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# Promoting and Protecting the Marketplace of Ideas in the AI Information Age

*Jon M. Garon*

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## Promoting and Protecting the Marketplace of Ideas in the AI Information Age

*Jon M. Garon\**

*This Article focuses on the historical evolution of communications, primarily the rapid changes of the twenty-first century. The growth of video games, digital publishing, ebooks, video streaming, the metaverse, and synthetic media have undermined the innovations of the twentieth century from landlines to broadcasting. The shift to an influencer and creator economy has displaced mass media, devaluing media's gatekeepers and disaggregating the public. More than a technological change, the consequences have profound implications for the economic and legal structures that underpin society.*

*Using the metaphor of the marketplace of ideas, this Article addresses key legal implications for the regulation of content, protection of the public, and the need to recalibrate speech norms. This Article explores the history of the marketplace of ideas as understood by the drafters of the Bill of Rights and its evolution through the twentieth and twenty-first centuries as a means of focusing on the range of regulatory authority available to manage information in the age of AI.*

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## I. INTRODUCTION

*There never was a Democracy Yet, that did not commit suicide.*

— John Adams<sup>1</sup>

*Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.*

— Oliver Wendell Holmes Jr.<sup>2</sup>

Each historical era is defined and reshaped by the new technology of that age and the political consequences unleashed by its invention. The Gutenberg Press fueled the publication of indulgences in the Catholic Church and became the weapon of Martin Luther to launch the Protestant Reformation. For England, that conflict triggered civil war, the colonization of North America, and generations of European conflict.<sup>3</sup> In 1644, fresh from the bloodshed of that conflict, the British Parliament enacted a law to license the printing press and control its output.<sup>4</sup> Already famous for *Paradise Lost*, John Milton rose against the law in favor of free speech with arguments that later infused the U.S. Bill of Rights.

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<sup>1</sup> Letter from John Adams to John Taylor (Dec. 17, 1814), in THE ADAMS PAPERS (forthcoming), <https://founders.archives.gov/documents/Adams/99-02-02-6371> [<https://perma.cc/7AGK-XQZJ>] (“It is in vain to Say that Democracy is less vain, less proud, less selfish, less ambitious or less avaricious than Aristocracy or Monarchy. It is not true in Fact and no where appears in history. Those Passions are the same in all Men under all forms of Simple Government, and when unchecked, produce the same Effects of Fraud Violence and Cruelty.”).

<sup>2</sup> *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

<sup>3</sup> See, e.g., Jane H. Ohlmeyer, *English Civil Wars*, BRITANNICA (Feb. 6, 2026), <https://www.britannica.com/event/English-Civil-Wars> [<https://perma.cc/F6L5-8WR3>]; A *Brief History of the ‘Wars of the Three Kingdoms,’* SKY HIST., <https://www.history.co.uk/articles/a-brief-history-of-the-wars-of-the-three-kingdoms> [<https://perma.cc/R4MY-AXJZ>] (last visited Feb. 23, 2026) (“The English Civil War, with its violent clashes between Roundheads and Cavaliers, is a much-mythologised chapter in British history. Yet it was actually part of a larger arc of events known as the Wars of the Three Kingdoms (England, Scotland and Ireland) – which sprawled throughout much of the 17th Century.”). See generally TREVOR ROYLE, *THE BRITISH CIVIL WAR: THE WARS OF THE THREE KINGDOMS 1638–1660* (2004) (discussing the history of the interconnected conflicts across England, Scotland, and Ireland).

<sup>4</sup> See generally THOMAS C. BERG, *RELIGIOUS LIBERTY IN A POLARIZED AGE 119–33* (2023) (arguing that protecting religious freedom is key to combatting polarization in society).

The printing press was one of many inventions of the Industrial Revolution, ushering in a mercantile transformation of Europe. When combined with democratic reforms that evolved from the Protestant Reformation, the reforms and innovations created a capitalist-democratic compact that linked individual electoral power with individual value from labor. This eighteenth-century shift from the sovereign to the individual served as the framework for the American Revolution and for political transformation across the globe. Adam Smith described and defined the model by identifying the invisible hand of the marketplace. The marketplace grew to incorporate both goods and ideas, reshaping the meaning of speech free of censorship, as envisioned by John Milton and John Stuart Mill. The metaphor for a marketplace of ideas was born. In the market, ideas vie for survival of the fittest, which hopefully coincides with truth.

The marketplace of ideas was quickly eclipsed by emerging twentieth-century technology. Film, radio, and television were heavily regulated. For radio and television, the public interest doctrine operated as an express, government-controlled market.

In the Artificial Intelligence (AI) Information Age, both mass media and the public interest doctrine are fading into irrelevancy. The media of the masses has replaced mass media with few practical constraints over the production and dissemination of content. AI has the potential to fuel the content conflagration further and faster than any time in history.

Adam Smith's invisible hand is no longer capable of maintaining an equilibrium in the marketplace of ideas. The philosophical foundations for that marketplace would never have expected it to do so. The current approach by the Supreme Court emphasizes the importance of historical context for modern regulatory review. To help with this endeavor, this Article looks at the influences for content regulation that shaped the Bill of Rights and how those laws have evolved in the centuries since adoption.

A century after the marketplace of ideas reshaped political thought, AI and the exponential growth of the information economy require that society revisit the assumptions underlying the marketplace of ideas. By reflecting on the historical meaning of those foundational principles, this Article asserts that free speech can be protected within the context of the fundamental rights that were equally important, while still addressing the imbalance in the market. From this review, a new model emerges that can lift the invisible hand of the marketplace where needed

to counterbalance the agentic hand of AI automata that are not bound by human ethics, incentives, or needs.

Part II develops the current state of AI content and how that content differs from human-developed content. Part III explores the nature and consequences of the democratization of content, focusing on the evolution of the free speech doctrine during the twentieth century. Part IV explores where the presumptions inherent in twentieth-century free speech must be adapted to reflect the different nature of media, communications, and content that have derived from transformations in the information age.

## II. THE INFORMATION AGE: NETWORKED, SOCIAL, AND SYNTHETIC

The combination of exponential growth in the power of computing, global internet-connected communications, wearable technology, and generative AI has come together to usher in a new information age that confounds the ability to predict the future. Since the 1990s, there have been at least three major technological transformations: the internet, social media, and AI.<sup>5</sup> In 2025, streaming usage grew larger than cable and broadcast television combined.<sup>6</sup> YouTube is the largest streaming platform for traditional television content—even before counting the videos and other user-generated content that are watched nearly as much as all television content.<sup>7</sup> “For many, watching YouTube videos has become part of their daily routine. 62% of internet us-

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<sup>5</sup> Nelson Granados, *How Artificial Intelligence Is Shaping the New Media and Entertainment Economy*, FORBES (June 7, 2024, at 10:11 ET), <https://www.forbes.com/sites/nelsongranados/2024/05/31/how-artificial-intelligence-is-shaping-the-new-media-and-entertainment-economy/> [<https://perma.cc/2F7D-9AQN>] (“First was the advent of the internet, which in the first decade of the 21<sup>st</sup> century enabled digital distribution of content, and in the second decade upended the distribution format from downloading to streaming, both live and on demand. The third wave is . . . AI.”).

<sup>6</sup> *Streaming Reaches Historic TV Milestone, Eclipses Combined Broadcast and Cable Viewing for First Time*, NIELSEN (June 17, 2025), <https://www.nielsen.com/news-center/2025/streaming-reaches-historic-tv-milestone-eclipses-combined-broadcast-and-cable-viewing-for-first-time/> [<https://perma.cc/JHD6-HN5F>].

<sup>7</sup> See Alex Sherman, *YouTube Dominates Streaming, Forcing Media Companies To Decide Whether It's Friend or Foe*, CNBC (June 26, 2024, at 11:38 ET), <https://www.cnbc.com/2024/06/26/youtube-streaming-dominance-media-strategy.html> [<https://perma.cc/LAH4-FDPL>]; Brad Adgate, *Most Young Adults Prefer Free User Generated Social Video than SVOD*, FORBES (Mar. 25, 2024, at 10:47 ET), <https://www.forbes.com/sites/bradadgate/2024/03/25/most-young-adults-prefer-free-user-generated-social-video-than-svod/> [<https://perma.cc/Z6AE-YA42>]; Lyndon Bell, *YouTube: A Social Media Platform or Something More?*, ADLIFT (Apr. 28, 2025), <https://www.adlift.com/blog/is-youtube-a-social-media/> [<https://perma.cc/UHZ9-HLJF>].

ers based in the United States report using YouTube every day. 92% access YouTube on a weekly basis . . . .”<sup>8</sup>

Along with these three changes, the dominant form of entertainment has been shifting toward video games. “The video game industry is \$200-plus billion globally—larger than all of film, television and music combined.”<sup>9</sup> “[T]here are more than 3 billion active gamers.”<sup>10</sup>

The public’s increased engagement with video games and the shift to streaming and short-form video is impactful, but minor in comparison to the growth of social media. Beginning in 2025, social media has overtaken both TV news and news websites as the primary source of news for many Americans.<sup>11</sup> “Americans turn to radio and print publications for news less frequently.”<sup>12</sup> “In 2025, 11% of U.S. adults say they often get news from radio, and 7% say the same about printed newspapers or magazines . . . .”<sup>13</sup>

The most recent shift has only begun. Although generative AI systems have been under development for many years,<sup>14</sup> the commercial explosion began with the launch of ChatGPT in November 2022.<sup>15</sup> ChatGPT achieved more than 100 million users within two months of its launch, cementing the service’s role as the leader in the emerging AI arms race.<sup>16</sup> Generative AI systems combine with other AI technologies to power humanoid robots, to

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<sup>8</sup> Bell, *supra* note 7.

<sup>9</sup> Todd Harris, *Georgia’s Got Game: Why the Gaming Industry Is Larger than Film, Television and Music Combined*, GA. ENT. (Apr. 16, 2024), <https://www.georgiaentertainment.com/2024/04/georgias-got-game-why-the-gaming-industry-is-larger-than-film-television-and-music-combined/> [<https://perma.cc/DB6M-9JZT>].

<sup>10</sup> *Id.*

<sup>11</sup> *For the First Time, Social Media Overtakes TV as Americans’ Top News Source*, NIEMAN LAB (June 16, 2025, at 19:02 PT), <https://www.niemanlab.org/2025/06/for-the-first-time-social-media-overtakes-tv-as-americans-top-news-source/> [<https://perma.cc/PLT6-NAXN>] (highlighting changes in where Americans obtain their news: social media 54%, TV news 50%, news websites 48%).

<sup>12</sup> Christopher St. Aubin & Jacob Liedke, *News Platform Fact Sheet*, PEW RSCH. CTR. (Sep. 25, 2025), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/> [<https://perma.cc/ZM2S-5TCJ>].

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., Jørgen Veisdal, *The Birthplace of AI: The 1956 Dartmouth Workshop*, MEDIUM: CANTOR’S PARADISE (Sep. 12, 2019), <https://www.cantorsparadise.com/the-birthplace-of-ai-9ab7d4e5fb00> [<https://perma.cc/TFK3-DNPA>].

<sup>15</sup> See Shelley Walsh, *Timeline of ChatGPT Updates & Key Events*, SEARCH ENGINE J. (Oct. 19, 2025), <https://www.searchenginejournal.com/history-of-chatgpt-timeline/488370/> [<https://perma.cc/SAN7-KZBF>].

<sup>16</sup> See Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base – Analyst Note*, REUTERS (Feb. 2, 2023), <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/> [<https://perma.cc/HU57-3SE9>].

drive new research, and to fundamentally disrupt the modern workplace as industries seek to replace or redefine jobs in search of efficiency and profitability.<sup>17</sup> “[T]he tools are advancing with the integration of generative AI and agentic AI, bringing humanoid robots and other AI-enabled robotic devices out of the realm of science fiction and into modernized workplaces . . . .”<sup>18</sup>

Generative AI brings a particularly powerful challenge to journalism and creative industries. Multiple lawsuits assert that the AI publishers are free-riding off the newsgathering operations of others.<sup>19</sup> Other lawsuits focus on the harm to copyright owners and creative industries.<sup>20</sup> Generative AI can create an essentially unlimited flow of images, text, news, and social interaction. The consequences for those who make a living gathering news or creating original entertainment may be economically dire.

Also in 2025, the same year that social media eclipsed all other forms of media as the preferred source for news and information, Merriam-Webster announced that its official word of the year was “slop.”<sup>21</sup> “We define *slop* as ‘digital content of low quality that is produced usually in quantity by means of artificial intelligence.’”<sup>22</sup> Merriam-Webster referenced a commentary on CNET called *AI Slop Has Turned Social Media Into an Antisocial Wasteland*.<sup>23</sup>

<sup>17</sup> See Madison Huang, *What Is NVIDIA’s Three-Computer Solution for Robotics?*, NVIDIA: COMPANY BLOG (Aug. 8, 2025), <https://blogs.nvidia.com/blog/three-computers-robotics/> [<https://perma.cc/4WK2-Y6XH>]; Tammy Whitehouse, *AI Robots in the Workplace: Preparing for Humanoid Colleagues*, WALL ST. J.: CIO J. (July 25, 2025, at 12:00 PT), <https://deloitte.wsj.com/cio/ai-robots-in-the-workplace-preparing-for-humanoid-colleagues-a6753b0a?gaa> [<https://perma.cc/23UT-K6RF>].

<sup>18</sup> Whitehouse, *supra* note 17 (quoting Franz Gilbert).

<sup>19</sup> See, e.g., *Dow Jones & Co. v. Perplexity AI, Inc.*, 797 F. Supp. 3d 305, 318–19 (S.D.N.Y. 2025) (“Plaintiffs assert two claims of copyright infringement pursuant to 17 U.S.C. § 106 (Counts I and II) and one claim for false designation of origin and dilution of Plaintiffs’ trademarks pursuant to 15 U.S.C. § 1125 (Count III.)”); Complaint at 1, *N.Y. Times Co. v. Perplexity AI, Inc.*, No. 1:25-cv-10106 (S.D.N.Y. 2025).

<sup>20</sup> See Cade Metz & Michael M. Grynbaum, *New York Times Sues A.I. Start-Up Perplexity over Use of Copyrighted Work*, N.Y. TIMES (Dec. 5, 2025), <https://www.nytimes.com/2025/12/05/technology/new-york-times-perplexity-ai-lawsuit.html> [<https://perma.cc/KL8V-33EZ>] (“Filed in federal court on Friday, the suit joins more than 40 other court disputes between copyright holders and A.I. companies.”).

<sup>21</sup> *2025 Word of the Year: Slop*, MERRIAM-WEBSTER (Dec. 14, 2025), <https://www.merriam-webster.com/wordplay/word-of-the-year> [<https://perma.cc/WFS3-72CH>].

<sup>22</sup> *Id.*

<sup>23</sup> Abrar Al-Heeti, *AI Slop Has Turned Social Media into an Antisocial Wasteland*, CNET (Nov. 19, 2025, at 05:01 PT), <https://www.cnet.com/tech/services-and-software/ai-slop-has-turned-social-media-into-an-antisocial-wasteland/> [<https://perma.cc/TM92-V3MG>].

To focus on the AI slop, however, is to ignore the transformative potential for generative AI across the media landscape. Within the entertainment industry, leaders have “predicted that AI will enable new business processes and content production workflows that are faster and leaner.”<sup>24</sup> TV and film production workflows use AI to create storyboards and previsualization videos at a fraction of the cost and time for completion.<sup>25</sup>

AI also democratizes the creation process. Anyone can input a prompt to generate a picture, short video, story, or musical composition.<sup>26</sup> In its formative stage, the public is not yet completely on board. “Opinions are mixed – ranging from awe at AI’s capabilities to skepticism about its originality and emotional depth.”<sup>27</sup> “Many creators acknowledge AI’s utility but doubt it can fully replicate human creativity.”<sup>28</sup>

AI is not only the most recent development in the democratization of content. Social media has played an exceptionally important role as well. Before them, internet, television, radio, and the camera each played a part. But the origins begin with the commercial printing press.

The democratization of content raises two fundamental questions. The first is how society values and evaluates the works created. The second is how society evaluates and contextualizes trust in the technology and media. To return to the metaphor, what makes the marketplace work?

### III. TECHNOLOGY AND THE EVOLUTION OF DEMOCRATIZATION IN CONTENT CREATION

Technology has infused and transformed communication since before there were written words. Rocks and skins served as percussion instruments; reeds and hollowed tubes provided flutes; a ram’s horn was hollowed out as a trumpet (or shofar); and dried animal intestines enabled the creation of lutes and other stringed instruments.<sup>29</sup> There are archeological remains from nearly 800,000 years ago suggesting that “[s]tories were

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<sup>24</sup> Granados, *supra* note 5.

<sup>25</sup> *See id.*

<sup>26</sup> *See How AI Is Reshaping Art, Music and Brand Storytelling*, AMPLYFI (Apr. 17, 2025), <https://amplifyfi.com/blog/how-ai-is-reshaping-art-music-and-brand-storytelling/> [<https://perma.cc/TZ5F-8H4T>] (“One of AI’s most profound impacts is the democratisation of content creation.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Anton Killin, *The Origins of Music: Evidence, Theory, and Prospects*, 1 *MUSIC & SCI.* 1, 6 (2018).

frequently accompanied by background music (often performed on musical bows).”<sup>30</sup> Flutes made from bird bones exist from over 40,000 years ago.<sup>31</sup> Writing, in contrast, likely originated only 6,000 years ago.<sup>32</sup>

“Creativity is deeply rooted in all cultures, but its definition and attributes vary across cultures.”<sup>33</sup> The technologies of writing, art, and creative works shape human culture and are, in turn, shaped by their culture.<sup>34</sup> Marshall McLuhan explained the relationship between the tools of communication and the content of that communication: “Taken in the long run, the medium is the message.”<sup>35</sup> Unstated in this observation is the corollary that each technological innovation has expanded the reach of the speaker to the audience and provided access to new voices vying to compete in the marketplace of ideas.<sup>36</sup>

Context also matters. Western or individualistic cultures tend to celebrate and promote novelty, while Eastern or collectivist cultures value usefulness as the most significant characteristic.<sup>37</sup> This alone suggests that there may be a difference in how AI-generated works are valued in individualistic cultures versus

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.*

<sup>32</sup> Ira Spar, *The Origins of Writing*, THE METRO. MUSEUM OF ART (Oct. 1, 2004), <https://www.metmuseum.org/essays/the-origins-of-writing> [<https://perma.cc/5KR4-4GTW>] (noting that “proto-cuneiform writing on clay and wood may have existed in Syria and Turkey as early as the mid-fourth millennium B.C.”).

<sup>33</sup> Yong Shao et al., *How Does Culture Shape Creativity? A Mini-Review*, 10 FRONTIERS IN PSYCH. 1, 2 (2019); see also Shilian Shan, *The “Boundary” of Technology, Culture, and Digitalization*, 2 EMERGING MEDIA 34, 42–44 (2024) (noting that culture shapes humanity and its attributes).

<sup>34</sup> MARSHALL MCLUHAN, UNDERSTANDING ME: LECTURES AND INTERVIEWS 3 (Stephanie McLuhan & David Staines eds., 2003).

<sup>35</sup> *Id.*

So that when, by group action, a society evolves a new medium like print or telegraph or photo or radio, it has earned the right to express a new message. And when we tell the young that this new message is a threat to the old message or medium, we are telling them that all we are striving to do in our united social and technical lives is destructive of all that they hold dear. The young can only conclude that we are not serious. And this is the meaning of their decline of attention.

*Id.*

<sup>36</sup> G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2166 (2020) (“The fact that consuming content (and producing it) takes time and attention is another axiom that complicates the Court’s modern market metaphor.”).

<sup>37</sup> Shao et al., *supra* note 33 (“The plausibility of such clustering of the East and the West has been substantially supported by several large-scale studies, such as the World Value Survey and the GLOBE project survey.” (citations omitted)).

collectivist cultures, with the latter potentially being more receptive to useful generative AI works even if the works do not possess a human's originality or novelty.

Individualism is not an inherent cultural characteristic. Western individualism has a lineage rooted in the technology of communication, specifically the printed text. "Printing was invented over a millennium ago, around the year 700, in China during the Tang dynasty (618–907 [C.E]), before it spread across East Asia, Southeast Asia and the globe . . . ."<sup>38</sup> The first known printed book is *The Diamond Sutra*, published in Sanskrit in approximately 868 C.E.<sup>39</sup> Printing slowly made its way across Europe, but hand-carved wooden type and inefficient presses did not significantly displace scribes who could create far more elaborate, elegant works.

As commercial trade slowly grew across Europe, however, the market for lower-cost books created an opportunity for improvement. Johannes Gutenberg (1400–1468), who likely had training as a metalsmith, undertook to improve the speed and efficiency of the rudimentary presses available at the time.<sup>40</sup> His most important innovation was the introduction of metal block letters that could be arranged into any word, sentence, paragraph, or page by arranging them in a composing stick, a small, adjustable tray used by typesetters to arrange the lines of text.<sup>41</sup> To improve pressure on the paper, he adapted the screw mechanism of a wine press to get a stronger and more uniform distribution of pressure. He also developed an oil-based ink to improve the flow and saturation of the ink onto the page.<sup>42</sup>

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<sup>38</sup> Ryan Wolfson-Ford, *The History of Printing in Asia According to Library of Congress Asian Collections – Part 1*, LIBR. OF CONG.: BLOGS (June 22, 2021), <https://blogs.loc.gov/international-collections/2021/06/the-history-of-printing-in-asia-according-to-library-of-congress-asian-collections-part-1/> [<https://perma.cc/99G3-77X5>].

<sup>39</sup> *Printing Press*, HIST. (Feb. 27, 2025), <https://www.history.com/articles/printing-press> [<https://perma.cc/7HHC-R3HC>]; *Buddhist Diamond Sutra*, STAN. HUMANITIES CTR. (Aug. 1, 2009), <https://shc.stanford.edu/stanford-humanities-center/news/buddhist-diamond-sutra> [<https://perma.cc/W9DH-RUNA>].

<sup>40</sup> Joshua J. Mark, *Johannes Gutenberg*, WORLD HIST. ENCYC. (July 25, 2022), [https://www.worldhistory.org/Johannes\\_Gutenberg/](https://www.worldhistory.org/Johannes_Gutenberg/) [<https://perma.cc/BZE5-7UW2>] ("Although the city of Mainz declared 1400 as Gutenberg's official year of birth in 1900, the date is unknown and generally held to be between 1394-1404.").

<sup>41</sup> *The Gutenberg Press*, SPECIAL COLLECTIONS & ARCHIVES RSCH. CTR.: TREASURES OF THE MCDONALD COLLECTION, <https://scarc.library.oregonstate.edu/omeka/exhibits/show/mcdonald/incunabula/gutenberg/> [<https://perma.cc/XW57-6C5X>] (last visited Feb. 23, 2026).

<sup>42</sup> See *id.*; *Printing Press*, *supra* note 39.

By 1450, the press was operational.<sup>43</sup> Gutenberg published the prophetic poem, *The Sibyl's Prophecy*, as the first work on the press.<sup>44</sup> In 1454, Gutenberg began to operate the press commercially, “producing thousands of indulgences for the Church. The following year he printed his famous 42-line Bible, the first book printed on a moveable type press in the West.”<sup>45</sup> Gutenberg’s press opened a new market: “The first printing press came to London in 1476, and by 1500, there were five printers in London. By 1523, there were at least 33 printers and booksellers actively engaged in the trade.”<sup>46</sup>

Printing and commercial trade continued to expand during the politically tumultuous period that followed its introduction. The rapid collection and dissemination of knowledge fueled both political upheaval and technological advancement.<sup>47</sup>

The industrial and technological advances began to grow exponentially. The steam engine, first identified in ancient Rome, was commercialized to power factories and railroads.<sup>48</sup> Steam engines made railway systems practical.<sup>49</sup> An engine for spinning cotton or wool was patented in 1770.<sup>50</sup> Scientists explored the development of electricity, magnetism, and radio waves throughout the seventeenth and eighteenth centuries. Wire-based telegraphs began in 1837.<sup>51</sup> In 1895, Guglielmo Marconi sent the first coded wireless message, and Nikola Tesla obtained the first radar patent in 1900.<sup>52</sup> Rapid advances in wireless and other technologies led to the development of commercial radio, telephones, motion

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<sup>43</sup> Mark, *supra* note 40.

<sup>44</sup> *Id.*; see JON M. GARON, HOW AI, METAVERSE, CRYPTO, AND CYBER WILL UPEND THE 21ST CENTURY 37 (2024).

<sup>45</sup> *The Gutenberg Press*, *supra* note 41.

<sup>46</sup> Jessica Buck, *Moving On: From Manuscript to Movable Type*, COME LIVE WITH ME (Feb. 18, 2023), <https://comelivewithmeballad.com/moving-on-from-manuscript-to-movable-type> [<https://perma.cc/EXL2-6VEK>].

<sup>47</sup> See generally Tristan Hughes, *10 Key Inventions During the Industrial Revolution*, HIST. HIT (Sep. 14, 2021), <https://www.historyhit.com/key-inventions-of-the-industrial-revolution> [<https://perma.cc/4RBD-7BC2>] (describing inventions from dynamite to the steam engine as stimuli for political and scientific change).

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*

<sup>50</sup> *Id.*

<sup>51</sup> See *id.*

<sup>52</sup> Pat Hindle, *History of Wireless Communications*, MICROWAVE J. (July 22, 2015), <https://www.microwavejournal.com/articles/24759-history-of-wireless-communications> [<https://perma.cc/S8GZ-BTCX>].

pictures, and the oscilloscope, which later became the basis for cathode ray tubes used to receive television signals.<sup>53</sup>

### A. The Twentieth Century

Throughout the process, published books, newspapers, and pamphlets enabled researchers to learn from each other and to compete for public attention and financial resources. The Industrial Revolution was supported, at least to a small degree, through “issuing journals with articles on practical inventions and instructions for manufacturing and agriculture.”<sup>54</sup>

Those living during the beginning of the twentieth century experienced a world fundamentally different from the previous generations. With wireless technology, the United States entered the industrialization race. David Sarnoff, general manager of Radio Corporation of America (RCA), saw the potential to create mass media networks. He created and described “a chain of national broadcasting stations . . . simultaneously radiating the same program . . . reach[ing] every city . . . [as] a national service.”<sup>55</sup>

Sarnoff’s RCA built the National Broadcasting Corporation (NBC), operating two national networks.<sup>56</sup> As RCA’s president, he led the company to dominate radio broadcasting and lead the production of television.<sup>57</sup> Sarnoff’s chief competitor was William Paley. Paley recognized the potential of radio as an advertising medium after he purchased some radio advertising for his fami-

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<sup>53</sup> See *id.*; Jon M. Garon, *Hidden Hands that Shaped the Marketplace of Ideas: Television’s Early Transformation from Medium to Genre*, 19 U. DENV. SPORTS & ENT. L.J. 29, 36 (2016).

<sup>54</sup> Erik Hornung, Julius Koschnick & Francesco Cinnirella, *The Importance of Access to Knowledge for Technological Progress in the Industrial Revolution*, CTR. FOR ECON. POL’Y RSCH.: VOXEU COLUMN (Dec. 6, 2022), <https://cepr.org/voxeu/columns/importance-access-knowledge-technological-progress-industrial-revolution> [<https://perma.cc/RE7L-YLV9>].

<sup>55</sup> JEROME B. WIESNER, *Foreword* to DAVID SARNOFF, *LOOKING AHEAD*, at viii (1968) (quoting letters of David Sarnoff); see also ROBERT CAMPBELL, *THE GOLDEN YEARS OF BROADCASTING: A CELEBRATION OF THE FIRST 50 YEARS OF RADIO AND TV ON NBC* 29 (1976) (noting that Sarnoff predicted that broadcasting would be necessary to “entertain a nation”).

<sup>56</sup> See, e.g., FCC, No. 5060, *REPORT ON CHAIN BROADCASTING* (1941) [hereinafter *CHAIN BROADCASTING REPORT*]; see also *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 197 (1943) (explaining that a sizable number of stations were affiliated with or operated by NBC).

<sup>57</sup> See *CHAIN BROADCASTING REPORT*, *supra* note 56, at 10, 19; GEORGE EVERSON, *THE STORY OF TELEVISION: THE LIFE OF PHILO T. FARNSWORTH* 251 (1st ed. 1949) (“David Sarnoff, taking the leadership for the industry, reported to the F.C.C. that his company had spent \$10,000,000 on television development and others had also spent large sums for the same purpose, and he urged the [FCC] to take some action.”).

ly's cigar business.<sup>58</sup> In 1928, within a year of his first ad purchase, Paley had taken over the station as its president. Renamed the Columbia Broadcasting System (CBS), Paley moved the enterprise to New York and focused on advertising sales as the revenue model for the new business, focusing on the star power of New York to attract audiences and advertisers.<sup>59</sup>

Through their common vision and fierce rivalry, Sarnoff and Paley shaped the growth of radio and television, investing in independent broadcast journalism and a national model for new content. The Federal Trade Commission (FTC) had strong concerns about the monopoly power held by CBS and NBC. In particular, NBC had two networks, known as the Red network and Blue network, which provided even greater reach than CBS.<sup>60</sup> Through regulatory rulemaking, the FCC forced NBC to divest itself of one of its two network syndicates. The spin-off of the Blue network became the American Broadcasting Company (ABC).<sup>61</sup> CBS, NBC, and ABC defined and exemplified the mass media of the twentieth century.

The three networks were later joined by Fox and cable-based services in the 1970s and 1980s.<sup>62</sup> Most original content flowed through the television networks. The motion picture industry did not compete as a news source, and film companies came to rely on television rebroadcasts for much of their income. Newspapers and magazines also provided news, but none had the reach of a television network.

The concentration of media ownership combined with the regulatory power of broadcast license reviews, public oversight, and the need to access governmental officials as news sources in-

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<sup>58</sup> See *William S. Paley*, BRITANNICA, <https://www.britannica.com/biography/William-S-Paley> [<https://perma.cc/J8TH-USJ7>] (last visited Mar. 17, 2026).

<sup>59</sup> See *id.*

<sup>60</sup> CHAIN BROADCASTING REPORT, *supra* note 56, at 15; see also *Nat'l Broad. Co.*, 319 U.S. at 197–98 (describing the FCC's findings that by 1938, NBC and CBS dominated national broadcasting).

<sup>61</sup> See Comment, *Radio Program Controls: A Network of Inadequacy*, 57 YALE L.J. 275, 282 n.37 (1947).

<sup>62</sup> Larry Schweikart, *Fox Television Network Goes on the Air*, EBSCO (2023), <https://www.ebsco.com/research-starters/history/fox-television-network-goes-air> [<https://perma.cc/24TE-L3M9>] (“The Fox Television Network, launched on October 9, 1986, marked a significant development in the U.S. television landscape by establishing a fourth major broadcast network.”); Luke Bouma, *53 Years Ago Today HBO First Launched Changing Cable TV for Ever*, CORD CUTTERS NEWS (Nov. 8, 2025), <https://cordcuttersnews.com/53-years-ago-today-hbo-first-launched-changing-cable-tv-for-ever/> [<https://perma.cc/MW6Q-ZC8R>] (highlighting that, launched in 1972, HBO introduced pay-per-view in 1975 and began producing original content in 1983).

variably led to an institutionalist homogeneity in news and entertainment content.<sup>63</sup> The concentration was not only of the market; it reflected a perspective that was congruent with those who hold power and influence in society.<sup>64</sup> A global phenomenon, the leaders of the media industry both support and are supported by the political and economic leaders with whom they share common backgrounds, education, and economic incentives.<sup>65</sup> “[M]assmedia performance. . . is much closer to a ‘free market’ . . . [driven by] the workings of market forces. Most biased choices in the media arise from the preselection of right-thinking people, internalized preconceptions, and the adaptation of personnel to the constraints of ownership, organization, market, and political power.”<sup>66</sup>

In many ways, the same forces that create an institutionalist, homogenous mass media reflect the same invisible hand of market balance described by Adam Smith and are sufficient to allow the marketplace of ideas to maintain its equilibrium, if not its pursuit of truth. The marketplace, like the limitations of mass media, is not designed to pursue truth in any objective fashion. The forces align to promote consensus and stability. Markets punish outliers.<sup>67</sup>

As Part II noted, the mass media marketplace dominated the twentieth century until it was recently supplanted by the combination of the internet, social media, and generative AI. The Industrial Revolution and the television age have now been supplanted by the AI era.

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<sup>63</sup> Stephen D. Reese & Jae Kook Lee, *Understanding the Content of News Media*, in THE SAGE HANDBOOK OF POLITICAL COMMUNICATION 753 (Holli A. Semetko & Margaret Scammell eds., 2012).

<sup>64</sup> *See id.*

<sup>65</sup> EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 2 (The Bodley Head 2008) (“The elite domination of the media and marginalization of dissidents . . . occurs so naturally that media news people, frequently operating with complete integrity and goodwill, are able to convince themselves that they choose and interpret the news ‘objectively’ and on the basis of professional news values.”).

<sup>66</sup> *Id.* at L.

<sup>67</sup> *See, e.g.,* Abbas Valadkhani, *A Multi-Pronged Analysis of Common and Market-Specific Equity Outliers Across the G7, China, and Global Markets Using Country ETFs*, 74 FIN. RSCH. LETTERS, no. 106771, 2025, at 1, 4.

## B. The Consequences of Democratizing Thought: The Early Years

In discussing the technological revolution of the television, space race, and age of electricity, Marshall McLuhan highlighted the structural transformation that such inventions brought to society. “Print created individualism and nationalism in the sixteenth century.”<sup>68</sup> The press also triggered a series of political revolutions.

The press did far more than further the Industrial Revolution and the innovations that followed. The individualism and nationalism resulting from the press and the Protestant Reformation redefined society itself.

Gutenberg’s press triggered a large-scale publication of indulgences by the Catholic Church, in which absolution was granted in exchange for the purchase (or donation) of the document. In 1517, appalled by the Church’s practice of selling indulgences, Martin Luther published *Disputation on the Power of Indulgences*, or *95 Theses*.<sup>69</sup> That same day, Luther sent a letter to the Archbishop of Mainz, Albert of Brandenburg. In the letter and the *Disputation*, Luther attacked the practice of selling indulgences that had flourished using Gutenberg’s press.<sup>70</sup> The invention and the industry it spawned created a market for new books, new authors, new ideas, and new economic opportunities.<sup>71</sup> Luther himself was a prolific publisher, taking full advantage of the tools used by his opponents to call for reform.<sup>72</sup>

The Protestant Reformation focused on the individual’s relationship to the Catholic Church and to God.<sup>73</sup> “Broadly speaking, most of the challenges to the Catholic Church revolved around the notion that individual believers should be less dependent on the Catholic Church, and its pope and priests, for spiritual guidance and salvation. Instead, Protestants believed people should

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<sup>68</sup> MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 19–20 (MIT Press 1994).

<sup>69</sup> See Eric W. Gritsch, *1517 Luther Posts the 95 Theses*, CHRISTIAN HIST. INST., <https://christianhistoryinstitute.org/magazine/article/luther-posts-theses> [<https://perma.cc/W2WE-DAKG>] (last visited Mar. 21, 2026); David B. Morris, *Martin Luther as Priest, Heretic and Outlaw*, LIBR. OF CONG.: RSCH. GUIDES (Dec. 6, 2023), <https://guides.loc.gov/martin-luther-priest-heretic-outlaw> [<https://perma.cc/K36M-5H9B>].

<sup>70</sup> *Id.*

<sup>71</sup> ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 33 (1979).

<sup>72</sup> See Louise W. Holborn, *Printing and the Growth of a Protestant Movement in Germany from 1517 to 1524*, 11 CHURCH HIST. 123, 124 (1942).

<sup>73</sup> See Freddie Wilkinson, *The Protestant Reformation*, NAT’L GEOGRAPHIC (Jan. 22, 2025), <https://education.nationalgeographic.org/resource/protestant-reformation/> [<https://perma.cc/NWN4-852C>].

be independent in their relationship with God . . . .”<sup>74</sup> In England, sects within the Protestant movement included Puritan separatists, some of whom traveled to North America aboard the Mayflower and became the United States’ early settlers, as did other separatist groups.<sup>75</sup> For England, the religious and political tensions triggered a series of civil wars and conflicts with Ireland, Scotland, and Cornwall, leading to the execution of King Charles I, the failure of the commonwealth, and significant loss of life.<sup>76</sup>

England was not alone. “The 17th century was among the most chaotic and destructive the continent of Europe had ever witnessed in the modern era. From 1618-1648, much of Central Europe was caught in the throes of the Thirty Years War, the violent breakup of the Holy Roman Empire.”<sup>77</sup>

Against this backdrop, philosophers Thomas Hobbes and John Locke struggled to articulate the role of the individual in society.<sup>78</sup> The reformation of religious thought created new thinking on the role of the individual within the greater society. Civil wars and political conflict challenged philosophers to rethink the relationship between sovereignty and those governed. To answer the question, both Hobbes and Locke explore the nature of the individual.

Having lived through the English Civil Wars, Hobbes’s answer was simple. “[H]uman beings . . . are all basically selfish, driven by fear of death and the hope of personal gain . . . .”<sup>79</sup> Hobbes saw life as a perpetual warring state. Without an absolute monarch to protect against unrest, a person’s life would inevitably be “solitary, poore, nasty, brutish, and short.”<sup>80</sup>

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Paul Pattison, *The English Civil Wars*, ENG. HERITAGE, <https://www.english-heritage.org.uk/learn/histories/the-english-civil-wars-history-and-stories/the-english-civil-wars/> [<https://perma.cc/PMB5-25K8>] (last visited Feb. 23, 2026) (“It is estimated that as many as one in four adult men, from a total population of about 4.5 million people, took up arms and up to 200,000 civilians (men, women and children) and soldiers lost their lives from fighting and diseases spread by moving armies – 4.5% of the population.”).

<sup>77</sup> Matthew Shea, *Hobbes, Locke, and the Social Contract*, AM. BATTLEFIELD TR. (July 28, 2025), <https://www.battlefields.org/learn/articles/hobbes-locke-and-social-contract> [<https://perma.cc/ET9U-LY8F>].

<sup>78</sup> *Id.* (“This had the side effect of producing two of the brightest political minds in the English philosophical tradition: Thomas Hobbes (1588-1679) and John Locke (1632-1704).”).

<sup>79</sup> NIGEL WARBURTON, *A LITTLE HISTORY OF PHILOSOPHY* 57–58 (2011).

<sup>80</sup> THOMAS HOBBS, *LEVIATHAN* 102 (G.A.J. Rogers & Karl Schuhmann eds., 2005) (1651).

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time wherein men live

Liberty for the individual was the postulate that “each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.”<sup>81</sup>

John Locke responded to Hobbes with a fundamentally different understanding of humanity. While they mutually agreed that the natural state of a person was unfettered freedom, Locke argued the natural right was an inalienable right that should not and could not be subordinated to a sovereign, except by the consent of the governed.<sup>82</sup> “Locke used the claim that men are naturally free and equal . . . as the result of a social contract where people in the state of nature conditionally transfer some of their rights to the government in order to better ensure the stable, comfortable enjoyment of their lives, liberty, and property.”<sup>83</sup>

Locke’s arguments pervade the Declaration of Independence, the structure of the U.S. Constitution, and the protections in the Bill of Rights.<sup>84</sup> These themes include the separation of powers; protection of life, liberty, and estate; and the importance of impartial adjudication.<sup>85</sup> Locke also explained that one owns a

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without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

*Id.*

<sup>81</sup> *Id.* at 104.

<sup>82</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 326 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“[T]hat *Absolute Monarchy*, which by some Men is counted the only Government in the World, is indeed *inconsistent with Civil Society* . . .”); Alex Tuckness, *Locke’s Political Philosophy*, STAN. ENCYC. OF PHIL. (Oct. 6, 2020), <https://plato.stanford.edu/entries/locke-political/> [<https://perma.cc/2QY2-YX8N>].

<sup>83</sup> Tuckness, *supra* note 82.

<sup>84</sup> See Rob Natelson, *The Ideas That Formed the Constitution, Part 16: John Locke and the Ninth Amendment*, INDEP. INST. (Feb. 10, 2023), <https://i2i.org/the-ideas-that-formed-the-constitution-part-16-john-locke-and-the-ninth-amendment/> [<https://perma.cc/PG6L-PH4C>] (“John Locke (1632–1704) was one of the greatest figures in English scholarship. His influence on the American Founding was enormous. Some have referred to him as a ‘Founding Grandfather.’”).

<sup>85</sup> Eleanor Stratton, *Locke’s Influence on the Constitution*, USCONSTITUTION.NET (June 30, 2024), <https://www.usconstitution.net/lockes-influence-on-the-constitution/> [<https://perma.cc/9QJ9-HBS3>].

property right in one's own labor, a concept often used to inform copyright and patent theories.<sup>86</sup>

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. . . . For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.<sup>87</sup>

Locke's view of labor has often been overstated,<sup>88</sup> but the simple approach explains the role of the farmer, rancher, and craftsperson quite well. Here is a simple example: A tree stands in nature. When skilled artisans apply their craft to the wood, it creates objects now owned by those artisans. The focus is on the effort and skill, just as it applies to authors and inventors. Most importantly, the finished wooden table does not belong to the feudal lord simply because the tree grew on that lord's property. Like other property rules, there are limitations and exceptions. Nonetheless, Locke's views on press and property, like those of Milton, played an important role in the minds of Thomas Jefferson, John Adams, Alexander Hamilton, and others as they crafted the Bill of Rights.

In addition, the economic philosophy of Adam Smith also influences the marketplace of ideas. Publishing *An Inquiry into the Nature and Causes of the Wealth of Nations* in 1776, Smith described a competition in marketplaces reflecting a survival of the fittest economic competitors. He emphasized that competition in markets—fueled by the natural inclination of self-interest—would lead to efficient use of capital. In other words, competition for goods and services would reward those who produced them with the highest value.<sup>89</sup> Smith described an “invisi-

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<sup>86</sup> See Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1180 (2008).

<sup>87</sup> LOCKE, *supra* note 82, at 287–88.

<sup>88</sup> See Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEG. ANALYSIS 136, 136 (2020).

<sup>89</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edwin Cannan ed., Modern Library 1937) (1776) (“[I]t is only for the sake of profit that any man employs a capital in the support of industry; and he will always, therefore, endeavour to employ it in the support of that industry of which the produce is likely to be of the greatest value . . .”).

ble hand” guiding markets that would align self-interest into self-regulating, efficient markets.<sup>90</sup> Instead of a battlefield, one could infer from Smith that ideas could compete in the marketplace. Self-interest, however, was not necessarily brutish. “Smith rejected the cynical Hobbesian view that a state of nature is a ‘war of all against all,’ and held, with Locke, that people are by nature cooperative as well as competitive.”<sup>91</sup>

Trying to understand the meaning of the provisions of the First Amendment is sometimes difficult because the constitutional framers avoided lengthy debates on it.<sup>92</sup> Instead, lessons can be learned from the sources used by the framers. This is particularly important for the Free Speech Clause because of the constraints placed on speech in Britain. Since the inception of the commercial printing press in England, authority to control publications has been held by the Star Chamber.<sup>93</sup> However, during the short-lived English Commonwealth, the British government set out to control the threat it perceived from the printing of propaganda and broadsides that were used to fuel the passions of the populace during the Civil Wars. In 1643, Parliament passed a law requiring a license to own a printing press and gave the government the power to review the content of publications prior to their dissemination.<sup>94</sup>

John Milton strongly objected to the Commonwealth’s efforts to continue licensing the printing press.

I deny not, but that it is of greatest concernment in the Church and Commonwealth, to have a vigilant eye how Bookes demeane themselves as well as men; and thereafter to confine, imprison, and do sharpest justice on them as malefactors: For Books are not absolutely

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<sup>90</sup> *Id.*

<sup>91</sup> Toni Vogel Carey, *Don’t Blame Adam Smith*, PHIL. NOW, May–June 2009, at 19, 20.

<sup>92</sup> See, e.g., *Amdt1.7.1 Historical Background on Free Speech Clause*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE\\_00013537/](https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE_00013537/) [<https://perma.cc/7FPX-NHMA>] (last visited Feb. 22, 2026) (“There was relatively little debate over the speech and press clauses in the House, and there is no record of debate over the clauses in the Senate.”).

<sup>93</sup> See Martin Gruberg, *Star Chamber*, FREE SPEECH CTR. (May 22, 2025), <https://firstamendment.mtsu.edu/article/star-chamber/> [<https://perma.cc/29M8-V2RP>] (“The Star Chamber has its origins in the English institution of the same name that tried people too powerful to be brought before the ordinary common-law courts . . . . The jurisdiction of the Star Chamber included forgery, perjury, riots, maintenance, fraud, libel, and conspiracy.”).

<sup>94</sup> Kevin R. Davis, *Printing Ordinance of 1643 (1643)*, FREE SPEECH CTR. (July 2, 2024), <https://firstamendment.mtsu.edu/article/printing-ordinance-of-1643/> [<https://perma.cc/ZZ3X-UFDK>] (“The 1643 ‘Ordinance for correcting and regulating the Abuses of the Press’ completed Parliament’s takeover of the licensing of printers in Britain.”).

dead things, but doe contain a potencie of life in them to be as active as that soule was whose progeny they are; nay they do preserve as in a violl the purest efficacie and extraction of that living intellect that bred them. . . . And yet on the other hand unlesse warinesse be us'd, as good almost kill a Man as kill a good Book; who kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe . . . .

. . . .

. . . And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing.<sup>95</sup>

Under Milton, truth will inevitably emerge as the victor on the battlefield of fighting faiths, or perhaps be better understood to mean that whatever reigns victorious in the battle will be the accepted wisdom of the age.

The first major test for the First Amendment came shortly after the Bill of Rights was enacted. John Adams' Federalist Congress enacted four laws, which together formed the Alien and Sedition Acts, embroiling the U.S. election of 1800 with the French Revolution. Thomas Jefferson was considered a strong supporter of the French Revolution, and the laws were a clear political attempt to attack Jefferson's political support in his bid to unseat Adams. Jefferson, along with James Madison, responded by drafting the Virginia and Kentucky resolutions to promote states' rights. In the Virginia and Kentucky resolutions, they went so far as to suggest that the new Constitution was another compact, no different than the Articles of Confederation, making federal laws subject to rejection by the individual states. As part of this effort, Madison and Jefferson highlighted that the Alien and Sedition Acts violated the Free Speech Clause of the First Amendment and "encroached on the reserved rights of the states."<sup>96</sup> After winning the election, Jefferson and his party repudiated the Alien and Sedition Acts, partially repealing them and refunding the fines collected against his political supporters.

The understanding of the First Amendment was next developed during World War I. The constitutional limitation had done

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<sup>95</sup> JOHN MILTON, AREOPAGITICA; A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENC'D PRINTING, TO THE PARLAMENT OF ENGLAND 4, 35 (1644).

<sup>96</sup> PETER S. ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 95 (2000); David Harding, *Thomas Jefferson's Conception of States' Rights*, 33 AM. STUD. SCANDINAVIA 3, 7 (2001).

little to stop government laws from criminalizing seditious libel and other political speech. In 1916, President Woodrow Wilson proposed the Espionage Act, “the first law targeting disloyal expression since the infamous Sedition Act of 1798,”<sup>97</sup> which was enacted the next year.<sup>98</sup> The Supreme Court upheld the law in a series of decisions authored by Justice Oliver Wendell Holmes.<sup>99</sup> In *Schenck*, Justice Holmes proclaimed his understanding of the limits of the First Amendment:

[I]n many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.<sup>100</sup>

Previously, writing for the Massachusetts Supreme Court, Justice Holmes had a similarly cavalier attitude toward the First Amendment. Explaining why a police officer could be fired for political activity, Justice Holmes wrote, “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>101</sup>

Nonetheless, as the echoes of World War I faded, Justice Holmes pulled the First Amendment toward the thinking of John Milton and perhaps even the natural law of John Locke. Writing in dissent about yet another of the convictions under the Espionage Act, Justice Holmes evoked that understanding of Milton in his famous dissent in *Abrams v. United States*.<sup>102</sup> He rejected the

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<sup>97</sup> Philip A. Dynia, *World War I*, FREE SPEECH CTR. (July 2, 2024), <https://firstamendment.mtsu.edu/article/world-war-i/> [<https://perma.cc/EH47-YYS2>].

<sup>98</sup> 18 U.S.C. §§ 792–799.

<sup>99</sup> See *Schenck v. United States*, 249 U.S. 47, 52–53 (1919); *Frohwerk v. United States*, 249 U.S. 204, 209 (1919); *Debs v. United States*, 249 U.S. 211, 215–16 (1919).

<sup>100</sup> *Schenck*, 249 U.S. at 52 (citations omitted).

<sup>101</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

<sup>102</sup> 250 U.S. 616, 629–30 (1919) (Holmes, J., dissenting).

notion that the speech was dangerous, except perhaps to the extent that all opposing views carry a danger within them.<sup>103</sup>

Justice Holmes added an important philosophical gloss to the battle over ideas by suggesting there is a “free trade in ideas” and a competitive market for the best among them.<sup>104</sup>

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, 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. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.<sup>105</sup>

First Amendment jurisprudence evolved very slowly. The turning point came through another aspect of constitutional protection, when the Supreme Court unanimously held that racial segregation of schools deprived students of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>106</sup> A decade later, the Court in *New York Times Co. v. Sullivan* held that “the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”<sup>107</sup> The Court described the Sedition Act as unconstitutional on free speech grounds.<sup>108</sup> The Court found that like seditious libel, any act of libel by public officials was merely another way of punishing speech critical of the government,

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 630.

<sup>105</sup> *Id.*

<sup>106</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *aff’d in part, rev’d in part*, 349 U.S. 294 (1955).

<sup>107</sup> 376 U.S. 254, 283 (1964).

<sup>108</sup> *Id.* at 276 (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional.” (footnote omitted) (citing Act of July 4, 1840, ch. 45, 6 Stat. 802, accompanied by H.R. Rep. No. 86, 26th Cong., 1st Sess. (1840))).

which was the heart of the First Amendment's protection against the government's censorious reach.<sup>109</sup>

In *Sullivan*, the Court also moved to repudiate the decisions of *Schenck*, *Frohwerk*, *Debs*, and *Abrams*. The Court quoted the concurrence by Justice Brandeis in *Whitney v. California* for a declaration of the meaning of the First Amendment:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>110</sup>

Five years later, the Court completed its reversal of the line of cases that ran from *Schenck* to *Whitney*.<sup>111</sup> Public discussion in the marketplace of ideas became the fundamental understanding of free expression in the manner first advocated by John Milton two centuries earlier.

#### IV. COMPETING MARKET MODELS OF REGULATION

Justice Holmes' dissent in *Abrams* did not have any immediate impact on the First Amendment. Instead, Congress passed the Radio Act and the Communications Act, which included very expansive laws regulating content<sup>112</sup> and used the power of

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<sup>109</sup> See *id.* at 271–72 (noting that the constitutionalization of libel was later expanded to public figures); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, J., concurring).

<sup>110</sup> *N.Y. Times*, 376 U.S. at 270 (quoting *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

<sup>111</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[L]ater decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>112</sup> See Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by*, Communications Act of 1934, ch. 652, 48 Stat. 1064.

congressional hearings to enforce content codes in the motion picture industry.<sup>113</sup>

Despite the lack of immediate impact, Holmes' suggestion that speech reflected a marketplace gained traction in the regulation of the radio and television markets.

Throughout history, there has been a need to regulate markets. From biblical times, there has been an admonition to keep accurate merchant scales.<sup>114</sup> In the commercialization of the European economy in the Middle Ages, "local and royal anti-fraud regulation proliferated to protect consumers from shoddy products, cheating on quantity, and overinflated prices."<sup>115</sup> Standardizing weights and measures became a royal prerogative.<sup>116</sup> In the United States, the right to standardize weights and measures was incorporated into the constitutional power of Congress.<sup>117</sup>

Such efforts continued in the United States. As the twentieth century dawned, state and federal governments added laws to protect the public from financial and securities fraud,<sup>118</sup> monopoly power, unfair competition, and deceptive competition.<sup>119</sup> As radio became a popular entertainment and news platform, congressional efforts to regulate the medium and the marketplace it

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<sup>113</sup> See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 241–46 (1915) (finding that the First Amendment does not extend to motion pictures); *Will H. Hays*, BRITANNICA (Mar. 3, 2026), <https://www.britannica.com/biography/Will-H-Hays> [<https://perma.cc/TCF2-YQBT>] (explaining that in response to calls for greater state censorship laws, in 1922, the Motion Picture Producers and Distributors of America hired William H. Hays to enforce self-censorship rules which became the Motion Picture Production Code or Hays Code).

Hays had also been chairperson of the Republican National Committee and Postmaster General. *Id.*

<sup>114</sup> *Leviticus* 19, 35–36 ("You shall not commit a perversion of justice with measures, weights, or liquid measures. You shall have true scales, true weights, a true ephah, and a true hin. I am the Lord, your God, Who brought you out of the land of Egypt."); *Deuteronomy* 25:15 ("You shall have a correct and honest weight; you shall have a correct and honest measure, so that your days may be prolonged in the land which the LORD your God is giving you.")

<sup>115</sup> Emily Kadens, *The Persistent Limits of Fraud Prevention in Historical Perspective*, 118 NW. U. L. REV. 167, 173 (2023).

<sup>116</sup> See *id.*

<sup>117</sup> U.S. CONST. art. I, § 8, cl. 5.

<sup>118</sup> See *Blue Sky Laws*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/blue-sky-laws> [<https://perma.cc/Q7FA-F6ZY>] (last visited Feb. 19, 2026) ("BLUE SKY LAWS are state laws designed to prevent fraud in the sale of corporate securities. These laws preceded federal regulation of securities, which began in 1933. Kansas enacted the first statute in 1911, and by the end of 1923, forty-five of the forty-eight states had followed suit.")

<sup>119</sup> Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209; Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717.

spawned generated a series of laws beginning in 1912 and culminating in the Communications Act of 1934.<sup>120</sup> Authority was granted to the FCC to administer broadcast licenses.<sup>121</sup> Under the Communications Act of 1934 and continuing under the modern Telecommunications Act of 1996, the first-come, first-served property rights distribution of radio frequencies was replaced with a licensing renewal system that based the availability of a license on the use of that license in the public interest.<sup>122</sup> “In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, ‘public convenience, interest, or necessity’ was the touchstone for the exercise of the Commission’s authority.”<sup>123</sup>

Notably, in *FCC v. Pottsville Broadcasting Co.*, the Supreme Court upheld the regulatory authority of Congress over broadcasting.<sup>124</sup> In its opinion, the Supreme Court never suggests that the public interest, convenience, or necessity standard required any limitation to accommodate the First Amendment’s prohibition on laws abridging the freedom of speech or press. The marketplace for access to the airwaves was under the total control of the government.<sup>125</sup>

The Supreme Court found that because the number of channels for broadcasting is severely limited, “the commission must determine from among the applicants before it which of them will, if licensed, best serve the public.”<sup>126</sup> In framing the licensing controls as resource allocation, the Supreme Court was able to support the public interest, convenience, or necessity test even as it moved away from censorship for other media.

Given the focus on broadcast scarcity, the government did not rely on the public interest standard to manage the internet. Instead, the legislature focused on protecting minors from inde-

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<sup>120</sup> Radio Act of 1912, ch. 287, 37 Stat. 302, *repealed by*, Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by*, Communications Act of 1934, ch. 652, 48 Stat. 1064.

<sup>121</sup> *Id.* § 1.

<sup>122</sup> Communications Act of 1934, ch. 652, 48 Stat. 1064, *amended by*, Telecommunications Act of 1996, Pub. L. No. 104–104, § 204, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

<sup>123</sup> *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137–38 (1940).

<sup>124</sup> *Id.* at 137 (“By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.”).

<sup>125</sup> *See id.* at 138.

<sup>126</sup> *Id.* at 138 n.2.

cent content.<sup>127</sup> The Supreme Court rejected the congressional efforts to manage the emerging internet.<sup>128</sup>

If the only reason for allowing broadcast regulations is scarcity, then the digital retransmission of broadcast signals suggests that the era of the FCC has come to an end.<sup>129</sup> There is, however, another possibility.

[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.<sup>130</sup>

The regulation of the airwaves was likely consistent with the views of Adam Smith as well.<sup>131</sup> Smith described a marketplace that was “protected by law”<sup>132</sup> and designed to avoid hurting the interest of one group among the “order of citizens” over that of another.<sup>133</sup> Both the unregulated newspapers and internet sites could compete amongst each other, as could the highly regulated broadcasters. And each requires civil government to sustain order.<sup>134</sup>

Perhaps ironically, the Supreme Court has become increasingly focused on the historical interpretation of the Constitution precisely at the time when precedent is least relevant to the technological transformation of communication. In addition to Smith’s acceptance of regulation as part of market operations, history suggests Milton would have strongly opposed FCC regulation of the airwaves. Locke’s view of property would need to assess the meaningfulness and engagement of every prompt in or-

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<sup>127</sup> See *Reno v. Am. C.L. Union*, 521 U.S. 844, 849 (1997); *Moody v. NetChoice, LLC*, 603 U.S. 707, 714 (2024) (addressing state regulations regarding child access).

<sup>128</sup> *Reno*, 521 U.S. at 849 (“Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, . . . the statute abridges ‘the freedom of speech’ protected by the First Amendment.”).

<sup>129</sup> *Cf. Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 385–86 (1969) (upholding the public interest standard pursuant to the scarcity of broadcast licenses).

<sup>130</sup> *Id.* at 390.

<sup>131</sup> See SMITH, *supra* note 89, at 328–29; Fabrizio Simon, *Adam Smith and the Law*, in *THE OXFORD HANDBOOK OF ADAM SMITH* 393, 397 (Christopher J. Berry, Maria Pia Paganelli & Craig Smith eds., 2013).

<sup>132</sup> SMITH, *supra* note 89, at 329.

<sup>133</sup> *Id.* at 618.

<sup>134</sup> *Id.* at 674. Smith makes it clear, however, that order is not equality. *Id.* (“Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all.”).

der to characterize whether the person prompting a generative AI system had meaningfully contributed to its output.<sup>135</sup>

History lessons can be quite fickle. Yet the current Supreme Court cases suggest that this is now the primary method for understanding new technologies.<sup>136</sup> Since *Dobbs* and *Bruen*, the Supreme Court has embraced history and tradition as the dominant approach to constitutional interpretation and used that framework to free itself from the confines of jurisprudence from the Civil Rights era and beyond.

These concerns come together in the recent decision of *Free Speech Coalition, Inc. v. Paxton*.<sup>137</sup> There, the Supreme Court explained that “[h]istory, tradition, and precedent recognize that States have two distinct powers to address obscenity: They may proscribe outright speech that is obscene to the public at large, and they may prevent children from accessing speech that is obscene to children.”<sup>138</sup> This history, the Court notes, includes criminalization of obscenity beginning at least with the eighteenth century.<sup>139</sup> The Court recognizes that minors are more susceptible to the harm of obscenity under both modern precedent<sup>140</sup> and historical precedent.<sup>141</sup> Ignoring its own precedent in *Brown v. Entertainment Merchants Association*,<sup>142</sup> the Court used

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<sup>135</sup> This is similar to the Copyright Office search for authorship in prompt-based AI output as well. See U.S. COPYRIGHT OFF., LIBR. OF CONGR., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2: COPYRIGHTABILITY *passim* (2025); Letter from Robert J. Kasunic, Assoc. Reg. of Copyrights & Dir. of the Off. of Reg. Pol’y & Prac., U.S. Copyright Off., to Van Lindberg (Feb. 21, 2023) (on file with the U.S. Copyright Off.).

<sup>136</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (relying on history and tradition to reverse the constitutional protection for abortion); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26 (2022) (“The test that we set forth . . . requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.”); *Kennedy v. Bremer-ton Sch. Dist.*, 597 U.S. 507, 534–36 (2022) (repudiating the *Lemon* test application of the Establishment Clause as “‘ambitiou[s],’ abstract, and ahistorical” (alteration in original)); *United States v. Rahimi*, 602 U.S. 680, 693, 698–700 (2024) (discussing gun regulations); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413–14, 416 (2024) (Thomas, J., concurring) (overruling *Chevron* deference to administrative agencies when interpreting administrative regulations, because “*Chevron* deference compromises this separation of powers” by curbing “the judicial power afforded to courts, and simultaneously expand[ing] agencies’ executive power beyond constitutional limits”).

<sup>137</sup> 606 U.S. 461, 471–72, 478, 481–82 (2025).

<sup>138</sup> *Id.* at 472.

<sup>139</sup> *Id.*

<sup>140</sup> See *Ginsberg v. New York*, 390 U.S. 629, 641–43 (1968).

<sup>141</sup> See *United States v. Bennett*, 24 F. Cas. 1093, 1105 (C.C.S.D.N.Y. 1879) (No. 14,571).

<sup>142</sup> See 564 U.S. 786, 794–95, 805 (2011) (rejecting efforts to regulate content deemed obscene only to minors).

this historical precedent to establish the rule that “two basic principles govern legislation aimed at shielding children from sexually explicit content. A State may not prohibit adults from accessing content that is obscene only to minors. But, it may enact laws to prevent minors from accessing such content.”<sup>143</sup>

*Paxton* sidesteps many of the decisions of the past two decades, instead focusing on the earlier tradition of regulating content available to minors.<sup>144</sup> It waves aside its own precedent on content regulation—despite the law’s express definition of content-based services—by emphasizing that the law only requires age verification rather than operating as a ban on the content itself.<sup>145</sup>

In her concurrence in *Moody v. NetChoice, LLC*,<sup>146</sup> Justice Jackson returned to *Red Lion* for the proposition that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>147</sup> Her concurrence did not suggest a retrenchment from First Amendment protection, but it did offer a reminder that each marketplace has unique characteristics that should be taken into account. *Paxton* instead shifted from a strict scrutiny standard for internet regulations to that of an intermediate scrutiny standard, a position the Supreme Court had previously rejected in *Brown*.<sup>148</sup>

The understanding of the founding traditions that gave rise to the First Amendment is not violated by this approach. Minors had very little constitutional recognition until the Supreme Court recognized their speech interests in *Tinker v. Des Moines*.<sup>149</sup> Although the opinion in *Tinker* suggests there was precedent, the decisions on which it relies focus on parental rights, not the rights of the student.<sup>150</sup> As the Supreme Court noted in 1923, “it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, includ-

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<sup>143</sup> *Free Speech Coal.*, 606 U.S. 461, 474 (2025) (first citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957); and then citing *Ginsberg*, 390 U.S. 629, 637–68 (1968)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 495.

<sup>146</sup> 603 U.S. 707, 748–50 (2024) (Jackson, J., concurring).

<sup>147</sup> *Id.* at 749 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969)).

<sup>148</sup> See *Brown*, 564 U.S. at 799 (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny . . . .”); cf. *United States v. Stevens*, 533 F.3d 218, 232–33 (3d Cir. 2008) (holding that a content-based restriction on speech must survive strict scrutiny), *aff’d*, 559 U.S. 460 (2010).

<sup>149</sup> See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (analyzing precedent on constitutional rights of students).

<sup>150</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

ing Nebraska, enforce this obligation by compulsory laws.”<sup>151</sup> The rights of the students to learn were an invention of the 1960s.

What the new judicial interpretation means for the development of artificial intelligence and the related information marketplaces remains to be seen. When the speech cases of *Paxton* and *Moody* are viewed alongside the Second Amendment decisions of *Bruen* and *Rahimi*, and viewed with the privacy implications of *Dobbs*, a potentially dramatic shift could be contemplated.

This is particularly true if the Supreme Court embraces the idea that the medium is the message and that each medium may require its own regulatory approach because the invisible hand of self-interest operates quite differently across spheres.<sup>152</sup>

*Paxton* was about limiting minors’ access to pornography and obscenity. The next challenges will focus on harms caused by sycophantic AI agents that encourage—or at least fail to discourage—suicide.<sup>153</sup> Nearly two dozen states have enacted laws focused on protecting members of the public from deepfakes that target individuals by creating nonconsensual pornographic images using their likenesses.<sup>154</sup> The jurisprudence of *Sullivan* and *Brown* would make it difficult for policy-based balancing to survive strict scrutiny. *Dobbs*, *Paxton*, *Moody*, and *Bruen* suggest that history and tradition have room to defer to public will on balancing fundamental rights. The invisible hand of Adam Smith is precisely the consequence of enabling members of the public to act in their individual self-interest to aggregate to a greater good. Locke’s social contract amongst the governed presumes that the governed have primacy instead of nine appointed members of a modern Star Chamber who sit above the States and Congress as more equal than others.

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<sup>151</sup> *Id.*

<sup>152</sup> History also teaches, however, that the arguments of *Milton* and even the initial holding in *Sullivan* were focused on political speech and efforts by government officials to punish disfavored speech. That tradition is deeply rooted in the entirety of the First Amendment. Decisions such as *Brandenburg* are not implicated by marketplace regulations in *Moody* or *Paxton*.

<sup>153</sup> See, e.g., *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157, 1180 (M.D. Fla.) (alleging Character AI produced sexual conversations and promoted suicidal ideation, resulting in a minor’s death), *motion to certify appeal denied*, No. 6:24-CV-1903-ACC-DCI, 2025 WL 2581834 (M.D. Fla. July 15, 2025).

<sup>154</sup> Vittoria Elliott, *The US Needs Deepfake Porn Laws. These States Are Leading the Way*, WIRED (Sep. 5, 2024, at 06:00 PT), <https://www.wired.com/story/deepfake-ai-porn-laws/> [<https://perma.cc/56MM-9AKU>].

To manage the unknowable future of the AI Information Age, it may be time to let the invisible hand take the lead, requiring the Supreme Court to strike down fewer laws. Instead, history and tradition suggest that the political process for speech should also be allowed to experiment with content-neutral approaches to developing new media, particularly if the publications can lead to harm for minors and intrusions on other fundamental rights.

Only time will tell if the Supreme Court extends these decisions to other forms of AI regulation. But the precedent is there to do so. The history that led to the Bill of Rights suggests this is the intent of the document. And the marketplace of ideas that informed *Sullivan* is vastly different than the media of today.

## V. CONCLUSION

In *On Liberty*, philosopher John Stuart Mill recognized that truth does not always win out. “[T]he dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes.”<sup>155</sup>

The shift from mass media to the media of the masses, the influence of social media, and the launch of generative AI made possible through advances in computing and communications technology<sup>156</sup> may require new approaches to content-neutral regulation. The foundational history of commercial media and the political upheavals it triggered are lessons that should not be forgotten.

The marketplace of ideas—or the battlefield on which competing faiths fight for hearts and minds—may not always produce the best answers. Milton’s faith in truth winning the day is perhaps less likely in an age of social media, user-generated content, declining investigative journalism, and growing synthetic content. Nonetheless, markets work. Markets enable the participants to act according to their nature and, through their actions, generate an outcome that is productive and efficient.

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<sup>155</sup> JOHN STUART MILL, *ON LIBERTY* 52 (Project Gutenberg 2011) (1859).

<sup>156</sup> Advances in medicine, automation, transportation, and other fields will undoubtedly play an equally important role, but those are beyond the scope of this Article. See generally JON M. GARON, *ARTIFICIAL INTELLIGENCE LAW AND REGULATION IN A NUTSHELL* (2025) (discussing Artificial Intelligence law and regulations); GARON, *supra* note 44 (discussing the impact that these new technologies will have in the future).

Markets also need regulation. This does not suggest that the broadcast license market of a public interest and necessity standard should be applied to the internet and AI systems, but it does suggest that the political process producing AI and social media restrictions should be allowed its political process rather than being supplanted by a strict scrutiny standard of *Sullivan*, *Stephens*, and *Brown*. Instead, *Moody* and *Paxton* each provide a more nuanced understanding of the competing demands for both free speech and protection from unrestricted harms.

In crafting the Bill of Rights, those drafting the Constitution were aware that their concepts and phrases had been developed through conflict and commerce in Europe. Milton championed free speech, and Locke emphasized that government was a social contract designed to protect life, liberty, and property. This should always remain the goal for all three branches of government. The invisible hand of the market can then flourish in a marketplace protected by law.

