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Can You Have Too Much of a Good Thing?: The Modern Marketplace of Ideas

*Rachael L. Jones**

I. INTRODUCTION

Imagine it: A bustling marketplace. A labyrinth of booths form winding paths for buyers to view and evaluate the day's wares. As sellers prepare for the gates to open, they polish their goods, ensuring that they place their shiniest, best-selling products out front – the ones they know their customers enjoy and purchase time and time again. The products vary in size, form, and shape – some palatable to all, some to only a select few. Still, each seller knows – deep down – that his or her wares are best. They have either researched the make-up of their products and refined them over time or developed a profound allegiance to their brand through public support and sheer determination. They are persuasive. They are determined to get their products into households across the nation.

As the market opens, you walk through the gates. You have heard about what the market offers and are interested to take a look. Both political and social times have been trying lately, and something from the market may help you make sense of the ongoing conflicts. Maybe, just *maybe*, you will find something that can boost your confidence or, at the bare minimum, educate you. As you walk in, the sheer size of the market overwhelms you; there are hundreds – *thousands!* – of sellers in booths forming a network of pathways and connections. You head down the main thoroughfare and sellers accost you, each offering a pitch for their latest, greatest items. Some are detailed, calm, and convincing. Others are loud, red-faced, and combative – indignantly screeching at all who would question the quality of their product. Some are forceful and unyielding in their proclamation that it would be a mistake to pass up even a moment with them. Others seem to view the entire market as a mockery, cracking jokes and working to frustrate the other sellers and distract would-be buyers. You are cornered in the sellers' frenzy and immediately start dismissing some of them as they crowd around. As you try to sort out the sellers' pitches, more appear – some selling worn out products or garbage, others selling knock-offs with false-promises of quality goods. Some sellers want you to ignore other sellers and *only* talk to those that they approve. Some sellers end up walking away from you because they dislike your attitude or style. Eventually, you have your pick of items from a select few sellers you

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find reasonable. You choose a number of items that suit you and leave the market confident that you have obtained what you really needed. You find that you really enjoyed talking with some of the sellers and know that you will probably buy from them again. Others you plan to forget. You even consider reporting some of the more aggressive sellers to security.

Millions of people experience this scenario every day. However, rather than wandering through the labyrinthine maze of a pop-up market in search of useful goods, we open applications on our smartphones to obtain news and other forms of communication.¹ The proverbial “marketplace of ideas” resembles the scenario described above: a bustling, open market with thousands of statements, ideas, and concepts that speakers in the market try to bolster. Every day, internet users stroll down the marketplace thoroughfare of their own social media feeds, which are comprised of voices carefully coordinated by each individual user. In the traditional market, the best and brightest goods (or in the case of the marketplace of ideas – best and truthful speech) rise to the top, overshadowing and outselling lesser or “bad” goods. In this digital marketplace, however, the buyer has the power to pick and choose what sellers (speakers) he or she encounters at the outset. In fact, the buyer has the power to select the wares he or she deems most valuable, even if they may not objectively be the best.

This hypothetical is not cautionary; rather, it reflects the reality that our marketplace of ideas is changing. Every day, more speakers join this market and make the marketplace of ideas larger than ever. What was once hailed as a place of discussion – where minority voices had a platform and all citizens were invited to sift through the muck of bad ideas and falsities in the search for truth – is starting to resemble an echo chamber.² With every “like,” post, block, comment, message, mute, or re-tweet, we curate our own path through the modern marketplace – and our paved routes are not always inclusive of all viewpoints. This is problematic in our increasingly connected world. If we are choosing the voices – and sources of the content – we are exposed to, are we still able to objectively sift through the growing mass of ideas to unearth

1. We also log on to our computers. Social media usage has been on the rise in the United States for some time. According to Pew Research Center, the average American uses three out of the eight major platforms (Facebook, Instagram, LinkedIn, Pinterest, Snapchat, Twitter, WhatsApp, and YouTube). Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/>.

2. Christine Emba, Opinion, *Confirmed: Echo Chambers Exist on Social Media. So What Do We Do About Them?*, WASH. POST (July 14, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/07/14/confirmed-echo-chambers-exist-on-social-media-but-what-can-we-do-about-them/?noredirect=on&utm_term=.16b5d75bbaab. An echo chamber is “[a]n environment in which a person encounters only beliefs or opinions that coincide with their own, so that their existing views are reinforced and alternative ideas are not considered.” *Echo Chamber*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/echo_chamber (last visited Oct. 4, 2018).

the truth? In a modern nation where up to two-thirds of the adult population relies on social media websites for news³ and false news stories clutter our search engines,⁴ the results can be tragic.⁵ If “video killed the radio star,”⁶ is internet speech killing the marketplace of ideas?

Though a champion for the marketplace theory, Justice Oliver Wendell Holmes, in a famous dissent,⁷ noted that the marketplace was “an experiment,”⁸ much like America itself was in 1776. After all, the very foundation of our system of government was built on the voice of the people. Recent years, however, have demonstrated that support for the convention of public participation is dwindling.⁹ When we step back and examine our current, pop-

3. Angela Moon, *Two-Thirds of American Adults Get News from Social Media: Survey*, REUTERS (Sept. 8, 2017), <https://www.reuters.com/article/us-usa-internet-socialmedia/two-thirds-of-american-adults-get-news-from-social-media-survey-idUSKCN1BJ2A8>.

4. See Amy Kristin Sanders et al., *Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate*, 8 J. OF INT’L MEDIA AND ENT. LAW (forthcoming 2018).

5. The results of this new phenomenon are not only harmful to our current theories on free expression but also have real-world consequences that can lead to violence. For example, during the 2016 U.S. presidential election, a false news story made the rounds on social media touting a conspiracy theory that a child sex trafficking ring tied to the Democratic presidential campaign was operating in Washington D.C. Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html?_r=1. After reading the story online, an armed North Carolina man traveled to Washington D.C. to storm the local pizza joint where the alleged trafficking ring was based. Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?hpid=hp_rhp-top-table-main_no-name%3Ahomepage%2Fstory&tid=a_inl&utm_term=.f5374af9029d. He specifically cited the false news story about the child trafficking ring as his motivation. *Id.*

6. THE BUGGLES, VIDEO KILLED THE RADIO STAR (Island Records 1979).

7. *Abrams v. United States*, 250 U.S. 616, 624–30 (1919) (Holmes, J., dissenting).

8. *Id.* at 630. Granted, Holmes’ statement was “as all life is an experiment.” *Id.* However, Holmes was strangely foreshadowing the many criticisms that would plague the marketplace – and perhaps inadvertently underscore cracks in its foundation.

9. See Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 21, 2018), <http://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/>. In this era of hyper-partisan politics, the United States voter turn-out rates fall short of many developed countries. *Id.* The lack of engagement and the favor of the two-party system does not bode well for the public understanding. Rather, it has created a scenario rife with opportunity to drown out minority voices. See Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 533–34 (2011).

ular concepts of democracy, we tend to conjure up visions of citizen empowerment and engagement – which manifests in the voting booth rather than the town square.¹⁰ In light of this, social media have filled a gap in the communication of ideas: With the mere click of mouse, an aggrieved citizen can alert millions of citizens to his or her plight. Every share, comment, and “like” online gives weight – if not validity – to the statements of users with the free rein to comment on any hot button issue.¹¹ Popular posts and social media influencers – whether they are actors, activists, or legacy media – have the power to shape trending topics in a manner equivalent to the now-antiquated news ticker scrolling along the frames of cable news channels.

With users and speakers curating their own mini-marketplaces in a world riddled with debate, the future looks bleak for the marketplace of ideas. How do we know that the truth will prevail when many believe false news content? How can we keep our faith in public debate when viewpoints often trump facts and eliminate any hope of productive discussion? Too many speakers – especially when they shout – leads to a cacophony. How can anyone make sense of such noise?

This Article argues that though the state of the marketplace looks grim, it is not dead *yet*. Rather, we have entered an era in which the role of the marketplace is shifting. Instead of representing the proverbial promised land of truth and expression, the marketplace is serving an important role in the pursuit of democratic self-governance. From private media companies offering fact-checking services to combat false news¹² to teenagers using social media to

10. Blasi, *supra* note 9, at 533.

11. Of course, users are constrained by the boundaries set by their chosen social media platform. Some sites, such as Twitter and Facebook, have terms of service that limit the topics or forms of speech based on their community standards. *E.g.*, *Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Oct. 3, 2018) (providing a link to “The Twitter Rules,” which outline content boundaries); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Oct. 3, 2018) (Section 5, “Other terms and policies that may apply to you,” provides a link to “Community Standards,” which outline content boundaries). Still, aside from these standards, social media offers users great freedom to comment and discuss controversial topics in the name of free speech – though they are not historically bound by the First Amendment as nongovernment actors. *See* AJ Willingham, *The First Amendment Doesn’t Guarantee You the Rights You Think It Does*, CNN, <https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html> (last updated Sept. 6, 2018); *cf.* Brian P. Kane, *Social Media Is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, *ADVOC.*, Oct. 2017, at 31, 31–33.

12. During the 2016 presidential debates, several legacy media sources launched fact checking sites that livestreamed during the debate. *See, e.g.*, *Politics: Fact Check*, NPR, <https://www.npr.org/sections/politics-fact-check> (last visited Oct. 3, 2018); *Fact Checks*, N.Y. TIMES, <https://www.nytimes.com/spotlight/fact-checks> (last visited Oct. 3, 2018). The sites took statements made by the candidates and compared them to known facts, revealing whether the candidate was lying. *See, e.g.*, *Fact Checker*, WASH. POST, https://www.washingtonpost.com/news/fact-checker/?utm_term=.6519e772f88f (last visited Oct. 3, 2018). Independent fact-

call citizens to action on gun reform,¹³ the marketplace appears to be adapting. But it remains to be seen whether the marketplace can continue to best serve the principles of free speech in our ever-changing and ever-debating society. Working in tandem, the marketplace and self-governance theories may just preserve the rights we hold dear in our First Amendment doctrine in this new era of speech. Part II of this Article provides a brief overview of the marketplace-of-ideas model, including a discussion of its benefits and critiques. Part III explains why the traditional marketplace model does not comport with our current modes of speech and investigates whether the self-governance theory and the liberty theory of free expression should be the standard model for free speech under the First Amendment. Part IV explores the modern marketplace of ideas and posits that self-governance and liberty theories help facilitate changes in our understanding of free speech and tools that ultimately preserve the marketplace's role in society.

II. MARKETPLACE THEORY

The marketplace theory is perhaps the most widely accepted and longstanding rationale for the protection of free speech in the United States.¹⁴ Based on the concept of an open market, the marketplace of ideas is a place where information and ideas can flow freely, uninhibited by government censorship.¹⁵ The marketplace was conceptualized as a place where all ideas could receive vetting by a diverse audience. It allows truthful and beneficial speech – “good” speech – to rise above any harmful speech – “bad” speech.¹⁶ Simply put, in the marketplace, the response to “bad” speech should be *more* speech,

checking sites, such as Snopes and PolitiFact, have also gained popularity in recent years. See generally SNOPEs, <https://www.snopes.com/>; POLITIFACT, <http://www.politifact.com/>.

13. EmmaKate Austin, *Stoneman Douglas Students Launch #WhatIf Social Media Campaign*, SUN SENTINEL (Feb. 26, 2018, 1:00 PM), <http://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-stoneman-douglas-students-launch-whatif-campaign-20180226-story.html>; Jonah Engel Bromwich, *How the Parkland Students Got So Good at Social Media*, N.Y. TIMES (Mar. 7, 2018), <https://www.ny-times.com/2018/03/07/us/parkland-students-social-media.html>.

14. Julia K. Brotman, *Access, Transparency, and Control: A Proposal to Restore the Marketplace of Ideas by Regulating Search Engine Algorithms*, 39 WHITTIER L. REV. 33, 33 (2018).

15. *Id.* at 39.

16. Sanders et al., *supra* note 4.

not censorship.¹⁷ Where there is a plethora of competing opinions and speakers, the marketplace theory posits that society benefits from the discussion and engagement of ideas to siphon out false or misleading speech.¹⁸

Because it promotes the discovery of truth, the marketplace is lauded for demonstrating why speech regulation is ultimately ineffective or unnecessary for society.¹⁹ After all, information is the lifeblood of a well-functioning democracy.²⁰ Thus, this theory has historically underlain the prevailing rationale for robust protections of speech in the United States. Our society was introduced to the concept of the marketplace through the works of John Stuart Mill and John Milton.²¹ However, it was not officially adopted into First Amendment doctrine until 1919.²² In his dissent in *Abrams v. United States*, Justice Oliver Wendell Holmes advocated that

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the 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 market²³

In doing so, Holmes thrust marketplace theory to the forefront of discussions on the state of free expression. Since then, the United States Supreme Court has repeatedly touted the marketplace theory as a shield to protect speech.²⁴

17. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

18. Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 68–69 (1989).

19. *Id.*; see Brotman, *supra* note 14, at 34–40.

20. See Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1, 4–5 (2012) (discussing the importance of information collection, analysis, and distribution to modern governments).

21. See generally John Milton, *AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND* (Cambridge 1973) (1644); JOHN STUART MILL, *ON LIBERTY*, (Penguin Books 2010) (1859). In many respects, Milton’s *Areopagitica* is considered the “foundational essay” of the free speech tradition. Vincent Blasi, *John Milton’s Areopagitica and the Modern First Amendment*, COMM. LAW., Winter 1996, at 12.

22. The marketplace of ideas was first mentioned in United States Supreme Court case law in Justice Oliver Wendell Holmes’ dissent in *Abrams v. United States*. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

23. *Abrams*, 250 U.S. at 230.

24. See, e.g., *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). Since the dissent in *Abrams*, the marketplace has become a staple of United States Supreme Court First Amendment doctrine. See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (“The Court has long viewed the

For years, the courts have relied on normative assumptions that present an idealized version of both the audience and the intent of speech, which assumes that the public is rational and capable of determining the truth and credibility of speech.²⁵ In its jurisprudence, the United States Supreme Court adheres to the concept of the “rational audience” when analyzing speech issues.²⁶ Using this model, the Court attempts to draw the line for speech protection based on reasonable interpretation rather than the “actual effect speech will have . . . on a particular segment of the target audience.”²⁷ However, this model fails to consider the inescapable truth about an audience and the marketplace: Different people may interpret the same speech in radically different ways; because each person’s world view is shaped by his or her background, education level, employment, and a myriad of other factors,²⁸ the possibilities for varied interpretation are boundless. Finding one true, uniform interpretation of speech (or the truth) seems virtually impossible.

In her article exploring the justification for the continued use of the “rational audience” model, First Amendment scholar Lyrissa Lidsky uses the infamous text at issue in *Cohen v. California*²⁹ to illustrate how the interpretation of speech varies depending on one’s perspective.³⁰ In *Cohen*, defendant Paul Robert Cohen was charged with disturbing the peace when he wore a jacket with the phrase “Fuck the Draft” emblazoned on it at a Los Angeles County courthouse.³¹ Some members of the community found the statement to be a vile epithet and took offense.³² However, others – Cohen included – saw the statement as a passionate protest against the Vietnam War.³³ As Lidsky points out, people in the modern marketplace may interpret the text on Cohen’s jacket differently than those on either side of the 1971 case;³⁴ in today’s terms, the statement could be viewed as a mere dislike of the draft or an actual threat

First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

25. Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 (2010).

26. *Id.* at 805.

27. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007).

28. Lidsky, *supra* note 25, at 801.

29. 403 U.S. 15 (1971).

30. Lidsky, *supra* note 25, 807–10.

31. *Cohen*, 403 U.S. at 16.

32. *See id.* The State charged Cohen with violating the California Penal Code, which prohibited an individual from “maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . .” *Id.* (alterations in original).

33. *Id.* Cohen did not threaten or speak to any one; the lettering on his jacket was the only issue. *See id.* Because Cohen was not violent, and because speech that is merely offensive to some is still protected under the First Amendment, the Court overturned his conviction. *See id.* at 26.

34. Lidsky, *supra* note 25, at 808.

against those running the draft, depending on the reader's political affiliation. This illustration is the tip of the iceberg when it comes to analyzing audience interpretation and subjectivity. Moreover, it frustrates the rationale that an audience can, in fact, be reasonable.

In our modern era, speakers tend to assume that audiences are actually capable of assessing the quality and credibility of speech from an objective standpoint.³⁵ This practice gives weight to the notion that more speech is inherently better than less speech.³⁶ The Supreme Court has promoted this notion for many years and has preserved the marketplace's role in our jurisprudential canon, despite evidence that it may be failing. As the marketplace continues to deteriorate into a shouting match, though, scholars are left wondering whether it can withstand the vast number of speakers flocking to its gates.

These factors have formed the basis for the critiques the marketplace has been subjected to over the years.³⁷ First, the marketplace is prone to oversimplifying (or conversely, complicating) information important to the public. Because truth is often found through the contributions and analyses of several voices, it can be swayed based on the individual speaker's (or listener's) background and capabilities. Moreover, truth is often only one factor that society uses to determine whether speech is "good."³⁸ After all, a passionate argument from a determined speaker can sway even the most skeptical of thinkers when bet against less colorful debaters. Critiques of the marketplace have only intensified in the digital era. As First Amendment attorney and scholar Nabiha Syed points out, there are two major points of weakness with the marketplace theory.³⁹ First, audiences today are able to avoid speech they disagree with entirely, thus limiting their engagement with ideas in the market.⁴⁰ Internet platforms have enabled users to pick and choose (for the most part) the speech they want to hear. While this is most prevalent with social media – which often contains "mute" and "block" features – users are able to engage in similar curation of search engine results through use of filters and keywords. They may also limit their exposure to ideas by avoiding certain websites or, conversely, bolster other ideas by promoting others. Second, the marketplace theory does not adequately address the power structure of modern speech.⁴¹ As Syed notes, internet platforms have "radically improved the capabilities of many to speak," but the marketplace has not shifted to accommodate the number of voices now

35. *Id.* at 810.

36. *See* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

37. Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory of Platform Governance*, 127 *Yale L.J. F.* 337, 339–42 (2017); *see* *Solum*, *supra* note 18, at 69–80.

38. Sanders et. al, *supra* note 4.

39. Syed, *supra* note 37, at 340.

40. *Id.*

41. *See id.* at 340–41.

present within its walls.⁴² After all, when many voices band together, consensus has the capability to trump fact – a phenomenon commonly seen on social media among groups with marginalized or unpopular views.

Uninhibited, open discourse has given the public the opportunity to determine where the line between truth and falsity lies.⁴³ Justice Louis D. Brandeis believed that a “process of education” occurs through discourse that empowers citizens to reject “falsehoods and fallacies” in favor of truth and fact and that one of the tenets of democracy is that deliberate and truthful voices prevail over the “arbitrary.”⁴⁴ Can we reconcile these notions, knowing that the marketplace is a much different arena than it was when these rationales were presented? In this frustrating age of speech, it is easy to concede that regulation may be necessary. The harmful effects of online speech, such as the proliferation of false news or spread of hate speech, have wrought havoc on elections, private companies, individuals, and socio-economic groups.⁴⁵ Innovations in technology have radically changed both how we think and communicate as a society. Our modern world is so globally connected that information has become a societal currency.⁴⁶ Like all of us, the marketplace is enduring this new era of speech for the first time. When the marketplace was envisioned, information was bartered by a select few: the press, government actors, and the privileged few who had the means to disseminate ideas (such as a printing press or a broadcast frequency). This limited number of information sources allowed the marketplace to do what it does best – analyze speech through informed discussion to determine the validity of the statements asserted. Vetting speech was simpler and the process was less frustrating.⁴⁷ Today, information flies at those who participate in the marketplace from every direction. Those who used to work as moderators (such as the traditional media) still work to disseminate

42. *Id.*

43. Lidsky, *supra* note 25, at 814.

44. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Note that that in this concurrence, Justice Brandeis called upon much of the argument that Justice Holmes made in the *Abrams* dissent. Lidsky, *supra* note 25, at 814; *see also* *Whitney*, 274 U.S. at 373–80.

45. Sanders et. al, *supra* note 4.

46. *See* Balkin, *supra* note 20, at 5 (“Modern citizenship requires data processing in order to distribute the benefits of citizenship, and this leads to the creation of vast government databases . . .”).

47. The marketplace has faced scourges of false information before. In the 1890s, yellow journalism spread sensationalized headlines at a rapid rate and tabloid journalism did the same in the 1920s. *See* Jean Folkerts, *The History of American Journalism: A Bibliographical Essay*, AM. STUDIES INT’L 15, Oct. 1991, at 17, 31. While this type of sensationalized speech presented problems within the marketplace, ultimately truthful speakers prevailed when challenging baseless headlines. The problem today is worse: Increasingly, consumers/listeners are unable to decipher whether certain types of speech are sensational or false (unlike the stylized, signature appearance of yellow journalism pieces), causing confusion. Worse, often the debate over speech is rooted in the opinion or closely-held belief of the speaker, making effective debate impossible.

“good” speech to the marketplace, but they are frequently thwarted by others seeking to promote their own agendas and ideas. With every speaker holding a digital megaphone, speech and truth have become inherently subjective.

This shift in how we now view and understand speech (“good” versus “bad”) requires a reexamination of the rationales and theories supporting free speech. Some of the tenets of the marketplace, such as the idea that speech should be vetted for the greater good, are thwarted by users in the digital marketplace that interact with speech to support their own agenda.⁴⁸ Because speech is increasingly viewed as means to achieve an end (e.g., a political identity),⁴⁹ the traditional marketplace theory is often dismissed as an unachievable ideal.⁵⁰ In a perfect world, everyone in the marketplace would freely and objectively engage with ideas. But, as discussed above, technological advances and strong political opinions have circumvented much of the traditional marketplace altogether.⁵¹ Thus, we have to start reconceptualizing how we interact with speech and reconsidering whether the marketplace theory still best serves our speech paradigm.

III. SELF-GOVERNANCE, INDIVIDUAL LIBERTY, AND SPEECH

Our freedom of speech and press have become some of the most hotly debated topics in recent years. With President Trump using social media to brand the free press as the “enemy of the people”⁵² and white nationalists demurring that harassing speech is just their form of protest,⁵³ it seems that the First Amendment is increasingly being used as a sword for political warfare. This practice is not uncommon. Championing the First Amendment has often been a strategy for political gain, depending on the political climate. First

48. See Syed, *supra* note 37, at 340–41 (citing Saudi Arabian “cyber troops” who drown out critiques of the regime with “unrelated content and hashtags”).

49. Today, political identity has become the self-defining characteristic for American citizens. In a study conducted by Stanford University, researchers found that Americans’ bond to their political party is typically stronger than their connection to religion or race. Milenko Martinovich, *Americans’ Partisan Identities Are Stronger Than Race and Ethnicity*, *Stanford Scholar Finds*, STANFORD NEWS (Aug. 31, 2017), <https://news.stanford.edu/2017/08/31/political-party-identities-stronger-race-religion/>. The study revealed that many hold political affiliation over race or gender because political affiliation is a choice and rather than something assigned at birth. *Id.* Moreover, partisan affiliation is a voluntary thing that encapsulates one’s attitudes and beliefs. *Id.*

50. See discussion of weakness of the marketplace theory *supra* notes 39–42 and accompanying text.

51. See *supra* text accompanying notes 39–46.

52. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 4:48 PM EST), <https://twitter.com/realDonaldTrump/status/832708293516632065>.

53. See Alex Blasdel, *How the Resurgence of White Supremacy in the US Sparked a War Over Free Speech*, GUARDIAN (May 31, 2018, 1:00 PM EST), <https://www.theguardian.com/news/2018/may/31/how-the-resurgence-of-white-supremacy-in-the-us-sparked-a-war-over-free-speech-aclu-charlottesville>.

Amendment scholar Jack Balkin explains that because constitutional interpretation does not have a “fixed normative or political valence,” theories and legal arguments are often subject to the “ideological drift” – a phenomenon where “law means that legal ideas and symbols [] change their political valence as they are used over and over again in new contexts.”⁵⁴ In other words, it is not uncommon for individuals to adapt their arguments (and even their understanding) on free speech to suit their political beliefs.⁵⁵

Considering our society is more polarized than ever,⁵⁶ it is easy to see how the marketplace of ideas has become inundated with statements aimed at affecting the political beliefs of others. Social media have become sounding boards for all who would dare enter the arena of public debate. While at first blush this uninhibited sharing of ideas and statements would seem like a First Amendment victory, it actually puts strain on the marketplace – weight that it may not have been designed to carry. Because these platforms have the potential to create “echo chambers,” it is possible for users to limit the statements they engage with – and hinder the market’s engagement with ideas. This is problematic because it prevents the marketplace from functioning properly, stifles the flow of information, and limits the ideas that one may analyze in the search for truth.

54. J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870–71 (1993). Balkin provides several examples in his research of the ideological drift, which have affected the application of First Amendment doctrine over the years. *Id.* at 871. Notable examples include the rise of the libertarian views on free speech and the civil rights movement. *Id.* During the civil rights movement, the freedom of speech was championed as a liberal ideal because it promoted racial equality. *See id.* However, since the early 1990s, free speech has been utilized to pushback such equality through the rallying of conservatives who would challenge the “colorblind” Constitution. *Id.*

55. *See id.* at 871. In recent years, we have seen the ideological drift at work as many – mainly conservatives – push back against the rise of “political correctness.” *Cf.* Jennifer Delton, *When ‘Free Speech’ Becomes a Political Weapon*, WASH. POST (Aug. 22, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/08/22/when-free-speech-becomes-a-political-weapon/?utm_term=.9355d43d31cc. And the “drift” of free speech is not limited to advocates. Examples of the drift can be seen on the bench – even the United States Supreme Court. Professor Lee Epstein argues that Justices tend to be “opportunistic free speakers,” meaning that they demonstrate a tendency to vote in line with their personal preferences when it comes to the political ideology of the speaker. Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment 3* (July 15, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572; *see also* Adam Liptak, *For Justices, Free Speech Often Means ‘Speech I Agree With’*, N.Y. TIMES (May 5, 2014), <https://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html>.

56. Steven Shepard, *Study: Americans More Divided Along Party Lines Than Ever*, POLITICO (Oct. 5, 2017), <https://www.politico.com/story/2017/10/05/poll-americans-divided-party-lines-243466>.

But not all hyper-political messaging is bad. Often these types of statements from false news to biased sources serve a purpose in the minds of their authors and readers. At their core, hyper-political statements are political speech, meaning they are afforded the highest protection under the First Amendment. How can this be reconciled? Considering the ideological drift has been employed to champion the speech of some and not others, and new speech platforms have inundated the marketplace with more voices than ever, how can minority voices rise above the cacophony? If the marketplace is being stunted, how should speech be analyzed from a constitutional standpoint? Democratic self-governance theory is a natural place to turn – and for good reason. Self-governance theory focuses on one’s personal understanding and desire to play a meaningful role in society rather than the indecipherable cries of the masses. Self-governance theory posits that people should be free to consume and interact with speech to shape their ideologies as a means to fulfill their role as participants in democracy. Championed through the work of Alexander Meiklejohn,⁵⁷ self-governance theory requires that citizens have access to all forms of expression that may be useful to their personal decision-making.⁵⁸ Anchoring the First Amendment to the idea of self-government, Meiklejohn argued,

The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.⁵⁹

First Amendment scholar Robert Post argues that individuals must be able to use information to inform their own identities so they may, in turn, engage in dialogue with each other to make determinations for the welfare of our nation.⁶⁰ The use of speech for subjective and individualistic purposes has long

57. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 66 (1948) (“We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves.”).

58. See Solum, *supra* note 18, at 73 (“If citizens are denied access to data, opinions, criticism, or arguments that are relevant to a decision they must make, the result may be a bad decision.”); Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 108 (2015).

59. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960).

60. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 635–36 (1990) (“[I]ndividuals from diverse traditions and communities must attempt to communicate with each other if they wish to participate in that dialogue which will ultimately direct the actions of the entire nation.”).

been considered a healthy practice for democracy. As Justice Brandeis once indicated, the goal of a working democracy should be for citizens to develop their “faculties” so that they may discuss ideas in the search for political truth.⁶¹ In Brandeis’ view, the speech of those who use their First Amendment freedoms to develop their personal “faculties” should, ultimately, “prevail over the arbitrary,” and public discussion in the name of political truth is a duty and a necessary component of a healthy citizenry.⁶²

Like marketplace theory, self-governance theory is not without its criticisms. As scholar Martin H. Redish points out, self-governance theory often fails to recognize the adversary nature of democracy, overlooking the possibility of self-interested political speakers and the competing interests at stake.⁶³ It is this self-serving nature of speech that arguably has, indeed, cluttered the modern marketplace: Rather than speaking to promote truths, self-interested speakers often use their platforms only to disseminate or promote ideas that serve their own agendas. However, as discussed below, this type of speech is not without its societal and individual benefits.

Autonomy, whether in the political sense or personal, has long been one of the foremost ideals protected and promoted by the freedom of expression.⁶⁴ This more individualized view of free speech is rooted in the individual right of self-fulfillment and quest for dignity; autonomy, conceptually, means the “state of not being subject to the will of another.”⁶⁵ While all theories deriving from the more Millian principles center on the rights of the individual speaker rather than society at large, the focus on individual autonomy as a justification for free speech holds speech in esteem because it is an essential element of human dignity.⁶⁶ As constitutional scholar Harry Melkonian writes,

For democracy to function, the free speech rights of the individual must be preserved and not be subject to suppression even if the majority does not want those views expressed. In this respect, the individual reason [for justifying free speech] connects back to the political reason or instrumental justification[, such as the marketplace theory].⁶⁷

61. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 682 (1988).

62. *Whitney*, 274 U.S. at 375.

63. MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSIONS AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 74 (2013).

64. HARRY MELKONIAN, *FREEDOM OF SPEECH AND SOCIETY: A SOCIAL APPROACH TO FREEDOM OF EXPRESSION* 127 (2012).

65. *Id.*

66. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 9 (1992); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 200–01 (1977).

67. MELKONIAN, *supra* note 64, at 128–29.

In tandem, self-governance and liberty theories work to promote free speech for the purposes of the speaker's self-fulfillment, which ultimately "enables the speaker to influence the course of events" in society.⁶⁸ Thus, in analyzing speech under the theory of individual liberty and self-governance, speech is worthy of protection because of its value to the individual; speech, then, is not a "means to an end but is an end unto itself."⁶⁹

IV. THE MODERN MARKETPLACE

The self-governance and individual liberty theories are most applicable to our current social and political tendencies. Like the marketplace theory, these theories push back on the regulation of speech but for different reasons. Self-governance theory focuses on regulation that curtails one's ability to formulate a political identity based on one's beliefs – the beliefs that, in turn, influence one's behavior and opinions.⁷⁰ Furthermore, regulation stifles the public's ability to separate the wheat from the chaff when it comes to "good" speech. Interestingly, in some instances, arguments against regulation can work in tandem for the greater good of our First Amendment ideals. An example of this may be found in the attempted regulation of false news content. In recent years, there has been a push for regulation of false news content because it centers on false information and can have potentially damaging effects both in the marketplace and in reality. However, many false news stories are the product of political agenda; in fact, some agree with obviously false news stories because they validate a particular political stance or belief.⁷¹ Because these false news statements support the political identities of some, self-governance theory holds these statements in esteem. However, the fact that some individuals choose to put their trust in volatile or false content does not bode well for the marketplace – or, at least the traditional marketplace.

Individual speakers continually come to their own conclusions based on the principles of individual liberty and the self-governance theory. After all, political disagreement is the reason for many hostile debates online – and in public. When analyzing free speech, it is easy to forget that the public actually *receives* the speech used to formulate individual stances. In turn, those stances are debated, proven, or disproven in the court of public opinion. In other words, in today's modern marketplace, it is necessary to first analyze speech for its value to the individual before it is vetted by the market because speech's value is increasingly determined on a subjective basis. At a minimum, self-governance theory must be employed to reshape our understanding of how the

68. *Id.*; see EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 69 (1989).

69. MELKONIAN, *supra* note 64, at 129.

70. As Melkonian points out, self-governance theory and individual liberty theory are closely linked, differing only in that one is based in political reason and is rooted in autonomy in the sense that self-governance theory keeps the focus on the individual speaker/listener's use of speech to determine his or her role in society. *See id.*

71. *See, e.g.*, sources cited *supra* note 5 referencing "Pizzagate."

marketplace works. In his concurring opinion in *Whitney v. California*, an opinion noted for its championing of the marketplace theory, Justice Brandeis stated,

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are *means indispensable to the discovery and spread of political truth*; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁷²

Therefore, self-governance and individual liberty technically fuel the marketplace of ideas. In an era where the marketplace is bursting at the seams with speech and information, we must return to this autonomy-based view of speech to help disencumber the marketplace and preserve the free-flow of ideas for the betterment of society as a whole.

This is how the modern marketplace emerges. There are no moderators and no rules – just expression. What was once envisioned as a sunny, open marketplace has morphed into something akin to the floor of the New York Stock Exchange. In this modern marketplace, sellers still peddle their wares. Unlike the traditional marketplace, however, where the sellers and moderators evaluate the worth of the products, the buyers are the ones who power the market’s structure and products’ popularity. Here, because speech is inherently subjective, it is easy for persons – or “buyers” of speech – to pick and choose the statements or ideas that suit their fancy. But where multiple buyers take issue with a particular product, they may band together to establish that the product is a dud – much like a trading group might deem certain stocks as bad bets. In this metaphor, rather than one giant market, each individual may view speech and ideas as tokens for their individual portfolios, which, when shared, make up a thriving economy of speech that powers society: Good speech keeps the market thriving and bad speech causes it to falter. However, the worth of particular ideas may be vetted by the individual: Some speech may be greatly valued by a majority of speakers, making it a prevailing idea within the market, while other ideas may only hold great value to a particular individual.

The nature of speech has changed greatly since Holmes thrust the marketplace of ideas into our First Amendment lexicon. Today, we see speakers using the self-governing principles of others to rouse fervor on issues pertinent to their own self-governance and autonomy, vetting ideas and statements

72. 274 U.S. 357, 375 (1927) (emphasis added), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

through a technological marketplace that either tears speech apart or makes it go viral. It is much more subjective, but it is also much harsher on those who introduce “bad” or false speech that is not valued by society as a whole.⁷³ In considering speech through a self-governance lens at the outset, however, those who analyze speech are forced to consider the value of the speech before this occurs, granting speech the value it needs (if any) in the face of the churning modern marketplace. This balance allows the marketplace to correct itself and readjust as needed without self-destruction.

We see examples of the modern marketplace’s rumblings in different ways. One of the most telling is the inception of fact-checking sites like PolitiFact⁷⁴ and Snopes.⁷⁵ Websites like these are designed to find the literal truth behind statements floating around the Internet, especially statements that pertain to politics. This is just one way the marketplace seems to be self-correcting some of its shortcomings by harnessing the power of self-governance and liberty principles. Rather than rejecting bizarre, false statements entirely, the marketplace provides an alternative that promotes the dissemination of truth. This move, in turn, allows others to vet the “bad” and “good” statements on their own and use them in their own political identity.

Another example of how the modern marketplace is prevailing was recently provided by the U.S. District Court for the Southern District of New York in *Knight First Amendment Institute v. Trump*.⁷⁶ In *Knight*, the court held that a public official may not block an individual from engaging with his or her social media profile.⁷⁷ Because public officials (including the President of the United States) have been known to use social media platforms, such as Twitter, to convey information relevant to the public, the court held that digital platforms can be deemed public forums under the First Amendment.⁷⁸ In a boon for the marketplace of ideas, the court highlighted the public’s right to interact

73. Increasingly, the court of social media allows for backlash against speakers who offer objectively “bad” speech. The most common example is viral backlash against hate speech. For example, after engaging in hate speech and promoting conspiracy theories, social media commentator Alex Jones not only received considerable backlash from social media users but was ultimately banned from several social media platforms. Avie Schneider, *Twitter Bans Alex Jones and InfoWars; Cites Abusive Behavior*, NPR (Sept. 6, 2018), <https://www.npr.org/2018/09/06/645352618/twitter-bans-alex-jones-and-infowars-cites-abusive-behavior>.

74. POLITIFACT, <https://www.politifact.com/> (last visited Oct. 7, 2018).

75. SNOPE, <https://www.snopes.com/> (last visited Oct. 7, 2018).

76. 302 F. Supp.3d 541 (S.D.N.Y. 2018).

77. *Id.* at 579–80.

78. *Id.* at 577. For a brief analysis of the case, see *Knight Institute v. Trump – Lawsuit Challenging President Trump’s Blocking of Critics on Twitter*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter> (last visited Oct. 7, 2018); Lyrissa Lidsky, *Twitter as Public Forum: The Limits of The Trump Ruling*, LAW360 (May 31, 2018), <https://www.law360.com/articles/1048484/twitter-as-public-forum-the-limits-of-the-trump-ruling>.

freely with government officials on internet platforms,⁷⁹ preserving the idea that engagement and discussion help uncover “good” speech – and, in turn, allow for individuals to obtain information that may assist in their own democratic self-governance. Examples like this reiterate that we must utilize – if not rely on – the marketplace to actually obtain the speech necessary to engage in self-governance and self-realization.

IV. CONCLUSION

In a 1945 opinion, Justice Hugo L. Black stated that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁸⁰ Despite the cacophony that has overtaken much of the marketplace, Justice Black’s assertion still rings true. More than ever, we as individuals in democracy must stand firm in our beliefs and our own sense of political identity. It is for this reason that the marketplace’s role in the way speech is conveyed in society seems to be *changing* rather than dissipating. With more participants than ever before, the marketplace has proven that it remains a vital aspect in analysis of speech. To examine the validity of even the most farfetched of claims, do we not turn to the marketplace (usually in the form of a search engine) to seek other statements that may verify or discredit such statements? However, to ensure that the marketplace continues to thrive, we must reconsider how we view speech within the marketplace. By viewing the marketplace through a lens formed through the self-governance and individual liberty theories, we can allow speech to flow in the marketplace for vetting by individuals who, in turn, disseminate speech for the betterment of society as they see fit. The marketplace may be overrun with speakers, but if First Amendment doctrine has taught us anything, it has taught that ultimately more speech is better than less. Considering the initial purpose of the marketplace, we must allow our method of analysis to shift in light of changing landscapes. Because the value of speech is determined by its recipient, we must allow for self-governance and liberty theories to play a more significant role in the marketplace metaphor. In doing so, we may help maintain the marketplace for years to come.

79. See *Knight*, 302 F. Supp. 3d at 576–77.

80. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

