of speech: self-fulfillment, the truth, good government, and diversity.⁴⁶ We can evaluate a freedom of speech regime based on how well it fulfills those ideals. If achieving some of the values of freedom of speech, namely the truth, is done via a Marketplace of Ideas, then we need a set of values to judge whether the marketplace works and whether the market framework is problematic. We focus on three criteria: instrumental, epistemic, and normative. In the Marketplace of Ideas 3.0, these criteria are affected by the technological affordances of the internet combined with the governance history of the modern speech environment. These three criteria or values are:

- *Instrumental*: Does the Marketplace of Ideas better situate or orient people in the public sphere that gives access to information?

⁴⁶ See TIMOTHY GARTON ASH, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD 73–81 (2016).

- *Epistemic*: Does the Marketplace of Ideas help lead to the truth (though not necessarily eliminate falsehoods, rumors, or lies)?
- *Normative*: Does the Marketplace of Ideas protect people’s rights as seekers, sources, and subjects of information?

[23] By applying the above criteria to the Marketplace of Ideas 3.0, we can further highlight how the marketplace has changed from the *Abrams* dissent to today, and how the iterative metaphor sheds light on modern speech.

A. Instrumental Value: Orientation

[24] One’s orientation in the marketplace 3.0 affects one’s ability to access information. One “has access to information when he/she has the freedom or opportunity to obtain, make use of, and benefit from that information.”⁴⁷ To have access to information, that information must be available, findable, reachable, comprehensible, and usable.⁴⁸ A speech environment (i.e., the Marketplace of Ideas) provides access to information only if it properly orients people to be able to find, read, and comprehend information. In other words, someone is properly oriented in the Marketplace of Ideas when they are well informed. That is, orientation includes both knowledge of the speech products available and the possibility of browsing new ideas. Therefore, the instrumental value asks the question: does the Marketplace of Ideas situate or orient people in the public sphere that gives access to information?

[25] When it comes to the instrumental value, what separates the Marketplace of Ideas 3.0 from previous iterations is the increased difficulty of the tasks of orientation, including finding, reaching, and comprehending information. The increased orientation difficulty stems from the technology being used in the Marketplace of Ideas and the affordances that the

⁴⁷ Kay Mathiesen, *Facets of Access: A Conceptual and Standard Threats Analysis*, in *iCONFERENCE 2014 PROCEEDINGS* 605, 607 (2014), <https://www.ideals.illinois.edu/items/47422> [<https://perma.cc/2P9F-KS2Y>].

⁴⁸ *See id.* at 608.

technology grants. Volume, velocity, and scale are three large impediments to public sphere orientation, and these three impediments are driven by modern information communication technologies. Volume refers to the amount of information in the Marketplace of Ideas. Velocity is the speed in which information travels in the Marketplace of Ideas. Finally, scale refers to the many different overlapping features, applications and networks that form the Marketplace of Ideas. These three factors characterize the marketplace 3.0 and differentiate the Marketplace of Ideas 3.0 from the marketplace of years past.

[26] Volume is an orientation problem, particularly when it comes to finding and reaching information. The Marketplace of Ideas 3.0 has democratized information production, resulting in exponential growth in the amount of information produced. More sources of information (i.e., availability) does not necessarily equate to more or better access to information, and especially truthful information.⁴⁹ While the amount of information has grown, our ability to find, reach, comprehend, and use that information, has not kept up.

[27] Society has shifted from an information-scarce economy to an attention-scarce economy.⁵⁰ Social media platform companies are modern day “attention merchants,” meaning that their business model is based on

⁴⁹ Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSPS. 133, 133–34 (2008); Claudio Lombardi, *The Illusion of a “Marketplace of Ideas” and the Right to Truth*, 3 AM. AFFS. 198, 199 (2019).

⁵⁰ E.g., Michael H. Goldhaber, *The Attention Economy and the Net*, FIRST MONDAY (1997), <https://firstmonday.org/ojs/index.php/fm/article/view/519/440> [<https://perma.cc/W6CT-YQXK>]; Paul DiMaggio et al., *Social Implications of the Internet*, 27 ANN. REV. SOCIO. 307, 313 (2001); TIM WU, THE ATTENTION MERCHANTS: THE EPIC STRUGGLE TO GET INSIDE OUR HEADS 20 (2017) [hereinafter WU, THE ATTENTION MERCHANTS]; Tim Wu, *Is the First Amendment Obsolete?*, in THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY 15, 15 (David E. Pozen ed., 2020); ALICE MARWICK & REBECCA LEWIS, MEDIA MANIPULATION AND DISINFORMATION ONLINE 42 (2017); MARTIN GURRI, THE REVOLT OF THE PUBLIC AND THE CRISIS OF AUTHORITY IN THE NEW MILLENIUM 390 (2018); TIM HWANG, SUBPRIME ATTENTION CRISIS: ADVERTISING AND THE TIME BOMB AT THE HEART OF THE INTERNET 10–12 (2020).

profiting from user attention, primarily through advertising and data brokering.⁵¹ Basing a business model on attention retention privileges posts that go viral, often because of emotional reasons.⁵² Additionally, attention-based business models favor user engagement rather than user experience.⁵³ Unlike previous media such as newspapers or broadcast where printing materials and spectrum rights had to be bought and secured, speaking online has a negligible (if any) cost of entry. Information is easy to create, and “cheap speech” is democratized, but the information that is created does not have to be true.⁵⁴ Cheap speech also has the effect of making “reverse censorship,” or the flooding of the public sphere with information to drown out particular voices or pieces of information, more possible.⁵⁵

[28] The overabundance of information and scarcity of attention means that many ideas never meet another and therefore, never compete with each other.⁵⁶ Without actual idea versus idea competition, Holmes’ ideal system is left unfulfilled. Online communication accelerates the tendency for people to affiliate themselves more easily with others who share

⁵¹ Zeynep Tufekci, *As the Pirates Become CEOs: The Closing of the Open Internet*, 145 DAEDALUS 65, 72–73 (2016); WU, THE ATTENTION MERCHANTS, *supra* note 50, at 9; HWANG, *supra* note 50.

⁵² Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MKTG. RSCH. 192, 192–93 (2012); Sharad Goel et al., *The Structural Virality of Online Diffusion*, 62 MGMT. SCI. 180, 180 (2016); Soroush Vosoughi et al., *The Spread of True and False News Online*, MIT INITIATIVE ON THE DIGITAL ECONOMY 1–2 (2018), <https://ide.mit.edu/wp-content/uploads/2018/12/2017-IDE-Research-Brief-False-News.pdf> [<https://perma.cc/2KH7-HYQ3>].

⁵³ Evelyn Douek, *Governing Online Speech: From “Posts-as-Trumps” to Proportionality and Probability*, 121 COLUM. L. REV. 759, 777–778 (2021).

⁵⁴ Symposium, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833, 1837–38 (1995); RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT 19–20 (2022).

⁵⁵ Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 565 (2018).

⁵⁶ Robert Weissberg, *The Real Marketplace of Ideas*, 10 CRITICAL REV. 107, 110–11 (1996).

homophilous characteristics, creating “filter bubbles” or “echo chambers.”⁵⁷ The literature on the origins, effects, and surface tension of filter bubbles is in debate.⁵⁸

[29] However, whether or not people in the different bubbles or chambers talk to each other, it is difficult for both speakers and listeners to orient themselves or to understand the scope, participants, structure, and expectations of the market competition.⁵⁹ The scarcity of attention compounds with existing behavioral problems of digesting ideas and weighing ideas.⁶⁰ Well-known examples, among many other biases and heuristics, include confirmation bias and representativeness heuristics. Confirmation bias is the tendency for people to both seek out and accept information that confirms one’s own preexisting beliefs or priors.⁶¹ For instance, political partisans seek out sources that share their partisan

⁵⁷ Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 430 (2001); SUNSTEIN, *supra* note 38, at 145–46; NATHANIEL PERSILY, *THE INTERNET’S CHALLENGE TO DEMOCRACY* 17 (2019).

⁵⁸ PERSILY, *supra* note 57, at 5.

⁵⁹ See, e.g., Pablo Barberá et al., *Tweeting From Left to Right: Is Online Political Communication More Than an Echo Chamber?*, 26 PSYCH. SCI. 1531, 1540 (2015); Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROC. NAT’L. ACAD. SCIS. 554, 554 (2016); Matthew Gentzkow & Jesse M. Shapiro, *Ideological Segregation Online and Offline*, 126 Q. J. ECON. 1799, 1800 (2011); E. Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCI. 649, 654 (2015); Nir Grinberg et al., *Fake News on Twitter During the 2016 U.S. Presidential Election*, 363 SCI. 374–78 (2019); JOSHUA A. TUCKER ET AL., *SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE* 46 (2018).

⁶⁰ See Bambauer, *supra* note 19, at 654.

⁶¹ See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 176 (1998).

affiliation.⁶² Representativeness heuristics are the cognitive biases that affect our understanding of averages and the probability of events.⁶³

[30] In other words, we may not understand the base rate for a human trait or what the probability of an event happening really means due to the cognitive heuristics we use to make decisions. For example, data suggests that we do not understand the base rates of demographics, income, crime, or poverty.⁶⁴ Misinformation often preys upon these heuristics to affect our comprehension of political or scientific facts.

[31] Confirmation bias and the representativeness heuristic affect our ability to access information and orient ourselves in the public sphere, particularly our ability to comprehend and use new ideas. While both confirmation bias and representativeness heuristic involve basic human cognitive structures, —and have been at issue in all eras of human communication—the era of algorithms and digital information platforms makes these problems particularly acute. Algorithms are likely most successful (in terms of human engagement) when they serve up confirming information and information that creates emotion based on prior beliefs and behavioral patterns.⁶⁵ Further, the separation of information content from context and source information (even the minimal context that, in prior eras, came from professional journalism) means that representativeness can easily be manipulated and base rates are largely absent from the experience of online information consumption.

⁶² Erik Peterson & Shanto Iyengar, *Partisan Gaps in Political Information and Information-Seeking Behavior: Motivated Reasoning or Cheerleading?*, 65 AM. J. POL. SCI. 133, 134 (2021).

⁶³ See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

⁶⁴ See Douglas J. Ahler & Gaurav Sood, *Measuring Perceptions of Shares of Groups*, in MISINFORMATION AND MASS AUDIENCES 71 (Brian G. Southwell et. al eds., 2018).

⁶⁵ See Dag Wollebæk et al., *Anger, Fear, and Echo Chambers: The Emotional Basis for Online Behavior*, 5 SOC. MEDIA + SOC'Y 1, 3 (2019).

[32] To summarize, the marketplace 3.0 is characterized by a lack of orientation in the public sphere. While there is more information available at our fingertips than ever before, more information unfortunately does not equate to better access. The volume, velocity, and scale of the marketplace 3.0 makes the tasks of accessing information more difficult. We live in an information-rich yet attention-scarce communication environment where platform business models are driven by engagement. Our ability to find, reach, comprehend, and make use of ideas has not kept up with the massive amount of information available. Additionally, the large amount of information available on the marketplace, the attention scarcity, and the targeted algorithms used by many platforms are compounded by existing cognitive and behavioral biases that influence our decision making, regardless of the venue. In short, the marketplace 3.0 struggles at fulfilling the instrumental value of orientation.

B. Epistemic Value: Truth

[33] A critical component of the Marketplace of Ideas as construed by Holmes is that through competition, truth will be tested. In other words, a Marketplace of Ideas should behave like a marketplace for goods.⁶⁶ Markets maximize preference satisfaction, or at least preferences that can be revealed through a market transaction.⁶⁷

[34] If we assume that people prefer the truth to falsities, and if we have enough competition of ideas, the marketplace should help lead us to the truth. The advantage of the Marketplace of Ideas framework is in its epistemic value, or its ability to lead people to the truth even if that truth is surrounded by falsities. Therefore, the epistemic value asks the question:

⁶⁶ R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389 (1974); CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS 218 (1980); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VALPARAISO U.L. REV. 951, 951–52 (1997).

⁶⁷ Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 2 (1996); ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 193 (1999); Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1, 3 (2012).

does the Marketplace of Ideas help lead to the truth (though not necessarily eliminate falsehoods, rumors, or lies)?

[35] In the Marketplace of Ideas 3.0 that takes place primarily online and in social media platforms, there is a venue mismatch that contributes to the marketplace's difficulties in fulfilling the epistemic value. The Marketplace of Ideas 3.0, as it manifests online, is not necessarily used by participants to trade truth or even trade ideas in general. Our revealed preferences for informational qualities other than truth can be a problem. People in the Marketplace of Ideas have preferences for particular pieces of information because of their content, not necessarily because of a veracity value and not necessarily because the idea is a superior (i.e., more truthful) product.⁶⁸ People often use social media to socialize or express themselves.⁶⁹ People are not necessarily shopping for truth when they engage with the modern public square, nor is social media a good venue for truth to sell itself. Additionally, there is a lack of cognitive engagement while using social media which under prepares people for the task of judging the veracity of any given piece of content.⁷⁰ People are not frequently using the Marketplace of Ideas 3.0 for truth gathering, and they are not thinking particularly deeply about the veracity of content they are seeing. However, we should not expect them to think deeply about this, given the business models of the platforms in the marketplace and the speed at which content flows.

⁶⁸ GOLDMAN, *supra* note 67, at 192.

⁶⁹ Sanghee Oh & Sue Yeon Syn, *Motivations for Sharing Information and Social Support in Social Media: A Comparative Analysis of Facebook, Twitter, Delicious, YouTube, and Flickr*, 66 J. ASS'N FOR INFO. SCI. & TECH. 2045, 2048 (2015); see Xinran Chen et al., *Why Students Share Misinformation on Social Media: Motivation, Gender, and Study-Level Differences*, 41 J. ACAD. LIBRARIANSHIP 583, 584 (2015) (eliciting unique ways in which people can enjoy the internet).

⁷⁰ Gordon Pennycook & David G. Rand, *Lazy, Not Biased: Susceptibility to Partisan Fake News Is Better Explained by Lack of Reasoning Than by Motivated Reasoning*, 188 COGNITION 39, 48 (2019); Gordon Pennycook & David G. Rand, *Who Falls for Fake News? The Roles of Bullshit Receptivity, Overclaiming, Familiarity, and Analytic Thinking*, 88 J. PERSONALITY 185, 186 (2020).

[36] One reason there is a venue mismatch in the Marketplace of Ideas 3.0 is because online speech, especially in a social media setting, has a homogenous presentation. Advertising, tabloid-style articles, hard news, soft news, opinion, and satire are all presented to the user in the same way with little surrounding context that we might see in other information sources, such as newspapers or broadcasts. The lack of context removes important cues we might receive in the real world about the veracity of the content, the content's source, and content creator's original intent.⁷¹ To use a market for goods comparison, homogenous presentation would be similar to a supermarket selling all of their goods in identical packaging. For a communications comparison, picture a tabloid newspaper where there are visual and cultural context cues which come with normative expectations about the veracity and quality of the information contained within. With online speech, that contextual information is stripped away.⁷² Furthermore, when online speech contains visual context clues, they can be misleading, and there is still much we do not know about contextual labeling of social media content.⁷³

[37] In addition to venue mismatch and presentation homogeneity, the participatory nature of the Marketplace of Ideas 3.0 makes it difficult for users to find the truth and easy for users to participate in spreading mis- and dis-information.⁷⁴ On social media, everyone is both a buyer and a seller

⁷¹ PERSILY, *supra* note 57, at 42; *see* WHITNEY PHILLIPS & RYAN MILNER, YOU ARE HERE: A FIELD GUIDE FOR NAVIGATING POLARIZED SPEECH, CONSPIRACY THEORIES, AND OUR POLLUTED MEDIA LANDSCAPE 59 (2020).

⁷² PERSILY, *supra* note 57, at 42.

⁷³ Don Fallis & Kay Mathiesen, *Fake News Is Counterfeit News*, 62 INQUIRY 1, 12, 16 (2019); John P. Wihbey et al., *Informational Quality Labeling on Social Media: In Defense of a Social Epistemology Strategy*, 23 YALE J.L. & TECH. 153, 201 (2021); *see* Garrett Morrow et al., *The Emerging Science of Content Labeling: Contextualizing Social Media Content Moderation*, 73 J. ASS'N FOR INFO. SCI. & TECH. 1365, 1380 (2022).

⁷⁴ *See* Kate Starbird et al., *Disinformation as Collaborative Work: Surfacing the Participatory Nature of Strategic Information Operations*, 3 PROC. ACM ON HUM.-COMPUT. INTERACTION 1, 2–3 (2019).

(though in different proportions). People exchange one piece of information for another piece of information in one sense.⁷⁵ In another sense, people are buying information and selling their attention.⁷⁶ In other words, someone may never attempt to sell their own information on social media but may instead buy information in exchange for their attention. Given the lack of contextual information in the homogenous presentation, buyers and sellers are not fully informed about the speech they are potentially buying. For example, we can compare the Marketplace of Ideas to the used car market. With used cars, there is an information asymmetry between seller and buyer, which leads to an adverse selection problem where high-quality products are driven away by cheap prices.⁷⁷ The problem online is that social media is interactive and broadly participatory where everyone may be selling a lemon on the Marketplace of Ideas 3.0. On social media there is even less contextual information about what people are buying (and potentially reselling via sharing) than used cars and ascertaining the truth of purchase quality is even more difficult to verify after the lemon is purchased. People may also be intentionally selling false information (i.e., disinformation or propaganda), which some might argue is not what the Marketplace of Ideas was designed to facilitate.⁷⁸

[38] Truth does not sell itself on the Marketplace of Ideas, but rather requires someone to be willing to do the selling work on behalf of the truth.⁷⁹ Additionally, due to the venue mismatch, people are not necessarily

⁷⁵ See Brazeal, *supra* note 67, at 14.

⁷⁶ *Id.*

⁷⁷ George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489–90 (1970).

⁷⁸ Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 866, 869 (2018); Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 387, 425 (2020).

⁷⁹ Jonathan Rauch, *The Constitution of Knowledge*, 37 NAT'L. AFF. 125, 129 (2018), <https://www.nationalaffairs.com/publications/detail/the-constitution-of-knowledge> [<https://perma.cc/UKC3-JTVX>].

shopping for non-lemons and people may actually prefer the lemons because it allows them to socialize with other lemon enthusiasts, signal ideology to fellow lemon buyers, or satirize the lemons on the market.

[39] Narrow, uniformly packaged information seeking does not apply only to social media, but to online search as well. An ethnographic study of college-educated Republicans, found that study participants were very eager to do their own fact-checking “research” on Google but were not necessarily aware of how Google works because Google does not tell its users how it works.⁸⁰ Participants viewed Google results as neutral and factual, rather than algorithmically targeted and narrowly supplied to specific search terminology and syntax.⁸¹ The study used the example of a controversy where former President Trump said that the National Football League’s ratings were down due to players kneeling during the national anthem, a claim fact-checked and debunked by media sources such as the *Washington Post*.⁸²

[40] However, one can Google “NFL ratings up” or “NFL ratings down” and receive different search results that confirm one’s search terms.⁸³ Google is not showing users the entire range of information products, nor would users have the attention and time to review it all. Instead, Google is delivering us the narrow range of ideas we are shopping for. The Marketplace of Ideas 3.0, due to the problems of venue mismatch, presentation homogeneity, and scale, is having trouble fulfilling the epistemic value of the framework.

⁸⁰ FRANCESCA TRIPODI, SEARCHING FOR ALTERNATIVE FACTS: ANALYZING SCRIPTURAL INFERENCE IN CONSERVATIVE NEWS PRACTICES 47 (2018), https://datasociety.net/wp-content/uploads/2018/05/Data_Society_Searching-for-Alternative-Facts.pdf [<https://perma.cc/3DHX-NQSU>].

⁸¹ *Id.* at 33–34.

⁸² *Id.* at 30.

⁸³ Amanda Wicks, *How to improve your media literacy skills*, THE WELL (June 1, 2021), <https://thewell.unc.edu/2021/06/01/how-to-improve-your-media-literacy-skills/> [<https://perma.cc/6KWM-9N6R>].

[41] While the marketplace 3.0 struggles to maximize truth, the Marketplace of Ideas is still useful to encourage free, independent thinking and active questioning of absolute authority. The marketplace is best understood as a “cultural statement than as a mechanism of social or intellectual ordering.”⁸⁴ It is less of a literal marketplace for goods and more a laboratory; the marketplace 3.0 is a place for critically weighing, testing, and comparing ideas and truths in the tradition of John Stuart Mill.⁸⁵ In other words, the Marketplace of Ideas should be judged by the epistemic process rather than outcomes of helping users find truthfulness. Intellectual openness and a desire to seek out information that can challenge our beliefs and punish intellectual rigidity are the important qualities of free speech that can encourage human inquisitiveness, free thought, and mental resilience in the face of illiberal attitudes toward censorship and authority.⁸⁶ Competition of ideas is not justification for viewing information exchange in terms of market failures or through the lens of market ideals like free access and trade, but is instead a mode of inquiry and opposition to rigidity and absolutism. The power of the competitive Marketplace of Ideas is not to determine certainty in absolute truth as the economic metaphorical interpretation may suggest, but rather to constantly test ideas.

[42] As a marketplace, the Marketplace of Ideas 3.0 also benefits from the possibility of market corrections or changes in the equilibria of truth.

⁸⁴ Blasi, *supra* note 23, at 46.

⁸⁵ See generally JOHN STUART MILL, A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE (9th ed. 1875) (explaining Mill’s views on logic and reasoning).

⁸⁶ See Blasi, *supra* note 23, at 45 (“[T]he features of markets that merit attention are those that also figure prominently in efficacious governance, scientific inquiry, and natural selection: openness to new capabilities, thirst for better information, responsiveness to changing conditions, encouragement of innovation and initiative, swift punishment of rigidity, slowness, lack of awareness, or the failure to audit.”); 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, 51 (2018) (“The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”).

Platforms frequently change their content moderation policies and algorithms and react to the social-epistemic environment.⁸⁷ Additionally, preferences change over time, and this can include preferences for different sources of ideas, different kinds of ideas, and different levels of veracity. For instance, early research suggests that fewer Americans were exposed to outright fake websites through social media in the 2020 American presidential election than in the 2016 American presidential election.⁸⁸ Given enough time, the Marketplace of Ideas can “correct” itself and people may converge on the truth.⁸⁹ However, there is no guarantee of a market correction and the process of reaching truthful equilibria may take years, if not decades, and the importance of being truthful in the moment may be well passed.

[43] In sum, the marketplace 3.0 is characterized by the ability to maximize revealed preferences for ideas, but not necessarily truth if other qualities are preferred. People use the internet platforms that make up the marketplace 3.0 for reasons other than gathering truth. Even if people wanted to gather true information, the homogenous presentation of content within and across platforms makes it difficult to ascertain an idea’s veracity without additional context. Furthermore, the marketplace 3.0 is more participatory than previous iterations, allowing for everyone to freely buy and sell ideas, regardless of whether even they themselves understand the veracity what they are buying or selling. The participatory affordances are compounded by the fact that few of us understand how search engines or social media platforms and their algorithms operate at a general level. That said, as a marketplace, the marketplace 3.0 could experience market corrections and reach new equilibria where veracity is preferred over other

⁸⁷ See Schroeder, *supra* note 86, at 42 (arguing that news is created to target individuals based on their social media algorithm and such algorithms then adapt to meet individual interests).

⁸⁸ See Ryan C. Moore et al., *Exposure to Untrustworthy Websites in the 2020 US Election*, STAN. CYBER POL’Y CTR. (May 17, 2022), <https://cyber.fsi.stanford.edu/events/exposure-untrustworthy-websites-2020-us-election> [<https://perma.cc/7S5G-JVNW>].

⁸⁹ See JAMES A. STIMSON & EMILY WAGER, *CONVERGING ON TRUTH: A DYNAMIC PERSPECTIVE ON FACTUAL DEBATES IN AMERICAN PUBLIC OPINION* 14 (2020).

qualities and, over time, people can converge on the truth. In other words, the marketplace 3.0 may function better in the long term macro testing of ideas than in short term micro trading of information.

C. Normative Value: Sources, Seekers, and Subjects

[44] In addition to the instrumental and epistemic values, there are normative values of the public sphere that go beyond information exchange and truth seeking. Information exchange has three components: the sources of the information, the seekers of the information, and the subject of the information. Any speech framework affects the rights of all three of the components. The rights of the components may be affected by characteristics such as market accessibility or the exportation of social norms and mores. Across the world, the rights are tied together with diverse societies where there are different views of freedom of expression, censorship, and regulation.⁹⁰ Therefore, the normative value asks the question: does the Marketplace of Ideas protect people's rights as seekers, sources, and subjects of information?

[45] In the marketplace 3.0, the normative protections for seekers and sources of information are limited along several dimensions. Thanks to the internet, search engines, social media, and ubiquitous connectivity, more people have the ability to speak and seek information than ever before.⁹¹ Access to the marketplace has never been easier, yet some people are still excluded from a free and fair trade of ideas by government censorship regimes or reverse censorship (e.g., the use of "trolls," bots, etc. to drown

⁹⁰ *In some countries, people think they have too much freedom of speech*, THE ECONOMIST (June 7, 2021) <http://www.economist.com/graphic-detail/2021/06/07/in-some-countries-people-think-they-have-too-much-freedom-of-speech> [<https://perma.cc/M7SA-XU8E>]; JOHN P. WIHBEY ET AL., DIVERGENT GLOBAL VIEWS ON SOCIAL MEDIA, FREE SPEECH, AND PLATFORM REGULATION: FINDINGS FROM THE UNITED KINGDOM, SOUTH KOREA, MEXICO, AND THE UNITED STATES 4 (2022).

⁹¹ ASH, *supra* note 46, at 47–48, 125.

out information).⁹² Additionally, the marketplace 3.0 assumes that everyone who participates in idea exchange views markets positively and will be willing to participate in a market-like setting.⁹³ Over the years, the marketplace metaphor has increasingly been viewed through a literal economic lens.⁹⁴ However, the economic viewpoint is likely not how Holmes himself thought about his metaphor.⁹⁵

[46] The focus on the economic dynamics of the Marketplace of Ideas marginalizes the democratic and associative aspects of the First Amendment.⁹⁶ The result of the shift of focus to economics is forcing freedom of expression ideals into specific normative views and an exportation of American First Amendment doctrine to the rest of the world. A free and fair marketplace is an economic ideal, but real-world markets are not perfectly fair nor free. Furthermore, there is not universal access to many economic markets and some people are excluded from markets, which may have the effect of corrupting the appeal of a Marketplace of Ideas.⁹⁷ If you have been excluded from an important marketplace (such as access to or ability to create ideas), then an environment for expressing yourself and sharing ideas that presents itself as an economic market, looks unappealing, unwelcoming, untrustworthy, and even inapplicable to your own situation. “We must eschew abstractions of First Amendment theory that proceed without attention to the dysfunction in the Marketplace of Ideas

⁹² Joshua A. Tucker et al., *From Liberation to Turmoil: Social Media and Democracy*, 28 J. DEMOCRACY 46, 50–52 (2017); Wu, *supra* note 55, at 548, 565, 574.

⁹³ Ingber, *supra* note 22, at 78, 80.

⁹⁴ Peters, *supra* note 19, at 66–67; Edward Nik-Khah, *The “Marketplace of Ideas” and the Centrality of Science to Neoliberalism*, in THE ROUTLEDGE HANDBOOK OF THE POLITICAL ECONOMY OF SCIENCE 32 (David Tyfield et al. eds., 2017).

⁹⁵ Blasi, *supra* note 23, at 2, 5–6, 45.

⁹⁶ See IAN ROSENBERG, THE FIGHT FOR FREE SPEECH: TEN CASES THAT DEFINE OUR FIRST AMENDMENT FREEDOMS 20 (2021).

⁹⁷ *Id.* at 20–23.

created by the racism and unequal access to that market.”⁹⁸ Normatively, we should want a Marketplace of Ideas that is a more inclusive, democratic framework that would better facilitate discussion of ideas by providing universal access to the market and the ability to speak.

[47] Outside of the United States, the marketplace 3.0 takes on a different dynamic with different norms, values, governments, and regulations.⁹⁹ Online communication via social media has greatly expanded the ability of global populations to access and speak ideas like never before, creating a truly international common public sphere. The largest and most successful corporations are based in the United States and rooted in First Amendment jurisprudence. Some scholars have recently called the globalized nature of social media platforms a “digital manifest destiny” where American speech norms and practices are being exported to the rest of the world through platform governance.¹⁰⁰ According to these scholars, the exportation of American values is bad because other countries have different free speech norms, traditions, and laws. However, there are two problems with this argument. First, other governments have (and exercise) power that shapes the marketplace 3.0 according to local values. Second, the exportation of American free speech values is not inherently bad, as sometimes non-American government laws are repressive, whereas social media platforms are not.

[48] In the United States, social media platforms have the protections of Section 230 of the Communications Decency Act, but these protections are not globally available to all of the platforms and there is varied treatment of social media platforms and their responsibilities. For example, the NetzDG law in Germany requires platforms to delete “obviously illegal” content

⁹⁸ Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 481 (1990).

⁹⁹ See Zahra Takshid, *Regulating Social Media in the Global South*, 24 VAND. J. ENT. & TECH. L. 1, 53 (2021).

¹⁰⁰ See Jessica Maddox & Jennifer Malson, *Guidelines Without Lines, Communities Without Borders: The Marketplace of Ideas and Digital Manifest Destiny in Social Media Platform Policies*, 6 SOC. MEDIA + SOC’Y 1, 1 (2020).

within 24 hours and other illegal content within one week and if the platforms do not comply with the content removal, then they may be fined up to five million Euros.¹⁰¹ Additionally, different values create new challenges for platform policymakers who recently have been forced to adapt to new, speech-chilling laws. Countries such as Turkey and India have instituted strict content moderation regimes that restrict speech, forcing social media platforms to adopt the regime if they would like to do business in the country.¹⁰² With restrictive laws comes the possibility that censorship regimes diffuse to other countries, limiting access to information and the ability for speakers to be sources of information. There may be momentum within the EU to move towards an EU-wide NetzDG equivalent.¹⁰³ Indeed, we have seen recently movement toward EU-wide regulation with the Digital Services Act.¹⁰⁴ If the EU establishes more stringent, EU-wide regulation similar to NetzDG, it could lead to what is called the “Brussels Effect,” where the EU’s capacity and propensity to regulate an industry leads to an externalization of its rules.¹⁰⁵

[49] All versions of the Marketplace of Ideas have been shaped by governments, and the amount of protection for seekers, sources, and subjects of information varies from location to location. What makes the

¹⁰¹ See Evelyn Mary Aswad, *Are Recent Government Initiatives to Combat Online Hate Speech, Extremism and Fraudulent News Consistent with the International Human Rights Law Regime?*, in GOVERNANCE INNOVATION FOR A CONNECTED WORLD (Eileen Donahoe & Fen Osler Hampson eds., 2018), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/stanford_special_report_web.pdf [<https://perma.cc/87HU-ACCX>].

¹⁰² See Christoph Schmon & Haley Pedersen, *Platform Liability Trends Around the Globe: Recent Noteworthy Developments*, ELEC. FRONTIER FOUND. (June 1, 2022), <https://www.eff.org/deeplinks/2022/05/platform-liability-trends-around-globe-recent-noteworthy-developments> [<https://perma.cc/EMB3-X7JE>].

¹⁰³ See DAVID KAYE, *SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET* (2019).

¹⁰⁴ See Martin Husovec & Irene Roche Laguna, *Digital Services Act: A Short Primer*, in PRINCIPLES OF THE DIGITAL SERVICES ACT (forthcoming 2023).

¹⁰⁵ Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 1 (2012).

marketplace 3.0 different from previous versions is its private-sector based centralization and the obfuscation of platforms. Social media corporations are governing speech based on their internal policies while the organizations are physically and legally outside of normal governance systems.¹⁰⁶ Balkin theorizes a triangular model of speech governance online composed of a triangle of users, governments, and platforms (or other digital infrastructures).¹⁰⁷ Traditional speech regulation was a dyadic relationship between a speaker and the government jurisdiction in which they resided. Internet platforms are now a third actor in speech governance. The main problem with the governance triangle in the marketplace 3.0 is that one component of the triangle, the platforms and infrastructure, extend beyond sovereign jurisdictions and are international in scope and reach. Effective governance that can achieve consensus and protect the rights of seekers, sources, and subjects of information will have to be international in scope. Otherwise, the history we have observed in which the regulations of one state are externalized internationally without deliberative international agreement will continue.

[50] The International Covenant on Civil and Political Rights (the ICCPR of 1966) remains to this day the defining, touchstone document for debating and analyzing freedom of expression in a global context. Social media companies sometimes invoke the ICCPR as they make content moderation decisions. Yet a central tension remains whether the ICCPR is fundamentally compatible with more ostensibly wide open American free speech principles (often deeply embedded in the corporate worldview of American technology companies). While some scholars believe tensions are overblown, the U.S. Senate only ratified the ICCPR in 1992 with significant reservations.¹⁰⁸ The Covenant states that, although everyone has the

¹⁰⁶ Klonick, *supra* note 2, at 1602–03.

¹⁰⁷ Balkin, *supra* note 28, at 1187–88.

¹⁰⁸ *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).*, HUMAN RIGHTS LIBRARY (Apr. 2, 1992), <http://hrlibrary.umn.edu/usdocs/civilres.html> [<https://perma.cc/6AGH-4NZT>].

freedom of expression under Article 19, this right may “be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”¹⁰⁹ The ICCPR also restricts, in Article 20, “1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹¹⁰ Adopting the ICCPR is one thing (173 countries have signed on), but using the Covenant as a basis for an internationally agreed upon governance model is another.¹¹¹

[51] In terms of the ICCPR becoming the governing doctrine in the marketplace 3.0, there are numerous challenges, such as the inherently ambiguous nature of “hate speech,” or “national, racial or religious hatred” that incites harm. The UN High Commissioner for Human Rights has, through consultation with human rights experts in 2013 in the “Rabat Plan of Action,” created relevant definitions related to speech and incitement.¹¹² But the debate continues to rage over hate speech and incitement, and many human rights advocates believe that law and norms have not caught up with the new realities of weaponized, viral content.¹¹³ Further, as David Kaye, the former U.N Special Rapporteur on Freedom of Expression and Opinion

¹⁰⁹ International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

¹¹⁰ *Id.* at art. 20.

¹¹¹ *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://indicators.ohchr.org/> [<https://perma.cc/VN3C-D2G2>].

¹¹² *The Rabat Plan of Action*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Oct. 5, 2012), <https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action> [<https://perma.cc/8MSP-MT9D>].

¹¹³ *See, e.g.*, Gelo Gonzales, ‘Online violence is real-world violence’ – Maria Ressa, RAPPLER (Mar. 3, 2022, 4:07 PM), <https://www.rappler.com/technology/features/woodrow-wilson-award-speech-maria-ressa-online-real-world-violence-disinformation/> [<https://perma.cc/Q35X-9FTY>].

has noted, the concept of hate speech is also subject to widespread abuse by governments around the world and therefore must be defined extremely narrowly, with clear justifications and legitimacy from authoritative legal bodies (and not arbitrary whims of persons in power).¹¹⁴ “Its vagueness and the lack of consensus around its meaning can be abused to enable infringements on a wide range of lawful expression. Many Governments use ‘hate speech,’ similar to the way in which they use ‘fake news,’ to attack political enemies, non-believers, dissenters and critics.” There is another double-edged dimension to this term, as well, as Kaye notes. The “phrase’s weakness (‘it’s just speech’) also seems to inhibit Governments and companies from addressing genuine harms, such as the kind resulting from speech that incites violence or discrimination against the vulnerable or the silencing of the marginalized.”¹¹⁵ In any case, the difficulties in coming up with standard ways of interpreting speech restrictions – ones that transcend national contexts – that use “hate speech” as a justification seem substantial, even as scholars try to track how global legal interpretations may be converging.¹¹⁶

[52] All told, the marketplace 3.0 is characterized by abundant affordances for the seekers, sources, and subjects of information, but with several problems stemming from issues of governance. The internet technology that forms the medium of the marketplace 3.0 allows for the unprecedented ability for seekers of information. However, the ability for people to seek information and speak in the marketplace 3.0 can be significantly curtailed by government censorship regimes or reverse censorship led by trolls and bots. Not all countries have the same free speech allowances as the United States (where the largest marketplace 3.0 platforms, outside of China, are based), and many countries across the globe

¹¹⁴ See U.N. Secretary-General, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 28, U.N. Doc. A/74/486 (Oct. 9, 2019).

¹¹⁵ *Id.* ¶ 1.

¹¹⁶ See AGNÈS CALLAMARD & SEJAL PARMAR, *Norms in Conflict: The Restraints on the Emergence of a Global Free Speech Norm*, in REGARDLESS OF FRONTIERS: GLOBAL FREEDOM OF EXPRESSION IN A TROUBLED WORLD 255, 267 (Lee C. Bollinger & Agnès Callamard eds., 2021).

are requiring platforms to create and implement their own visions of how speech should work in the marketplace 3.0. The Marketplace of Ideas was notionally theorized in the United States by the Supreme Court, but the marketplace 3.0 and future iterations (3.1, 3.2, etc.) will be primarily shaped by whether there is international cooperation (perhaps in the form of Articles 19 and 20 of the ICCPR) or international division.

V. CONCLUSION: CHALLENGES AND FUTURE OF THE MARKETPLACE OF IDEAS

[53] The Marketplace of Ideas as a metaphor has lasted for more than one-hundred years. It may have survived for so long because of the central role markets have played in American politics and society, or maybe because the marketplace metaphor truly captures best the nature of idea exchange and freedom of speech. Whatever the reason, the metaphor has proven resilient and has yet to be replaced by an alternative metaphor. Scholars, legal experts, journalists, and others have proposed alternative models, but none have suitably captured the public imagination strongly enough to replace the marketplace. For instance, some have used ecological and biological metaphors to describe the growth and cultivation of ideas and how pollution may affect ideas.¹¹⁷ Alternatively, Jones equated the modern Marketplace of Ideas to the New York Stock Exchange, and Lewis directly drew upon modern technology, referring to information exchange as a search engine of ideas.

[54] The many alternative models are useful for challenging the Marketplace of Ideas, but whether in the long term one of them is able to replace the metaphor is yet to be seen. A new metaphor will need to, at the very least, (1) be accessible (the marketplace 3.0 does this through freedom of speech and access to the market), (2) have a process of exchange between sources and seekers of information, (3) test truth (theoretically, ideas in the Marketplace of Ideas compete), and (4) prove why the new metaphor is more suitable than the Marketplace of Ideas. To truly shape public debate,

¹¹⁷ See, e.g., Philips & Milner, *supra* note 71, at 49, 181 (comparing the information on the internet with the lack of sunlight on a redwood forest floor).

any replacement will at once have to be as simple as the Marketplace of Ideas, capture the ideals of the First Amendment, and represent how idea exchange truly happens. These are steep tasks for any theorist.

[55] John Stuart Mill acknowledged that truth has no inherent power over falsities. Instead, the great power of truth, according to John Stuart Mill in *On Liberty*, is “that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.”¹¹⁸ In other words, Mill believed that truth, even if it is suppressed in the short term, will triumph in the end. Freedom of speech would help to accelerate the process. The strength of the Marketplace of Ideas is not to completely eliminate falsities (or stop people from “selling” falsities altogether), but rather the trust that over time, truth would win out. As we have highlighted in the article, there are many obstacles in the marketplace 3.0 to truth prevailing, and the trajectory of the online public square will only further challenge the advancement of truth.

[56] The internet and social media platforms present several potential challenges to the marketplace 3.0 and its ability to function. First is the constant changing of the platforms and their accompanying affordances. For instance, the meteoric rise in TikTok as a social media application has had older platforms (e.g., Instagram, YouTube) scramble to adapt to the new market demands.¹¹⁹ One difference between TikTok and the older problems is that TikTok is more of a content delivery application with less reliance

¹¹⁸ JOHN STUART MILL, *ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS* 30 (Mark Philp & Frederick Rosen eds., 2015).

¹¹⁹ Kalley Huang & Mike Isaac, *Instagram rolls back some product changes after user backlash*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/technology/instagram-reverses-changes.html> [<https://perma.cc/FQ22-BP7F>]; Salvador Rodriguez, *YouTube Shorts Is Huge In India, Now It's Going After TikTok in the U.S.*, WALL ST. J. (June 18, 2022, 7:00 AM), <https://www.wsj.com/articles/youtube-shorts-is-huge-in-india-now-its-going-after-tiktok-in-the-u-s-11655550000> [<https://perma.cc/K8P8-F7RN>].

on a user's network of social ties (i.e., friends, family, or acquaintances) where the delivery algorithm is central to the platform's operation.¹²⁰

[57] A second shift in the online public square that may present either a challenge or a benefit to the marketplace 3.0 is the creation and competition of new platforms. TikTok is the largest and most widely adopted of the new platforms¹²¹, but new social media applications are created frequently, and it is difficult to know which ones will become popular. Additionally, we have seen an outgrowth of politically oriented social media platforms such as Rumble, Gettr, or Parler.¹²² What's more, the Federal Trade Commission, under President Biden appointee Lina Khan, has been critical of social media platform market dominance with an eye towards the trust-busting toolbox. The fragmentation of the marketplace 3.0 could be an advantage if the increasing number of mainstream social media platforms are forced to compete with each other or the phenomenon could be a challenge if the fragmentation facilitates (or accelerates) the filter bubbling of society.

[58] A third challenge to the marketplace 3.0 may occur behind the scenes, originating in the backbone to how much of the internet functions: advertising. Platforms derive a large portion of their revenue from advertising, and the subtle (or not so subtle) changes in advertising technology and policy at the platforms can have a large effect upon what

¹²⁰ See WSJ Staff, *Inside TikTok's Algorithm: A WSJ Video Investigation*, WALL ST. J. (July 21, 2021, 10:26 AM), <https://www.wsj.com/articles/tiktok-algorithm-video-investigation-11626877477> [<https://perma.cc/G8GA-LVXB>].

¹²¹ Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2023)*, BUS. OF APPS (Jan. 9, 2023), <https://www.businessofapps.com/data/tik-tok-statistics/> [<https://perma.cc/76F3-SL8S>].

¹²² Galen Stocking et al., *1. Americans are more aware of some alternative social media sites than others, but overall, very few get news there*, PEW RSCH. CTR. (Oct. 6, 2022), <https://www.pewresearch.org/journalism/2022/10/06/americans-are-more-aware-of-some-alternative-social-media-sites-than-others-but-overall-very-few-get-news-there/> [<https://perma.cc/9KFV-CHGG>].

we see and the incentives for content creators.¹²³ For instance, removing monetization for outright certain types of content (such as fabricated news stories) can affect the supply of that content.¹²⁴ However, due to the scale of the platforms and other, non-monetary incentives for creating content, affecting incentives is not always possible.

[59] Yet another challenge for the marketplace 3.0 is the possibility of uncoordinated governance. As discussed in the normative value section above, there is an increasing will in the European Union to regulate online platforms and no corresponding regulation in the United States. Diverging views and regulation of internet platforms has (at least) two possible outcomes. First, the stricter regulations diffuse to other jurisdictions. Second, the marketplace 3.0 becomes further fractured between jurisdictions. Time will tell how the internet platforms react and change in response to regulations such as the Digital Services Act and whether other countries, including the United States follow the lead of the European Union or further diverge. The future of the marketplace 3.0 is uncertain, but we believe that it will follow a similar path to the marketplace 2.0 and see new, iterative regulations. Of course, legal decisions relating to antitrust and monopolistic behavior may affect technology companies and their dominance in the coming years; such decisions could reshape the character and architecture of governance and regulation.¹²⁵ However, unlike in the

¹²³ See Mike Isaac & Tiffany Hsu, *Meta plans to remove thousands of sensitive ad-targeting categories*, N. Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/09/technology/meta-facebook-ad-targeting.html> [<https://perma.cc/E5P4-37FA>]; Shira Ovide, *Google and Facebook's Ad Empires*, N. Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/10/28/technology/google-facebook-advertising.html> [<https://perma.cc/J8T9-X9JL>]

¹²⁴ Joshua A. Braun & Jessica L. Eklund, *Fake News, Real Money: Ad Tech Platforms, Profit-Driven Hoaxes, and the Business of Journalism*, 7 DIGIT. JOURNALISM 1, 1, 28 (2019); Robyn Caplan & Tarleton Gillespie, *Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy*, 6 SOC. MEDIA + SOC'Y 1, 1 (2020).

¹²⁵ Sarah Oh Lam, *A Review of "Big Tech" Antitrust Litigation in the Federal Courts*, 28 RICH. J.L. & TECH. 469, 504 (2022).

marketplace 2.0, the new regulations will likely come from outside the United States, mainly Europe.

[60] In this article we have argued that the Marketplace of Ideas metaphor is useful but has problems that can be revealed by contextualizing the metaphor in our current communication environment. The marketplace 3.0 takes place primarily on the internet and is guided by obfuscated, proprietary algorithms. Furthermore, the marketplace has been shaped by American history and the history of communication regulation that began in the early 20th century in response to obstacles presented by broadcast media. To interrogate the metaphor, we have presented three evaluative criteria in which we can judge the Marketplace of Ideas or alternative metaphor: an instrumental value, an epistemic value, and a normative value. These three criteria, combined with the descriptive historical context of communication, sheds light on the Marketplace of Ideas, the metaphor's strengths and weaknesses, and the forces affecting future iterations of the public square.