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SAVING THE MARKETPLACE FROM MARKET FAILURE: REORIENTING MARKETPLACE THEORY IN THE ERA OF AI COMMUNICATORS

Jared Schroeder*

Artificially Intelligent (AI) communicators represent a new type of actor within public discourse. These entities have played influential roles in recent elections in the U.S. and Europe.¹ This Article examines expression rights for AI actors through the lenses provided by the foundational assumptions of the marketplace of ideas theory and existing free-expression-related rationales regarding non-human actors in the U.S. and European legal systems. The Article contends that the fundamental assumptions of the marketplace model must be revised to focus on the flow of information, the *development* of truth, rather than the more Enlightenment-oriented competition of ideas that leads to the *discovery* of truth. Such a shift would allow limitations on AI that harm the flow of ideas, but otherwise protect AI expression that contributes to democratic discourse.

INTRODUCTION

Artificially intelligent communicators represent a fundamentally new type of actor within public discourse. Such actors—algorithms, AI agents, chatbots—are conveying significant amounts of information in virtual spaces, as well as making decisions about the information citizens do and do not encounter.² Importantly, when it comes to how we rationalize freedom of expression, these actors simply were not on the minds of those who provided the foundational assumptions upon which we have come to build our understandings of democratic discourse.³ Just the same, AI communicators

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¹ See *infra* note 9 and accompanying text.

² See Efrat Nechushtai & Seth C. Lewis, *What Kind of News Gatekeepers Do We Want Machines To Be? Filter Bubbles, Fragmentation, and the Normative Dimensions of Algorithmic Recommendations*, 90 *COMPUTERS HUM. BEHAV.* 298, 298–99 (2019); Brian Resnick, *Yes, Artificial Intelligence Can Be Racist*, *VOX* (Jan. 24, 2019), <https://www.vox.com/science-and-health/2019/1/23/18194717/alexandria-ocasio-cortez-ai-bias> [<https://perma.cc/8UH9-BT4W>]; Stefan Wojcik, *5 Things to Know About Bots on Twitter*, *PEW RES. CTR.* (Apr. 9, 2018), <https://www.pewresearch.org/fact-tank/2018/04/09/5-things-to-know-about-bots-on-twitter> [<https://perma.cc/A7CL-WVK9>].

³ For examples of the types of concerns that were on the minds of the thinkers who significantly influenced U.S. and European thought during formative periods, see JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION*

have arrived as part of the Fourth Wave of networked communication, a wave that is defined by increasingly meaningful interactions between humans and computer programs.⁴ Our existing theoretical and legal models are relatively unprepared for how these AI actors, which are characterized by fundamentally different natures and characteristics than human communicators, influence societal discourse.⁵ This concern has been particularly important since the 2016 United States presidential election, as computer programs of varying complexity have been used to leverage the non-physical, largely anonymous nature of online communication to increase the frequency and salience of certain ideas.⁶ This concern, along with others, strikes at the heart of marketplace theory, a tool that the U.S. Supreme Court has used to rationalize expansive protections for free expression for a century and European courts have, at times, turned to as well.⁷ AI actors, which also capitalize on the significant fragmentation and polarization that comes with the choice-rich nature of information and weaker ties that individuals share online, can flood virtual spaces with certain information and ideas, communicate threatening and hateful speech, and exploit and mislead those who receive their messages.⁸ While human actors engage in these same behaviors in virtual spaces, legal systems throughout the world have yet to resolve whether AI entities, which vary significantly in complexity and purpose, should receive the same or similar freedom of expression safeguards as humans.

9–10 (J.W. Gough ed., 1948); JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* 50 (George H. Sabine ed., 1951); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 16 (G.D.H. Cole trans., 1950).

⁴ Web 1.0 was characterized by massive information searchability and availability. Web 2.0 included social media and widespread creation of user-created content. Web 3.0 involved growing intrinsic relationships between information and knowledge. See Sareh Aghaei et al., *Evolution of the World Wide Web: From Web 1.0 to Web 4.0*, 3 *INT’L J. WEB & SEMANTIC TECH.* 1, 1 (2012); Nupur Choudhury, *World Wide Web and Its Journey from Web 1.0 to Web 4.0*, 5 *INT’L J. COMPUTER SCI. & INFO. TECHS.* 8096, 8099 (2014).

⁵ See Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 *NW. U.L. REV.* 1169, 1171–72 (2016); see also Brian R. Duffy, *Fundamental Issues in Social Robotics*, 6 *INT’L REV. INFORMATIONAL ETHICS* 31, 32–34 (2006).

⁶ See Alessandro Bessi & Emilio Ferrara, *Social Bots Distort the 2016 U.S. Presidential Election Online Discussion*, *FIRST MONDAY*, Nov. 2016, at 10–11; Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 *J. DEMOCRACY* 63, 70 (2017).

⁷ For examples of the marketplace theory’s role in U.S. decisions, see *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 339–40 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring). For examples regarding the theory’s use in ECtHR decisions, see *Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. 321, <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/8U5J-5KVG>]; *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 375, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/27NM-XN9U>].

⁸ See Helen Norton, *Robotic Speakers and Human Listeners*, 41 *SEATTLE U. L. REV.* 1145, 1147–48 (2018); Tim Wu, *Is the First Amendment Obsolete?*, *KNIGHT FIRST AMEND. INST.* (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [<https://perma.cc/7NDG-BGJQ>].

From involving themselves in political conversations during recent elections in France, the United Kingdom, and the United States,⁹ to discussions regarding school shootings in the United States, debates about the release of political documents, and terror attacks in London,¹⁰ more and more complex computer programs are contributing important facts, advocating on behalf of the interests of those who programmed them, and interjecting false and misleading information into human interactions in virtual spaces.¹¹ In the final days of the French presidential election in May 2017, for example, bot-based Twitter accounts blasted out tens of thousands of negative messages about centrist candidate Emmanuel Macron.¹² Just one of these accounts produced nearly 1,700 tweets about the French election in twenty-four hours, highlighting crucial concerns when it comes to how we understand AI communicators.¹³ First, they are a fundamentally global concern, with out-of-state actors often

⁹ See Khatya Chhor, *As French Media Went Dark, Bots and Far-Right Activists Drove #MacronLeaks*, FRANCE24 (last modified Sept. 5, 2017), <https://www.france24.com/en/20170508-french-media-blackout-bots-far-right-activists-wikileaks-pushed-macronleaks> [<https://perma.cc/9K43-DDMW>]; Bence Kollanyi et al., *Bots and Automation over Twitter During the U.S. Election*, PROJECT ON COMPUTATIONAL PROPAGANDA (Nov. 17, 2016), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2016/11/Data-Memo-US-Election.pdf> [<https://perma.cc/6UDK-6MCX>]; Edward Malnick & Gordon Rayner, *Exclusive: Labour Election Campaign Boosted by Fake Twitter Accounts*, TELEGRAPH (June 1, 2017, 10:00 PM), <https://www.telegraph.co.uk/news/2017/06/01/exclusive-labour-election-campaign-boosted-fake-twitter-accounts/> [<https://perma.cc/N7ST-AMMC>].

¹⁰ See Hayley Dixon, *Russian Bot Behind False Claim Muslim Woman Ignored Victims of Westminster Terror Attack*, TELEGRAPH (Nov. 13, 2017, 6:04 PM), <https://www.telegraph.co.uk/news/2017/11/13/russian-bot-behind-false-claim-muslim-woman-ignored-victims/> [<https://perma.cc/6LRB-RL68>]; Erin Griffith, *Pro-Gun Russian Bots Flood Twitter After Parkland Shooting*, WIRED (Feb. 15, 2018, 2:00 PM), <https://www.wired.com/story/pro-gun-russian-bots-flood-twitter-after-parkland-shooting/> [<https://perma.cc/H72D-9RZ3>]; Molly K. McKew, *How Twitter Bots and Trump Fans Made #ReleaseTheMemo Go Viral*, POLITICO (Feb. 4, 2018), <https://www.politico.com/magazine/story/2018/02/04/trump-twitter-russians-release-the-memo-216935> [<https://perma.cc/KM8Q-6PWQ>]; David Z. Morris, *Trolls and Bots Moved Fast to Politicize Texas School Shooting on Social Media*, FORTUNE (May 19, 2018), <https://fortune.com/2018/05/19/santa-fe-shooting-trolls-bots-conspiracy-theory/> [<https://perma.cc/9S83-ZZ2K>].

¹¹ See Gabe O'Connor & Avie Schneider, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election> [<https://perma.cc/5EXD-SVWQ>]; Samuel Woolley & Phil Howard, *Bots Unite to Automate the Presidential Election*, WIRED (May 15, 2016, 7:00 AM), <https://www.wired.com/2016/05/twitterbots-2/> [<https://perma.cc/C6VD-R5P9>]. For examples of political bots, see Every Trump-ette (@everytrumpette), TWITTER, <https://twitter.com/everytrumpette> [<https://perma.cc/53AP-9D3J>] (last visited Feb. 24, 2020); Erowid Sarah Palin (@SarowidPalinUSA), TWITTER, <https://twitter.com/SarowidPalinUSA> [<https://perma.cc/YMT5-4MMJ>] (last visited Feb. 24, 2020).

¹² See Chhor, *supra* note 9.

¹³ Daniel Politi, *American Alt-Right and Twitter Bots Are Key to Spreading French Election Hack*, SLATE (May 6, 2017, 5:45 PM), <https://slate.com/news-and-politics/2017/05/ameri>

deploying AI communicators in efforts to influence democratic processes in certain nations.¹⁴ Second, these entities often manipulate the marketplace of ideas by artificially boosting certain ideas that might otherwise fail to gain traction or acceptance and, at the same time, pushing other, human-generated ideas, from the marketplace.¹⁵ In this sense, the AI communicators have come to exploit and exacerbate fundamental problems that scholars have long identified regarding the information marketplace as Enlightenment thinkers such as John Milton and John Locke conceived it, and how it has been interpreted as a theory of the First Amendment in the United States and, to a lesser extent, employed by European courts.¹⁶ Finally, the courts in both the European and United States legal systems appear ill-prepared to consistently apply existing, human-communicator-focused precedent and legal understandings to AI actors that lack the characteristics that define the “human condition,” as thinker Hannah Arendt conceptualized it.¹⁷

These communicators do not labor or make decisions based on the inescapable knowledge of their own mortality. As Arendt explained, “Trust in the reality of life, on the contrary, depends almost exclusively on the intensity with which life is felt, on the impact with which it makes itself felt.”¹⁸ This emerging class of communicators does not function based on such a reality. They also do not sleep, vote, have families, grow tired of repeating messages, or become emotional. Of course, to simply state that they are not human and therefore ineligible for any kind of free expression safeguards oversimplifies the problem. Scholars have contended that AI actors, which in this Article is used as a blanket term that includes algorithms, AI agents, and chatbots,¹⁹ can contribute valuable information to democratic discourse.²⁰ It would also be a mistake to conclude that AI communicators are simply another tool that humans use to communicate, such as telephones or email accounts. While some AI communicators do little more than act as vehicles for human-created information, increasingly complex computer programs are taking part in human discourse, and prominent scholars within the robotics law field have concluded it would be a mistake to attribute all AI actors’ actions as extensions of their creators.²¹ As legal scholar Jack Balkin explained, “AI agents create problems for law because one cannot always predict what

can-alt-right-and-twitter-bots-are-key-to-spreading-french-election-hack.html [https://perma.cc/55CG-8TR4].

¹⁴ See, e.g., O’Connor & Schneider, *supra* note 11.

¹⁵ See *id.*; Woolley & Howard, *supra* note 11.

¹⁶ LOCKE, *supra* note 3, at 5–10; MILTON, *supra* note 3, at 45.

¹⁷ HANNAH ARENDT, *THE HUMAN CONDITION* 119–20 (1958).

¹⁸ *Id.* at 120.

¹⁹ Jack M. Balkin, Lecture, *The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L. J. 1217, 1219 (2017). Balkin drew these different iterations of computer programs that replicate human behavior together, reasoning that they represent similar concerns when it comes to the foundational laws that should govern them. *Id.*

²⁰ Norton, *supra* note 8, at 1145–46.

²¹ See Jack M. Balkin, *The Path of Robotics Law*, 6 CALIF. L. REV. 45, 52 (2015).

they will do when they interact with their environment.”²² Similarly, robotics law scholar Ryan Calo concluded, “We can see already how robots begin to blur the line between people and instrument, and how faulty assumptions about robots lead jurists to questionable or contradictory results.”²³ The European Parliament conveyed similar concerns in a 2017 resolution regarding recommendations from the Commission on Civil Law Rules on Robotics, stating:

[T]he more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc.); whereas this, in turn, questions whether the ordinary rules on liability are sufficient or whether it calls for new principles and rules to provide clarity on the legal liability of various actors concerning responsibility for the acts and omissions of robots where the cause cannot be traced back to a specific human actor²⁴

Thus, the growing complexity of AI communicators within democratic discourse raises questions about the extent to which the U.S. and European legal systems are prepared to handle the opaque realm that exists between computer programs that act as human tools, much like a megaphone, and AI that include some level of unpredictability and agency, such as bots that draw content from continuously changing pools of data or those that emulate human-like interactive experiences with the people who use them, such as the Lucia, a Spanish-speaking Facebook Messenger bot that was created in the fall of 2018 to help those who were in the immigrant caravan that was in Mexico and nearing the U.S. border.²⁵ As political-oriented bots generated about sixty percent of the discourse regarding the heavily politicized caravan on Twitter, Lucia engaged those seeking to navigate the U.S. immigration system in a conversation that was tailored to their responses.²⁶

Lucia highlights another challenge that legal systems face regarding safeguarding public discourse while at the same time protecting freedom of expression. AI

²² *Id.* at 51.

²³ Ryan Calo, *Robots in American Law* 5 (U. Wash. Sch. L., Res. Paper No. 2016-04, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737598 [<https://perma.cc/BE7W-GRH2>].

²⁴ European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, EUR. PARL. DOC. P8_TA(2017)0051, http://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html [<https://perma.cc/3DNJ-KBZG>] (last visited Feb. 24, 2020) [hereinafter European Parliament Resolution].

²⁵ See Jared Jaskot, *Introducing Lucia: A Chatbot for Asylum Seekers*, MEDIUM (Dec. 12, 2018), <https://chatbotslife.com/introducing-lucia-a-chatbot-for-asylum-seekers-28f7bb01a418> [<https://perma.cc/52HX-DK6E>].

²⁶ *Id.*; Issie Lapowsky, *Here’s How Much Bots Drive Conversation During News Events*, WIRED (Oct. 30, 2018, 2:00 PM), <https://www.wired.com/story/new-tool-shows-how-bots-drive-conversation-for-news-events/> [<https://perma.cc/KU84-4CZ6>].

communicators can contribute important information, a crucial ingredient to democratic discourse. The FOIA // Feed (@FOIAFeed), for example, is a Twitter bot run by the Freedom of the Press Foundation that tweets about reporting that incorporates data gathered using Freedom of Information Act requests.²⁷ Both the Athens and Frankfurt airports have Facebook Messenger–based bots that allow travelers to ask them questions and receive information about tickets, shops, and airport security.²⁸ Whatever their contributions, the presence of such non-human messengers within virtual spaces represents a substantial challenge to traditional legal systems regarding freedom of expression, particularly in Europe and the United States, where long-held constructs regarding the free flow of information in democratic society struggle to account for an emerging class of communicators that certainly convey information but, quite fundamentally, lack personhood.²⁹ For these and other reasons, the European and American legal systems provide foundational building blocks regarding how such communicators can be understood from a law and policy standpoint.³⁰ Their similarities and differences can be instructive as we consider an emerging concern that is fundamentally international in nature.

This Article examines the question of freedom of expression rights for AI actors through the lenses provided by existing U.S. and European free-expression precedents regarding non-human actors, as well as the marketplace of ideas theory. While several scholars are addressing this emerging concern—and coming to a variety of conclusions³¹—this Article draws together international and theoretical building blocks to contribute another potential approach to how such actors' rights can be understood. To be clear, the Article's foundational concerns relate with the question of how these legal systems, and others around the world, can safeguard the type of human interaction—the exchange of ideas and flow of information—that is fundamental to societal discourse from being overwhelmed and dominated by AI communicators, while at the same time protecting freedom of expression, which generally requires the government to remain clear of deciding who can and cannot communicate in most instances. In doing so, the Article explores legal rationales for freedom of expression rights for AI communicators, ultimately outlining a revised, artificial marketplace approach to conceptualizing the flow of information.

²⁷ FOIA // FEED (@FOIAFeed), TWITTER, <https://twitter.com/FOIAFeed> [<https://perma.cc/22NC-SAWC>] (last visited Feb. 24, 2020).

²⁸ Paul Sillers, *Robots, Chatbots and Augmented Reality: The Future of Travel and the Coolest Airport Tech*, INDEPENDENT (Sept. 24, 2017), <https://www.independent.co.uk/travel/news-and-advice/future-travel-airport-technology-hi-tech-chatbots-robots-augmented-reality-ai-a7961171.html> [<https://perma.cc/RMR7-P89E>].

²⁹ See, e.g., Norton, *supra* note 8, at 1150–51.

³⁰ See *id.* at 1149; see also European Parliament Resolution, *supra* note 24.

³¹ See generally Balkin, *supra* note 19; Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513 (2015); Ignacio N. Cofone, *Servers and Waiters: What Matters in the Law of A.I.*, 21 STAN. TECH. L. REV. 167 (2018); Norton, *supra* note 8; Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).

The Article consists of four parts: Part I defines artificial intelligence and considers the types of AI communicators that are involved in human discourse. It also explores the connective nature of virtual spaces. Part II examines the foundational assumptions of the marketplace of ideas theory, as well as discursive thought, a philosophical approach to freedom of expression in democratic society that is uniquely positioned to account for the collective and community-based properties of networked technologies and the AI communicators that have found homes in online spaces and are changing the way the marketplace of ideas functions. Part III considers how the European and American legal systems have handled questions regarding the rights of non-human communicators in the past and how international statements about freedom of expression might influence future decisions. Part IV concludes by drawing from these and other considerations to outline the artificial marketplace approach to understanding the rights of AI communicators.

I. AI COMMUNICATORS & VIRTUAL SPACES

AI and other non-human actors created by people, such as Frankenstein's monster, Maschinemensch in *Metropolis*, Hal from *2001: A Space Odyssey*, and the operating system in *Her*, have long captured human imaginations.³² In fact, Isaac Asimov's fictional, genre-defining "three fundamental Rules of Robotics" have played an outsized role in legal discussions about how we should understand questions about the rights of robots and computer programs.³³ Legal scholars have paid increasingly careful attention to robotics law in recent years.³⁴ They have done so as more human activities are automated, and online networked technologies—and the virtual environments they create—have provided ideal environments for computer programs to communicate with humans and to determine the information humans do and do not encounter.³⁵ Scholars within the robotics law field have considered a variety of concerns, such as civil and criminal liability for the physical or emotional harms such entities might create, or privacy and copyright questions that emerge in an era when computer

³² Jack Balkin uses fictitious characters as a starting point for his discussion of how we should understand AI rights. Balkin, *supra* note 19, at 1218–19. Similarly, John Weaver begins his book by discussing fictional works. JOHN FRANK WEAVER, *ROBOTS ARE PEOPLE TOO: HOW SIRI, GOOGLE CAR, AND ARTIFICIAL INTELLIGENCE WILL FORCE US TO CHANGE OUR LAWS* 3–5 (2014). Both Balkin and Gabriel Hallevy start their discussions with Isaac Asimov's Three Laws of Robotics. Balkin, *supra* note 19, at 1217–18; Gabriel Hallevy, *The Criminal Liability of Artificial Intelligence Entities—From Science Fiction to Legal Social Control*, 4 AKRON INTELL. PROP. J. 171, 172–73 (2010); see ISAAC ASIMOV, I, ROBOT 37 (1950).

³³ ASIMOV, *supra* note 32, at 37 (1. "[A] robot may not injure a human being, or, through inaction, allow a human being to come to harm." 2. "[A] robot must obey the orders given it by human beings except where such orders would conflict with the First Law." 3. "[A] robot must protect its own existence as long as such protection does not conflict with the First or Second Laws.").

³⁴ See generally Calo, *supra* note 31; Cofone, *supra* note 31; Norton, *supra* note 8.

³⁵ See, e.g., Lapowsky, *supra* note 26; Sillers, *supra* note 28.

programs are scraping information and creating new works.³⁶ This Article focuses on rights and freedoms for AI actors, rather than the types of question that arise when these entities break existing laws. Addressing the question of free expression for AI requires that we establish the nature of such communicators and the networked environments in which they engage with people.

A. Definitions

The term “artificial intelligence” was coined during a conference that was organized by Defense Advanced Research Projects Agency (DARPA) and conducted at Dartmouth College in the summer of 1956.³⁷ Those who proposed the conference, including Claude Shannon, contended “that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it.”³⁸ In the ensuing decades, scholars have defined AI as systems that can think and act rationally in ways that mirror human behavior and intelligence.³⁹ This Article uses AI as a term that engulfs computer programs that have the capacity to take action in their environment, algorithms, and machine learning tools. While these terms certainly can be distinguished from one another, the central concern of this Article is how computer-based, non-human actors are influencing human relationships, community, and discourse, as well as how we should conceptualize their nature and the extent to which they can communicate freely in democratic society. Thus, AI, for present purposes, refers to computer-based communicators, including algorithms, AI agents, and chatbots.

U.S. and European courts have done little to guide efforts to agree upon distinct legal definitions for AI and related technologies. When the courts have referred to AI, they have primarily done so in reference to algorithms, computer programs that filter online content or sift through data to return search results.⁴⁰ Computer scientists Stuart Russell and Peter Norvig characterized AI systems as being on a spectrum from weak to strong, concluding that strong systems can replicate human-like consciousness, while weaker systems are limited to merely executing programmed

³⁶ See, e.g., WEAVER, *supra* note 32, at 4; Hallevy, *supra* note 32, at 177; David C. Vladeck, Essay, *Machines Without Principals: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117, 120 (2014).

³⁷ *Artificial Intelligence*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/artificial-intelligence/> [<https://perma.cc/22LP-59H6>] (last visited Feb. 24, 2020).

³⁸ J. McCarthy et al., *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence* (Aug. 31, 1955), <http://jmc.stanford.edu/articles/dartmouth/dartmouth.pdf> [<https://perma.cc/2KQX-VAC5>].

³⁹ *Artificial Intelligence*, *supra* note 37.

⁴⁰ See, e.g., ACLU v. Gonzalez, 478 F. Supp. 2d 775, 789–90 (E.D. Pa. 2007); Langdon v. Google, Inc. 474 F. Supp. 2d 622, 627 (D. Del. 2007); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *1 (W.D. Okla. May 27, 2003); Am. Library Ass’n, Inc. v. United States, 201 F. Supp. 2d 401, 410 (E.D. Pa. 2002).

actions.⁴¹ Weak AI include Apple's Siri and Amazon's Alexa, which simply transcribe verbal requests for information by humans and then produce auditory versions of the search results.⁴² They represent a technological shift in the availability of information, but do not represent a dynamic AI entity that can replicate human actions or consciousness. Strong, or full, AI is more theoretical at this point, as no computer program has been able to fully implement the human brain or human actions.⁴³ Google's DeepMind, however, is working on numerous projects in which advanced algorithms learn to replicate limited aspects of human behavior, such as teaching itself how to excel at chess or predicting eye diseases and providing recommendations for treatment.⁴⁴ As far as communicators go, advanced chatbots, such as Mitsuku and Rose, have won the Loebner Prize for their ability to replicate human interaction to the extent that other humans have no idea whether they are communicating to with a person or a bot.⁴⁵ The potential applications for such communicators, from automating most commercial transactions to making political arguments that are triggered by the use of certain hashtags or keywords, have significant implications for discourse in society, even if they are limited in their ability to interact organically with others.⁴⁶ The implications are particularly important as AI actors become more nuanced and complex, and the nature of the virtual environments in which they encounter human communicators continue to change the way individuals communicate and understand both themselves and others.

B. The Nature of Virtual Spaces

The emergence of networked communication tools and the virtual realms for discourse that they create have led to substantial changes for human and AI entities. Most crucial among these changes, however, has been the emergence of a space in which the two can coexist within the same, virtual environment.⁴⁷ While human-like walking, talking robots—as seen in the movies—remain more imagination than reality,

⁴¹ STUART J. RUSSELL & PETER NORVIG, *ARTIFICIAL INTELLIGENCE: A MODERN APPROACH* 29 (1995).

⁴² *See id.*; Massaro & Norton, *supra* note 5, at 1192–93.

⁴³ Balkin, *supra* note 19, at 1220.

⁴⁴ David Silver et al., *A General Reinforcement Learning Algorithm that Masters Chess, Shogi, and Go Through Self-Play*, 362 *SCIENCE* 1140 (2018), <https://science.sciencemag.org/content/sci/362/6419/1140.full.pdf> [<https://perma.cc/HZ7X-T6S7>]; *Predicting Eye Disease with Moorfields Eye Hospital*, DEEPMIND: BLOG (Nov. 5, 2018), <https://deepmind.com/blog/article/predicting-eye-disease-moorfields> [<https://perma.cc/J6Q3-HRCL>].

⁴⁵ *Meet Mitsuku*, PANDORABOTS, <https://pandorabots.com/mitsuku/> [<https://perma.cc/G4AN-F4M7>] (last visited Feb. 24, 2020); *Rose*, BRILLIG UNDERSTANDING, INC., <http://brilligunderstanding.com/rosedemo.html> [<https://perma.cc/K7XG-6JNX>] (last visited Feb. 24, 2020).

⁴⁶ *See* Clive Thompson, *May A.I. Help You?*, N.Y. TIMES MAG. (Nov. 14, 2018), <https://www.nytimes.com/interactive/2018/11/14/magazine/tech-design-ai-chatbot.html> [<https://nyti.ms/2DkbKsu>].

⁴⁷ *See* Massaro & Norton, *supra* note 5, at 1170–71.

the relatively minimal entry requirements in virtual spaces allow computer programs, absent physical forms, to capitalize upon anonymity and lack of presence to engage with humans on a somewhat level playing field.⁴⁸ When combined, the introduction of human and non-human communicators into common, interconnected, and generally anonymous spaces is fundamentally changing the way democratic discourse occurs in the twenty-first century.⁴⁹ Crucially, the growing presence of AI entities in such spaces means that the influence of networked tools on discourse can no longer be considered without accounting for AI communicators. Networked technologies have substantially lowered the hurdles that once limited individuals—and AI entities—from communicating messages to audiences.⁵⁰

Discourse now takes place within a choice-rich, deeply fragmented environment.⁵¹ In such an environment, individuals can select the people, organizations, and sources of information with which they would like to interact, ultimately limiting the scope of potential ideas they encounter.⁵² Such a development has led individuals to construct intentional communities in which they surround themselves with generally like-minded individuals and sources of information that reinforce their pre-existing ideas.⁵³ Legal scholar Cass Sunstein explained that “[m]embers of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens, if they believe ‘fake news,’ or if they see one another as enemies or adversaries in some kind of war.”⁵⁴ Individuals in such environments generally can only become *more* extreme in their views, since they primarily encounter ideas that reinforce their existing beliefs and, conversely, few messages or individuals who present opposing perspectives.⁵⁵ Such a process of community formation and construction of realities is fundamentally different than how such information flowed and interactions occurred in preceding eras. Generally, in the twentieth century, traditional news organizations provided relatively similar sets of information to mass audiences.⁵⁶ Since

⁴⁸ See Persily, *supra* note 6, at 70.

⁴⁹ See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 17 (2008); SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* 11 (2011); Massaro & Norton, *supra* note 5, at 1172.

⁵⁰ See *supra* notes 27–28 and accompanying text.

⁵¹ SHIRKY, *supra* note 49, at 71–74; CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 44 (2007); Shanto Iyengar & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 59 J. COMM. 19, 20 (2009).

⁵² See MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 3 (2d ed. 2010); CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* 41–48 (2017).

⁵³ For network analysis of this phenomenon, see Itai Himelboim et al., *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-MEDIATED COMM. 154, 166–71 (2013).

⁵⁴ SUNSTEIN, *supra* note 52, at IX.

⁵⁵ See SUNSTEIN, *supra* note 51, at 76–77.

⁵⁶ See JARED SCHROEDER, *THE PRESS CLAUSE AND DIGITAL TECHNOLOGY’S FOURTH WAVE: MEDIA LAW AND THE SYMBIOTIC WEB* 69–70 (2018).

audiences had a limited range of sources from which to choose, citizens generally received relatively similar baselines of ideas from which to enter into interactions with others.⁵⁷ Furthermore, when individuals entered into discourse with others, they almost always had to be physically present, which brought with it certain dynamics that created social capital and strengthened the ties that bound individuals together in a community.⁵⁸

In this regard, networked communication scholars define a “tie” as a relationship “between communicators wherever they exchange or share resources such as goods, services, social support or information.”⁵⁹ People who have long-standing relationships in which they share ideas and communicate often maintain deeper bonds than those who do not.⁶⁰ Scholars have concluded that online interactions are inherently less likely to involve strong ties or the exchange of meaningful amounts of social capital between participants.⁶¹ This conclusion aligns with sociologist and psychologist Sherry Turkle’s conclusion that, “in person, we have access to the messages carried in the face, the voice, and the body. Online, we settle for simpler fare: We get our efficiency and our chance to edit, but we learn to ask questions that a return email can answer.”⁶² Thus, individuals not only have significant choice regarding the facts and *truths* they encounter in their intentionally formed communities, they also fundamentally do not form close relationships with others in virtual forums. The result of such an environment, one in which individuals within a society do not share common factual basis for interactions with others, is a sort of fragmented multiverse of public spheres. These shifts in human communication—how individuals communicate and form relationships—have opened the door for AI agents to succeed in having their messages accepted and shared within virtual communities.⁶³ In both the Brexit vote and the 2016 U.S. presidential election, for example, bots were found to be most influential when they reinforced existing opinions.⁶⁴

Within each fragmented, ideologically formed public sphere, the truths that emerge from interactions among individuals in that community might be substantially different than those in other online spaces. Therefore, in some communities, the *truth* is that former United States President Barack Obama was born in Kenya, while in others

⁵⁷ *See id.* at 70.

⁵⁸ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000).

⁵⁹ Caroline Haythornthwaite, *Strong, Weak, and Latent Ties and the Impact of New Media*, 18 INFO. SOC’Y 385, 386 (2002); *see also* PUTNAM, *supra* note 58, at 18–19.

⁶⁰ Haythornthwaite, *supra* note 59, at 386.

⁶¹ SHERRY TURKLE, *RECLAIMING CONVERSATION: THE POWER OF TALK IN A DIGITAL AGE* 23 (2015).

⁶² *Id.*

⁶³ *See id.*; Bessi & Ferrara, *supra* note 6.

⁶⁴ *See* Yuriy Gorodnichenko et al., *Social Media, Sentiment and Public Opinions: Evidence from #Brexit and #USElection* 3 (Nat’l Bureau Econ. Research, Working Paper No. 24631, 2018), <https://www.nber.org/papers/w24631.pdf> [<https://perma.cc/G2TJ-8X64>].

such a conclusion is preposterous.⁶⁵ The emergence and massive spread of persistently believed, yet directly conflicting realities such as these requires a different conceptualization of the flow of information and the nature of understanding in democratic society. In particular, the marketplace metaphor, which has dominated American understandings of freedom of expression for nearly a century and has historically been associated with European-founded Enlightenment understandings, must be reconsidered in light of the loss of shared realities and the fragmentation into communities of generally like-minded individuals.⁶⁶ While the marketplace theory is discussed in more detail later in the Article, it suffices at this point to conclude that we must consider a fundamentally different type of information marketplace in the twenty-first century.⁶⁷

This change in the flow of information has altered how people interact with others and AI communicators. Individuals are forming intentionally crafted personalities that are substantially influenced by the nature of the tools they use to communicate.⁶⁸ The relative anonymity and global nature of discourse in virtual spaces, along with the lack of strong bonds between individuals, is influencing how individuals choose to represent themselves.⁶⁹ While people are limited regarding self-representation in physical environments, virtual spaces present opportunities and challenges for identity formation and enactment. Communication scholar Zizi Papacharissi explained that “the individual must then engage in multiple mini performances that combine a variety of semiological references so as to produce a presentation of the self that makes sense to multiple audiences.”⁷⁰ Thus, while the lack of physical presence and the global nature of virtual spaces allow individuals to largely construct their identities online, the *form* of the tool also plays a role in stripping away nuance.⁷¹ Therefore, individuals limit the amount of subtlety in their messages as they seek to mitigate the potential for misunderstanding and to reach the different constituencies within their intentionally formed communities.⁷² The result is generally more strident, emboldened self-representations. Individuals trade the types of surgical, strategic efforts they might have made in a physical environment for more blunt projections of meaning to difficult-to-identify online audiences.⁷³

⁶⁵ Caitlin Oprysko, *Michelle Obama: 'I'd Never Forgive' Trump for Promoting Birther Conspiracy*, POLITICO (Nov. 9, 2018, 7:55 AM), <https://www.politico.com/story/2018/11/09/michelle-obama-trump-birther-978810> [<https://perma.cc/B7GN-J9PH>].

⁶⁶ See Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 COMM. L. & POL'Y 383, 426–30 (2016); see also *infra* Section II.B.

⁶⁷ See Schroeder, *supra* note 66, at 430.

⁶⁸ See, e.g., TURKLE, *supra* note 49, at 11.

⁶⁹ Zizi Papacharissi, *A Networked Self: Identity Performance and Sociability on Social Network Sites*, in FRONTIERS IN NEW MEDIA RESEARCH 207, 209 (Francis L.F. Lee et al. eds., 2013).

⁷⁰ See *id.* at 209.

⁷¹ See *id.*

⁷² See SCHROEDER, *supra* note 56, at 69–74.

⁷³ *Id.* at 69–70.

Each of these concerns—the choice-rich environment, human-relationship-limiting tools, fragmented virtual communities, limited bonds and social capital, and the intentional and limited nature of self-representation—all not only substantially influence human discourse, but enable AI communicators to thrive.⁷⁴ While AI entities that truly learn from experience and can interact with their environment, such as Google’s DeepMind project, are still being developed, computer-based communicators are becoming more and more adept at mimicking human communication.⁷⁵ The Cleverbot, a program that has been learning from its exchanges with humans for more than a decade, references more than 180 million lines of previous interactions each time it engages in a conversation.⁷⁶ The Picture Description Bot selects images from Wikimedia Commons and considers them using Microsoft’s Cognitive Services.⁷⁷ The service attempts to describe what is in the picture and then posts the image and description on Twitter (@picdescbot).⁷⁸ While the descriptions are correct as often as they are hilariously wrong, these types of communicators continue to develop human-like capabilities.⁷⁹ The lack of physical form, and the ways that individuals interact and create communities online, has opened the doors for AI communicators to easily integrate themselves into human discourse. While they might struggle to mimic the more intricate aspects of human behavior, the often blunt, ideologically focused messages humans share in their intentional communities online and the general lack of meaningful relationships allow such non-human communicators to fit into existing narratives and integrate themselves into human discourse.⁸⁰

C. AI and Political Discourse

Many AI communicators automatically post at certain times or are set up to respond to certain hashtags or key words.⁸¹ Such actors operate about 15% of Twitter’s

⁷⁴ See *id.* at 71.

⁷⁵ See Volodymyr Mnih et al., *Human-Level Control Through Deep Reinforcement Learning*, 518 NATURE 529, 529 (2015); see also, e.g., Microsoft Azure, *Cognitive Services*, <http://azure.microsoft.com/en-us/services/cognitive-services/> [<https://perma.cc/S9MG-3NSV>] (last visited Feb. 24, 2020).

⁷⁶ See Jennifer Hill et al., *Real Conversations With Artificial Intelligence: A Comparison Between Human–Human Online Conversations and Human–Chatbot Conversations*, 49 COMPUTERS HUM. BEHAV. 245, 245–50 (2015). See generally Cleverbot, Press Release, TURING TEST: The Bots Are Not Amused (June 11, 2014), <https://www.cleverbot.com/amused> [<https://perma.cc/W679-MSMV>].

⁷⁷ Picdescbot, *About This Bot*, TUMBLR, <https://picdescbot.tumblr.com/about> [<https://perma.cc/8CT7-3FMZ>] (last visited Feb. 24, 2020).

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ See, e.g., Hill et al., *supra* note 76, at 249.

⁸¹ See Sarah Kessler, *How Twitter Bots Fool You into Thinking They Are Real People*, FAST COMPANY (June 10, 2014), <https://www.fastcompany.com/3031500/how-twitter-bots-fool-you-into-thinking-they-are-real-people> [<https://perma.cc/LPS7-TV7Q>].

320 million active monthly users.⁸² Similarly, as many as 24 million of Instagram's 700 million accounts are run by non-human users.⁸³ During the most recent election in the United Kingdom, partisans created bots on Tinder, the dating and hook-up app, to strike up conversations with younger voters.⁸⁴ The bots communicated more than 30,000 messages, swiping "yes" on users and, if the other person swiped "yes" back, they engaged them in a discussion about the upcoming election rather than a conversation about getting together.⁸⁵ Several months beforehand, in November 2016, about one-quarter of all of the tweets about the United States presidential election were generated by bots.⁸⁶ In the aftermath of the November 2016 election and the Brexit referendum beforehand that June, a group of researchers suggested that bot activity on Twitter led to a 0.6% increase in votes for Trump and a 0.54% swing for "leave" votes in the Brexit referendum.⁸⁷ The authors emphasized that the AI communicators' impact was strengthened by the speed at which information travels online and the fragmented nature of online communities.⁸⁸ Many of the bots, in these instances and in matters that have since arisen, communicate false or misleading information.⁸⁹ The AI agents are especially impactful during politically charged events. AI communicators dominated online discussion of the immigrant caravan, which was central to the discourse during the run-up to the U.S. midterm elections in 2018.⁹⁰ In the week before the election, they accounted for 40 to 60% of the online discussion about the caravan.⁹¹ Of course, many of the human account holders who encountered the AI-authored messages had no idea that the ideas they were repeatedly encountering were not an example of widespread public support. They were, instead, artificially boosted ideas.

⁸² Michael Newberg, *As Many as 48 Million Twitter Accounts Aren't People, Says Study*, CNBC (Mar. 10, 2017), <https://www.cnn.com/2017/03/10/nearly-48-million-twitter-accounts-could-be-bots-says-study.html> [<https://perma.cc/3EGT-5VPQ>].

⁸³ Alexandra Ma, *Millions of Instagram Users Are Just Spambots*, HUFFPOST (July 2, 2015), http://www.huffpost.com/entry/instagram-spambot_n_7708550.html [<https://perma.cc/5BG8-E8H9>].

⁸⁴ Yara Rodrigues Fowler & Charlotte Goodman, *How Tinder Could Take Back the White House*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/opinion/how-tinder-could-take-back-the-white-house.html> [<https://perma.cc/G8XW-PX9S>].

⁸⁵ *Id.*; see also Robert Gorwa & Douglas Guilbeault, *Tinder Nightmares: The Promise and Peril of Political Bots*, WIRED UK (July 7, 2017), <http://www.wired.co.uk/article/tinder-political-bots-jeremy-corbyn-labour> [<https://perma.cc/MRJ9-K77R>].

⁸⁶ Kollanyi et al., *supra* note 9, at 4.

⁸⁷ Gorodnichenko et al., *supra* note 64, at 27.

⁸⁸ *Id.* at 1.

⁸⁹ See Bob Abeshouse, *Troll Factories, Bots and Fake News: Inside the Wild West of Social Media*, AL JAZEERA (Feb. 8, 2018), <https://www.aljazeera.com/blogs/americas/2018/02/troll-factories-bots-fake-news-wild-west-social-media-180207061815575.html> [<https://perma.cc/8NKKV-B7VA>].

⁹⁰ See Lapowsky, *supra* note 26.

⁹¹ *Id.*

Choice-rich virtual environments have created ideal spaces for AI communicators to reinforce the strongly held, and seldom-challenged, narratives that are found within fragmented, intentional communities and to mimic the self-representation approaches that are used by many human account holders. The bot-based activities in recent elections in France, the United Kingdom, and the United States, as well as evidence that foreign bots have engaged in issue-based campaigns, clearly illustrate that the combination of emerging AI communicators and the nature of virtual environments have raised substantial questions about the place of such entities within democratic discourse throughout the world.⁹²

II. THE MARKETPLACE AND DISCURSIVE THOUGHT

Questions regarding the rights of AI communicators almost inherently find themselves caught up in concerns about the flow of information and their potential influence on meaning making among citizens in democratic society. These entities lack the characteristics that have long been associated with being human, particularly in regard to conscience and empathy, but are endowed with the ability to share discourse-enabling information and to interact with humans. Thus, these entities bring the potential for significant interruption, and even market failure, into the flow of ideas and interactions among citizens in democratic society. Such a concern inherently relates to the marketplace of ideas theory of the First Amendment, the dominant justification for freedom of expression in the United States.⁹³ The theory assumes that in a relatively free communication environment, rational individuals are capable of discerning truth from falsity.⁹⁴ Thus, truthful ideas will succeed and false ideas will fail in the open market. The theory does not purely pertain to the United States legal system.⁹⁵ The European Court of Human Rights (ECtHR) has cited the theory in several freedom-of-expression-related decisions.⁹⁶ This Section examines the basic assumptions of marketplace theory and its shortcomings, which are particularly apparent when it comes to AI communicators. This Section furthermore considers how the theory has been used in ECtHR decisions before outlining the foundational assumptions of discourse theory and the approach's potential for reinvigorating marketplace theory in the twenty-first century.

⁹² See Abeshouse, *supra* note 89.

⁹³ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15 (1982).

⁹⁴ *Id.* at 15–16; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984); Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, 49 J. COMM. 151, 153 (1999).

⁹⁵ See, e.g., *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 430 n.2, 434, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/7ZM6-3SJK>].

⁹⁶ See, e.g., *Delfi AS v. Esotnia*, 2015-II Eur. Ct. H.R. 414, <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/DXF3-VFT6>]; *Taranenko v. Russia*, 2014-I Eur. Ct. H.R. 28, <http://hudoc.echr.coe.int/eng?i=001-142969> [<https://perma.cc/A5MT-J7AD>]; *Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 434; *Karatas v. Turkey*, 1999-IV Eur. Ct. H.R. 105, <http://hudoc.echr.coe.int/eng?i=001-58274> [<http://hudoc.echr.coe.int/eng?i=001-58274>].

A. *The Holmsian Marketplace*

Justice Oliver Wendell Holmes introduced the marketplace of ideas theory of the First Amendment in his dissent in *Abrams v. United States* in 1919.⁹⁷ Jacob Abrams and four other Russian immigrants who distributed leaflets in New York City to protest the U.S. military's actions on Russian soil toward the end of World War I were convicted of violating the Espionage Act of 1917.⁹⁸ The law, which was signed soon after the United States entered the war, criminalized any communication that could be understood as interfering with military operations, supported enemy activities, encouraged members of the military to be disloyal, or obstructed the draft.⁹⁹ Justice Holmes had written for a unanimous Court in three cases that were substantially similar to *Abrams* in the previous term, only eight months earlier, concluding in each case that the Espionage Act did not violate freedom of expression.¹⁰⁰ The Court came to the same conclusion in *Abrams*, but Justice Holmes, joined by Justice Louis Brandeis, dissented.¹⁰¹ In doing so, he constructed a much different argument.¹⁰² He explained,

[W]hen 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 market¹⁰³

He continued by concluding that his finding was “the theory of our Constitution.”¹⁰⁴ While it was a dozen more years before the Supreme Court struck down a law based on its interpretation of the First Amendment,¹⁰⁵ the dissent created a lasting rationale for freedom of expression.¹⁰⁶

Justice Holmes's dissent in *Abrams* was substantially based on his understanding of the nature of truth.¹⁰⁷ Importantly, however, his conclusions in this regard

⁹⁷ 250 U.S. 616, 630 (1919).

⁹⁸ *Id.* at 616–19.

⁹⁹ Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217.

¹⁰⁰ *Debs v. United States*, 249 U.S. 211, 212 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205–06 (1919); *Schenck v. United States*, 249 U.S. 47, 51–52 (1919).

¹⁰¹ *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting).

¹⁰² *Id.*

¹⁰³ *Id.* at 630.

¹⁰⁴ *Id.*

¹⁰⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam).

¹⁰⁶ See Howard C. Anawalt, *The Right to Communicate*, 13 DENV. J. INT'L L. & POL'Y 219, 227 (1984) (“Holmes states that there is a market place of ideas where all communications are free to circulate.”).

¹⁰⁷ See Paul L. Murphy & Patrick Gerry, *Opening Up the Marketplace to Free Trade in Ideas*, 14 L. & SOC. INQUIRY 415, 416 (1989).

were substantially different than the assumptions that have generally come to be associated with the theory. He did not believe in objective truth, a conclusion he communicated in many of his legal and personal writings. In a letter ten years after he wrote the *Abrams* dissent, he declared “[a]bsolute truth is a mirage.”¹⁰⁸ In another letter, this time in 1912, he explained to a friend that facts change and can only be taken for what they are at the moment they are needed.¹⁰⁹ Similarly, in his book, *The Common Law*, which was published early in his career in 1881, he explained that “[t]he life of the law has not been logic: it has been experience.”¹¹⁰ Ultimately, rather than an objective truth, Justice Holmes contended he was a “bettabilitarian,” a term he created to describe his belief that the best anyone can do when making a decision is to *bet* using the facts as they know that at the time and their personal experiences.¹¹¹ He also rejected those who claimed to have ownership of absolute truth, contending that such unmoving positions were what led the U.S. Civil War, in which he was shot on three different occasions.¹¹² In “Natural Law,” which was published a year before the *Abrams* dissent, he explained, “[W]hen differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.”¹¹³ Thus, the Holmsian marketplace, as introduced in *Abrams* and contextualized in his other legal and personal writings, contended that, since no one could know that absolute truth, the government should generally avoid limiting expression.¹¹⁴

B. The U.S. Supreme Court’s Marketplace

Since Justice Holmes’s use of the marketplace metaphor in 1919, the Supreme Court has consistently employed it as a tool to rationalize decisions to protect freedom of expression.¹¹⁵ Justices from a variety of ideological perspectives have used the metaphor and it has remained popular, particularly since the 1970s.¹¹⁶ Furthermore, justices have used the metaphor in nearly every area of First Amendment law, including prior

¹⁰⁸ THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 107 (Richard A. Posner ed., 1992).

¹⁰⁹ *Id.* at 7.

¹¹⁰ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Harv. Univ. Press 2009) (1881).

¹¹¹ Jared Schroeder, *The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth*, 7 BRIT. J. AM. LEGAL STUD. 169, 179–80 (2018).

¹¹² See LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 61–62 (2001).

¹¹³ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1919).

¹¹⁴ For a more detailed look at Justice Holmes’s understandings of truth and his personal, scholarly, and legal writings in that regard, see Schroeder, *supra* note 111, at 169–203.

¹¹⁵ W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 42 (1996).

¹¹⁶ *See id.*

restraint, defamation, commercial speech, and obscenity.¹¹⁷ Though Justices have never explicitly defined how they understand the marketplace of ideas and Justice Holmes's use of the marketplace in *Abrams* did not include any footnotes or in-text references to sources that might have influenced his decision and his intended meaning, the metaphor has come to be associated, by Justices and legal scholars, with Enlightenment-related assumptions about truth, the rationality of citizens, and the flow of information in society.¹¹⁸ Such a connection between Enlightenment thought and the marketplace of ideas can be seen in the Court's decision in *Red Lion Broadcasting v. FCC* in 1969.¹¹⁹ Justice Byron White, in writing for the Court in its decision to uphold the Fairness Doctrine, explained, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"¹²⁰ Importantly, Justice White's reasoning was constructed to rationalize upholding requirements that essentially forced broadcasters to allow a diversity of perspectives.¹²¹ In other words, the Court justified upholding the doctrine because Justices understood it as preserving the marketplace.¹²² Similarly, in 1953 in *United States v. Rumely*, which dealt with political activist Edward Rumely's fight with a House committee's demand that he provide the names of those who purchased his books in bulk, Justice William Douglas wrote, the "publisher bids for the minds of men in the market place of ideas. The aim of the historic struggle for a free press was 'to establish and preserve the right of the English people to full information'"¹²³ Justice Douglas characterized these conclusions as "the tradition behind the First Amendment."¹²⁴ In this sense, he associated the marketplace with the right to communicate and receive information.

The landmark 1974 defamation decision *Gertz v. Robert Welch, Inc.* indicates similar connections between truth, the First Amendment, and the marketplace rationale.¹²⁵ Justice Lewis Powell, in writing for the Court, explained, "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."¹²⁶ Finally, in relation to the Internet, Justice John Paul Stevens concluded the Court's 1997 decision in *Reno v. ACLU*, which established that online communication would receive significant First Amendment

¹¹⁷ Schroeder, *supra* note 66, at 384; *see, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); *Miller v. California*, 413 U.S. 15, 36 (1973).

¹¹⁸ *See* Donna L. Dickerson, <*Freedom of Expression*> and Cultural Meaning: An Analysis of Metaphors in Selected Supreme Court Texts, 1 COMM. L. & POL'Y 367, 368 (1996); Ingber, *supra* note 94, at 3; Napoli, *supra* note 94, at 155.

¹¹⁹ 395 U.S. 367, 390 (1969).

¹²⁰ *Id.*

¹²¹ *Id.* at 389–90.

¹²² *Id.*

¹²³ 345 U.S. 41, 56 (1953) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936)).

¹²⁴ *Id.*

¹²⁵ 418 U.S. 323 (1974).

¹²⁶ *Id.* at 339–40.

protection, with the finding that government regulation of online content “is more likely to interfere with the free exchange of ideas than to encourage it.”¹²⁷ He continued, “The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”¹²⁸

In each of these instances, the Justices communicated a concern for the flow of information and the danger of the government influencing the ideas that can and cannot be communicated in the marketplace of ideas.¹²⁹ In doing so, the Justices rationalized their uses of the marketplace metaphor with fundamental assumptions regarding Enlightenment thought. In particular, Enlightenment thought generally conceptualizes truth as being objective and universal, something that must be *found* rather than created.¹³⁰ It also assumes that individuals are generally rational and, given access to unfettered ideas, are capable of discerning truth from falsity.¹³¹ Such thinking can be seen in British philosopher and central Enlightenment figure John Milton’s conclusions in *Areopagitica* in 1644.¹³² Milton, in arguing against licensing requirements and censorship, concluded, “Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.”¹³³ He continued that, in an open contest, truth would vanquish falsity and limits on publication halt the pursuit of truth.¹³⁴ Nearly fifty years later, British thinker John Locke communicated similar ideas, explaining that truth and reason were gifts from God.¹³⁵ He found that human nature was governed by reason, which “teaches all mankind[] who will but consult it.”¹³⁶ Finally, Scottish thinker Adam Smith, whose ideas about the free market were published in *The Wealth of Nations* in 1776, connected Enlightenment assumptions about human rationality with economic decisions.¹³⁷ All of these influences can be seen in the ways that the Court has come to understand the marketplace approach. This is particularly

¹²⁷ 521 U.S. 844, 885 (1997).

¹²⁸ *Id.*

¹²⁹ See *Reno*, 521 U.S. at 886; *Gertz*, 418 U.S. at 339–40; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *United States v. Rumely*, 345 U.S. 41, 56–57 (1953) (Douglas, J., concurring).

¹³⁰ See GERALD F. GAUS, *CONTEMPORARY THEORIES OF LIBERALISM* 2–3 (2003); Fred S. Siebert, *The Libertarian Theory of the Press*, in *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO* 40 (Fred S. Siebert et al. eds., 1956).

¹³¹ Peter J. Gade, *Postmodernism, Uncertainty, and Journalism*, in *CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES* 64 (Wilson Lowrey & Peter J. Gade eds., 2011); Siebert, *supra* note 130, at 40–41.

¹³² See MILTON, *supra* note 3, at 45.

¹³³ *Id.*

¹³⁴ *Id.* at 50.

¹³⁵ LOCKE, *supra* note 3, at 5.

¹³⁶ *Id.* at 4.

¹³⁷ See 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 151 (London, 9th ed. 1799).

apparent in regard to Justices' assumptions about the nature of truth and the likelihood that truth will succeed and falsity will fail in a free exchange of ideas.¹³⁸

C. *The ECtHR and the Marketplace of Ideas*

Though the ECtHR has employed marketplace-related rationales for freedom of expression far less often than the U.S. Supreme Court, judges in several decisions have carefully considered and sought to apply the theory in article 10–related decisions.¹³⁹ In *Mouvement Raëlien Suisse v. Switzerland*, a 2012 ECtHR Grand Chamber judgment, judges narrowly upheld a Swiss administrator's right to reject a poster that sought to bring awareness to the Raelien Movement.¹⁴⁰ The poster read "The Message from Extraterrestrials" and included a phone number and website address.¹⁴¹ The group, as the Court outlined, believes in creating a superior genetic version of humanity and has been connected with pedophilia.¹⁴² The Movement contended that halting it from displaying its poster violated its article 10 rights under the ECHR.¹⁴³ The Grand Chamber upheld the limitations on the public display of the poster but, in its reasoning, contrasted public parks and billboards with online content.¹⁴⁴ The court reasoned, "If streets and parks of a city are the historical quintessential public fora, the Internet is today's global marketplace of ideas."¹⁴⁵ In doing so, the court indicated that different forums, online versus physical, should receive different levels of protection under article 10.¹⁴⁶ In two extensive footnotes that accompanied the reference, the court attributed the marketplace approach to Justice Holmes's dissent in *Abrams*, but went a step further, associating the theory not only with Enlightenment thought, including Milton's *Areopagitica*, but also with German thinker Jürgen Habermas, whose work (discussed later in this Article) operates using fundamentally different assumptions about truth and the flow of information.¹⁴⁷ Though the U.S. Supreme Court has repeatedly associated the marketplace with Enlightenment thought,¹⁴⁸ it has never

¹³⁸ See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 2889 [hereinafter ECHR]. This Article promises "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." *Id.* The second part of the Article, however, indicates that these safeguards come with "duties and responsibilities." *Id.* These "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society." *Id.*

¹⁴⁰ *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/7ZM6-3SJK>].

¹⁴¹ *Id.* at 382.

¹⁴² *Id.* at 382–83.

¹⁴³ *Id.* at 390.

¹⁴⁴ *Id.* at 434 (Pinto de Albuquerque, J., dissenting).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 434 & n.2.

¹⁴⁷ *Id.* at 430 n.2.

¹⁴⁸ See Dickerson, *supra* note 118, at 368.

connected it with more discursive ideas, such as those put forth by Habermas. Similarly in *Delfi v. Estonia*, a 2015 ruling by the Grand Chamber of the same court, justices concluded that despite Delfi's efforts to take down offensive comments that were made by users, a balance must be found between article 10's protections for expression and limiting immoral, hateful, and offensive expression.¹⁴⁹ In the final sentences of the dissent, judges drew together *Areopagitica* and the marketplace to caution lawmakers against using the case to support wider limitations on online expression.¹⁵⁰ The court explained that *Areopagitica* sought to convince Parliament "that licensing had no place in the free pursuit of truth. It argued that an unlicensed press would lead to a marketplace of ideas in which truth might prevail. It could not undo the bigotry of Parliament. We hope that it will have more success today."¹⁵¹

In four other cases that did not address online messages, jurists considered government efforts to limit potentially dangerous speech. In two cases from Turkey, the court found that the communicator's free expression rights were violated when officials limited their expression.¹⁵² In dissents in both cases, judges qualified the marketplace of ideas in contending not all speech should be protected.¹⁵³ In *Karatas v. Turkey*, a 1999 judgment that involved a Kurdish author's poetry, titled "The Song of Rebellion," dissenting judges explained, "Unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts"¹⁵⁴ Similarly, in *Sürek and Özdemir v. Turkey* five years earlier, two judges dissented when the court found government officials had violated the newspaper publishers' article 10 rights.¹⁵⁵ The dissenting judges contended the marketplace was reserved for peaceful expression, not threats of violence.¹⁵⁶ More recently, in *Taranenko v. Russia* in 2014, a protestor who contended her article 10 rights were violated after she was arrested for joining a group that occupied a government building in protest had her conviction upheld.¹⁵⁷

¹⁴⁹ *Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. 370, <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/DXF3-VFT6>].

¹⁵⁰ *Id.* at 413–14 (Sajo & Tsotsoria, J.J., dissenting).

¹⁵¹ *Id.* at 414.

¹⁵² See *Karatas v. Turkey*, 1999-IV Eur. Ct. H.R. 83, <http://hudoc.echr.coe.int/eng?i=001-58274> [<https://perma.cc/5WZU-JST2>]; *Sürek v. Turkey*, App. Nos. 23927/94 and 24277/94, Eur. Ct. H.R. 25–26 (1999), <http://hudoc.echr.coe.int/rus?i=001-58278> [<https://perma.cc/Q3RA-N27N>].

¹⁵³ *Karatas*, 1999-IV at 121 (Wildhaber, J.; Pastor Ridruejo, J.; Costa, J. & Baka, J., dissenting); *Sürek*, App. Nos. 23927/94 and 24277/94, at 44 (Wildhaber, J.; Kūris, J.; Stážnivká, J.; Baka, J. & Traja, J., dissenting).

¹⁵⁴ *Karatas*, 1999-IV at 121 (Wildhaber, J.; Pastor Ridruejo, J.; Costa, J. & Baka, J., dissenting).

¹⁵⁵ *Sürek*, App. Nos. 2397194 and 24277194, at 43 (Wildhaber, J.; Kūris, J.; Stážnivká, J.; Baka, J. & Traja, J., dissenting).

¹⁵⁶ See *id.* at 43–44.

¹⁵⁷ *Taranenko v. Russia*, 2014-I Eur. Ct. H.R. 1–2, 6, 20.

The court reasoned that “[e]xpression in the marketplace of ideas is only possible where no violence is incited, threatened or exerted. Where there is violence, there is no communication.”¹⁵⁸

In each of these instances, judges used marketplace theory to distinguish communication from violent action, something that is not a concern regarding AI agents in online environments. In the Internet-related cases—*Mouvement Raëlien Suisse* and *Delfi*—however, judges both associated the marketplace approach with Enlightenment ideas and used it to rationalize expansive protections for online expression.¹⁵⁹ These Enlightenment-related assumptions about truth and information, however, are central to consistent concerns regarding the marketplace of ideas foundational assumptions. These concerns are particularly relevant in the twenty-first century.

D. The Marketplace’s Shortcomings

Despite the theory’s place as the U.S. Supreme Court’s most commonly used tool for rationalizing safeguards for freedom of expression and its use by the ECtHR in article 10 cases, legal scholars have consistently questioned the fundamental assumptions that have come to be associated with the marketplace approach. First Amendment scholar Jerome Barron, in laying out his access-focused theory, contended “[o]ur constitutional theory is in the grip of a romantic conception of free expression, a belief that the ‘marketplace of ideas’ is freely accessible.”¹⁶⁰ In rejecting the marketplace approach, he contended that, if such a space once existed, it no longer does.¹⁶¹ Instead, news organizations limit the range and scope of ideas that are accessible to the public.¹⁶² Barron’s concern about access to ideas gets at one of the fundamental assumptions of the marketplace approach—that rational individuals will encounter the same or similar ideas as they seek to come to conclusions about truth and falsity.¹⁶³ Legal scholar Stanley Ingber communicated similar concerns. He characterized the marketplace as “more myth than reality.”¹⁶⁴ He explained that political, economic, and social perspectives firmly influence the information and frequency people encounter and their personal conclusions regarding truth.¹⁶⁵ He explained, “[T]he inevitable differences in these perspectives caused by the vastly differing experiences among

¹⁵⁸ *Id.* at 28 (Pinto de Albuquerque, J.; Turković, J. & Dedov, J., concurring).

¹⁵⁹ *See Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. 321–23, <http://hudoc.echr.coe.int/eng/?i=001-126635> [<https://perma.cc/DXF3-VFT6>]; *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 375–76, <http://hudoc.echr.coe.int/eng/?i=001-126635> [<https://perma.cc/DXF3-VFT6>].

¹⁶⁰ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

¹⁶¹ *See id.* at 1641, 1678.

¹⁶² *See id.* at 1641.

¹⁶³ *See id.* at 1678.

¹⁶⁴ Ingber, *supra* note 94, at 48.

¹⁶⁵ *See id.*

individuals make resolution of disagreement through simple discussion highly unlikely.”¹⁶⁶ Similarly, Frederick Schauer explained,

[O]ur increasing knowledge about the process of idea transmission, reception, and acceptance makes it more and more difficult to accept the notion that truth has some inherent power to prevail in the marketplace of ideas, or that the distinction between truth and falsity has much explanatory power in telling us which ideas are likely to be accepted by the public and which are likely to be rejected.¹⁶⁷

Each of these scholars communicated concerns about the fundamental inner workings of the theory. They questioned, in concerns that are particularly related with AI actors, how the marketplace can function if generally rational individuals do not encounter the same ideas and, if they do so, those ideas are presented differently or encountered with greater or lesser frequency.¹⁶⁸ These concerns are of particular importance when considered within the context of the unique nature of AI communicators and their ability to convey false information, to drown out human ideas in the marketplace, and to reach individuals in intentionally formed, ideological communities online.

Of course, at the heart of the theory, and of these concerns, is the discovery of truth. Scholars have reserved their greatest criticisms and concerns regarding the theory for its assumptions about the nature of truth. First Amendment scholar C. Edwin Baker argued, “[T]he assumptions on which the classic marketplace of ideas theory rests are almost universally rejected.”¹⁶⁹ He continued that the “theory is unworkable, dangerous, and inconsistent with a reasonable interpretation . . . of the first amendment.”¹⁷⁰ Baker, rather succinctly, concluded, “[T]ruth is not objective.”¹⁷¹ He recognized that many factors influence a person’s conclusions regarding what they find to be true, such as “interests, desires, or aesthetics—which guide the development of perceptions.”¹⁷² Similarly, legal scholar Vincent Blasi concluded that when the marketplace concept’s assumptions of truth are questioned, it “is generally found wanting as a persuasive contemporary rationale for free speech.”¹⁷³ Ingber

¹⁶⁶ *Id.* at 15.

¹⁶⁷ Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 777 (1986).

¹⁶⁸ See Ingber, *supra* note 94, at 46–48; Schauer, *supra* note 167, at 776–77.

¹⁶⁹ C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12 (1989).

¹⁷⁰ *Id.* at 3.

¹⁷¹ *Id.* at 12.

¹⁷² *Id.* at 13.

¹⁷³ Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 549 (1977).

highlighted similar concerns. He explained, “In order to be discoverable, however, truth must be an objective rather than subjective, chosen concept.”¹⁷⁴ If the foundational understandings about truth falter, the rest of the theory struggles. If truth is subjective, then it is no longer something that can be discovered via a competition with falsity in an exchange of ideas.¹⁷⁵

When applied to twenty-first century questions regarding AI actors, it becomes clear that the marketplace metaphor struggles as a rationale for freedom of expression. AI actors have the power to overwhelm human expression by posting countless messages. In doing so, whether these messages are truthful or not, they push certain ideas, or products, from the storefronts of the marketplace of ideas. When these concerns are drawn together with the fragmented, polarized, choice-rich nature of online communities, it is entirely possible that the marketplace of ideas will be transformed into a series of storefronts that offer only one or two products—or ideas. In this scenario, no competition between truth and falsity occurs. The decisions that humans make regarding the ideas, people, and organizations they encounter in virtual spaces, along with the power AI actors have to limit ideas in perspectives, can easily lead to competition-free marketplaces of ideas.

E. Discursive Revisions

When the ECtHR placed Habermas alongside Milton’s and John Stewart Mill’s ideas, as well as Justice Holmes’s conclusions from *Abrams*, in its discussion of the marketplace approach in *Mouvement Raëlien Suisse*, it drew together entirely different sets of assumptions regarding the flow of information and meaning making.¹⁷⁶ Habermas, along with other thinkers, came to significantly different conclusions regarding the nature of truth and the flow of information in democratic society.¹⁷⁷ These conclusions, which are generally in philosophical opposition to Enlightenment thought, are particularly relevant when we consider the nature of virtual spaces and the human and non-human actors that inhabit them. Virtual spaces, along with the interactions that occur among human and non-human communicators, are inherently discursive. The term “discursive,” in this conceptualization, refers to interactions that encourage collective, purposive discussions regarding issues and concerns that face society. Discursive thought is in many ways an antithesis to the more traditional, Enlightenment-founded rationalizations that have dominated much of European and American legal thought regarding how information flows and freedom of expression functions in democratic society.¹⁷⁸

¹⁷⁴ Ingber, *supra* note 94, at 15.

¹⁷⁵ See Schroeder, *supra* note 66, at 393.

¹⁷⁶ See *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373, 430 n.2, <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/JD4A-M6KZ>].

¹⁷⁷ See 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE REALIZATION OF SOCIETY* 11–14 (Thomas McCarthy trans., 1981).

¹⁷⁸ See David A. Hollinger, *The Enlightenment and the Genealogy of Cultural Conflict in*

In particular, discursive approaches to the flow of information and the construction of meaning within society generally assume that truth is the result of interactions among free individuals.¹⁷⁹ In this sense, truth *emerges* when individuals use information to interact with one another with the goal of coming to a mutual agreement.¹⁸⁰ Such was the conclusion of American thinker John Dewey, who explained that “knowledge is a function of association and communication; it depends upon tradition, upon tools and methods socially transmitted, developed and sanctioned.”¹⁸¹ Similarly, Habermas, who read Dewey’s work, made community and collective activity central to his conceptualizations of the public sphere and, later, his theory of communicative action.¹⁸² He contended that “[i]n other contexts, one also speaks of ‘general presuppositions of communication,’ but I prefer to speak of general presuppositions of communicative action because I take the type of action aimed at reaching understanding to be fundamental.”¹⁸³ In both understandings, the thinkers conceptualized truth as subjective and personal, something that was the result of interactions and ultimate agreements among free individuals.¹⁸⁴ Thus, discursive thought finds itself in fundamental opposition with a central assumption of the Enlightenment-based understanding that truth is universal and pre-existent. Milton, for example, contended that “[t]ruth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?”¹⁸⁵ Similarly, French philosopher Jean-Jacques Rousseau contended that “falsehood is capable of an infinite variety of combinations; but the truth has only one manner of being.”¹⁸⁶ Enlightenment thought, as considered earlier, assumed that truth must be *found*. It is universal and pre-existent. It is simply waiting to be discovered.

The more collective, discourse-based assumptions regarding truth carry with them the requirement that individuals have access to quality information so that they can be informed and carry shared basic understandings regarding matters of public concern into discussions with others. Such an assumption was crucial to Habermas’s

the United States, in WHAT’S LEFT OF ENLIGHTENMENT: A POSTMODERN QUESTION 8–11 (Keith Michael Baker & Peter Hanns Reill eds., 2001); Schroeder, *supra* note 66, at 398–401.

¹⁷⁹ See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 154–55 (1927); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 3–5 (William Rehg trans., 1996).

¹⁸⁰ See DEWEY, *supra* note 179, at 154–55; HABERMAS, *supra* note 179, at 3–5.

¹⁸¹ DEWEY, *supra* note 179, at 158.

¹⁸² See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 14–26 (Thomas Burger & Frederick Lawrence trans., 1989); HABERMAS, *supra* note 177, at 11–14.

¹⁸³ JÜRGEN HABERMAS, *ON THE PRAGMATICS OF COMMUNICATION* 21 (Maeve Cooke ed., 1998).

¹⁸⁴ See DEWEY, *supra* note 179, at 158; HABERMAS, *supra* note 183, at 21.

¹⁸⁵ MILTON, *supra* note 3, at 50.

¹⁸⁶ ROUSSEAU, *supra* note 3, at 159.

conceptualization of the public sphere.¹⁸⁷ The sphere, which Habermas described as “the sphere” of “public authority” and “the sphere of private people come together as a public,” flourished when newspapers provided information about matters of public concern and individuals engaged with the news and used it to enter into interactions with others with the goal of coming to a mutual agreement, or truth, regarding an issue or concern.¹⁸⁸ Of course, Enlightenment thought has generally assumed, as has most consistently been stated in the marketplace-of-ideas theory, that in an open exchange of ideas, rational individuals will identify *the* truth, separating it from false ideas.¹⁸⁹ The false ideas, therefore, will fall aside, just as poor products fail to find a consistent market.¹⁹⁰ The discourse model emphasizes protecting the formation of truths that arise through interactions among informed individuals while Enlightenment-based conceptualizations of the flow of information generally understand society’s challenge as identifying *the* truth amidst a sea of falsities.

Of course, other important assumptions go into considering the two approaches. The Enlightenment and discourse models differ regarding how they conceptualize the place of the individual in society. Traditional Enlightenment thought has generally conceptualized society as being created to benefit the individual, while discursive approaches emphasize the value of collective action and ability of each individual to contribute to democratic deliberation.¹⁹¹ Dewey, for example, explained that “a good citizen finds his conduct as a member of a political group enriching and enriched by his participation in family life, industry, scientific and artistic associations.”¹⁹² Importantly, discursive thought emphasizes community because its assumptions are founded upon the importance of free individuals coming together to come to mutual agreements regarding problems and concerns.¹⁹³ These differences between these assumptions about the nature of truth and community also fundamentally influence how freedom of expression should be understood in democratic society. Both Enlightenment and discursive thought are constructed upon the assumption that freedom of expression is fundamental to self-government.¹⁹⁴ Dewey emphasized the need for “free gatherings of neighbors” and “gatherings of friends in[] living rooms.”¹⁹⁵

¹⁸⁷ HABERMAS, *supra* note 182, at 14–26.

¹⁸⁸ *See id.* at 11, 27.

¹⁸⁹ *See* HABERMAS, *supra* note 179, at 400, 470.

¹⁹⁰ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *United States v. Rumely*, 345 U.S. 41, 56–57 (1953) (Douglas, J., concurring); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *see also* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2362 (2000).

¹⁹¹ *See* DEWEY, *supra* note 179, at 154–55; HABERMAS, *supra* note 182, at 3–9; Siebert, *supra* note 130, at 41–42.

¹⁹² DEWEY, *supra* note 179, at 148.

¹⁹³ *See id.* at 147–48.

¹⁹⁴ *See id.* at 167–68.

¹⁹⁵ John Dewey, *Creative Democracy—The Task Before Us*, in 14 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 227 (J. Boydston ed., 1976).

Similarly, Habermas contended that individuals must have access to a “diversity of independent mass media, and a general access of inclusive mass audiences to the public sphere.”¹⁹⁶ Of course, Enlightenment thinkers came to similar conclusions in the seventeenth and eighteenth centuries. Milton, in *Areopagitica*, railed against governmental limitations on freedom of expression.¹⁹⁷ Similarly, other Enlightenment thinkers, such as Locke and Rousseau, emphasized the retention of human liberty in the face of the institution of civil government.¹⁹⁸ Rousseau, for example, contended that individuals in democratic society give up “only such part of his powers, goods, and liberty as it is important for the community to control.”¹⁹⁹

Crucially, the assumptions within these two approaches regarding how the flow of information is understood, and the very purpose behind freedom of expression, can substantially influence how protections for AI communicators should be conceptualized. This dichotomy between the theories begs the question whether expression should be protected so that fully formed truths can be separated from falsity, or if expression must be safeguarded to allow free individuals to come together to conduct discourse and come to mutual agreements, or truths, about matters of public concern. In the Enlightenment model, information flows into a marketplace, where rational individuals assess whether it is true or false and whether or not the idea should be accepted.²⁰⁰ Conceivably, this model requires examining the extent to which AI communicators can contribute to such a marketplace. Conversely, the discourse model must consider such entities based on two points along the communicative process. First, whether they can convey information that provides a baseline for individuals to enter into informed discourse with others. Second, whether they themselves can contribute to such discourse by interacting with citizens. These considerations, along with the larger question regarding the rights of AI communicators, require considering the existent legal structures regarding such entities in the United States and Europe.

III. AI SPEECH RIGHTS AND THE U.S. AND EUROPEAN SYSTEMS

Neither the European nor the U.S. legal systems have directly addressed the question of freedom of expression rights for AI actors.

The ways in which the legal systems have interpreted freedom of expression questions more generally, particularly in regard to other non-human actors, provide guidance regarding how jurists might understand AI communicators’ rights. Furthermore,

¹⁹⁶ Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, 16 COMM. THEORY 411, 412 (2006).

¹⁹⁷ MILTON, *supra* note 3, at 45–46.

¹⁹⁸ *See generally* LOCKE, *supra* note 3; ROUSSEAU, *supra* note 3.

¹⁹⁹ ROUSSEAU, *supra* note 3, at xliii.

²⁰⁰ *See generally* LOCKE, *supra* note 3; ROUSSEAU, *supra* note 3.

statements found in international treaties and covenants, primarily in regard to European courts, provide insights regarding free expression rights for AI actors.

A. The U.S. System: Human, Corporation, or Animal?

The United States' legal system has generally remained silent about AI communicators. In *American Library Association, Inc. v. United States* in 2002, a federal district court considered the constitutionality of the Children's Internet Protection Act of 2000.²⁰¹ The law required public schools and libraries to place filtering software on the computers that are made available to students and patrons.²⁰² Libraries and schools that failed to comply would not receive certain federal grants.²⁰³ The judge ruled that the law violated the First Amendment, reasoning that filtering algorithms cannot identify "many distinctions between types of content that would be obvious to a human. And of critical importance, no presently conceivable technology can . . . determine whether a visual depiction fits the legal definitions of obscenity, child pornography, or harmful to minors."²⁰⁴ Essentially, he reasoned that the lack of human characteristics equated to a limitation on First Amendment protections for expression.²⁰⁵ In the appeal that followed, the U.S. Supreme Court found the law did not violate the First Amendment.²⁰⁶ While Justice David Souter mirrored the district court judge's reasoning in his dissent, none of the opinions in the decision referred to filtering software as AI.²⁰⁷ Thus, the nation's highest court has not, despite the opportunity, specifically addressed algorithms.

More recently, when hackers stole and published the names of more than thirty-seven million Ashley Madison users, the class action lawsuits that followed included references to bots.²⁰⁸ Users claimed that the website, which assists customers in their efforts to cheat on their spouses, "made extensive use of artificial intelligence 'bots' and other mechanisms to mimic fake users (specifically, female users) on the Ashley Madison website in order to induce actual (predominantly male) users to make purchases."²⁰⁹ The Ashley Madison lawsuits were ultimately settled,²¹⁰ but the question

²⁰¹ 201 F. Supp. 2d 401, 406–07 (E.D. Pa. 2002).

²⁰² CHILDREN'S INTERNET PROTECTION ACT (2017), <https://www.fcc.gov/consumers/guides/childrens-internet-protection-act> [<https://perma.cc/366Z-F25W>] (last visited Feb. 24, 2020).

²⁰³ *See id.*

²⁰⁴ *Am. Library Ass'n*, 201 F. Supp. 2d at 433.

²⁰⁵ *See id.* at 408, 410–11.

²⁰⁶ *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 194 (2003).

²⁰⁷ *See id.* at 231–43 (Souter, J., dissenting).

²⁰⁸ *See In re Ashley Madison Customer Data Sec. Breach Litig.*, MDL No. 2669, 2016 U.S. Dist. LEXIS 46893, at *7–8 (E.D. Mo. Apr. 6, 2016).

²⁰⁹ *Id.* at *8.

²¹⁰ *See Jonathan Stempel, Ashley Madison Parent in \$11.2 Million Settlement over Data Breach*, REUTERS (July 14, 2017), <https://reuters.com/article/us-ashleymadison-settlement-id-USKBN19Z2f0> [<https://perma.cc/9CX9-RW2C>].

of rights for AI communicators in the United States has not been. The courts, however, have provided some important building blocks in this regard.

1. Algorithms and Expression

Perhaps the most direct considerations of AI communicators have come in a pair of federal district court decisions that considered whether the results of searches using search engines such as Google and Bing are a form of protected speech.²¹¹ Both cases considered how algorithms work and the corporations' rights, rather than whether the algorithms themselves enjoyed any particular protections.²¹² In 2003, Search King sued Google after its place in the search engine's PageRank system was downgraded.²¹³ The firm contended that Google's algorithm's decision to reduce the site's relative importance in queries "impacted the business opportunities available . . . by limiting their exposure on Google's search engine."²¹⁴ The judge concluded that the lists of ranked websites that search engine algorithms produce are a form of opinion, and are therefore protected First Amendment speech.²¹⁵ The judge reasoned that, "PageRanks do not contain provably false connotations. PageRanks are opinions—opinions of the significance of particular web sites as they correspond to a search query."²¹⁶ Quite paradoxically, the judge found the *process* by which the search results are ranked to be objective, but the *results* that come from the process to be subjective.²¹⁷ She explained that "the result, which is the PageRank—or the numerical representation of relative significance of a particular web site—is fundamentally subjective."²¹⁸ Such a conclusion appears to indicate that AI actors, even those that function by relatively rudimentary computer programming, can be found to have human-like rights. Importantly, however, the question before the court in the case was focused on the corporation's rights rather than the AI communicator's.²¹⁹ Interestingly, four years later, a federal court in Delaware came to a similar conclusion, but did so using significantly different reasoning. In *Langdon v. Google, Inc.*, a North Carolina website operator contended that Google violated his First Amendment rights when it did not allow him to run advertisements for his websites and removed his pages from its potential search results.²²⁰ The court found that compelling Google

²¹¹ See *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 623, 630 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-14, 2003 WL 21464568, at *1, *4 (W.D. Okla. May 27, 2003).

²¹² See *Langdon*, 474 F. Supp. 2d at 627; *Search King, Inc.*, 2003 WL 21464568, at *1.

²¹³ *Search King, Inc.*, 2003 WL 21464568, at *1.

²¹⁴ *Id.* at *4.

²¹⁵ See *id.* at *3.

²¹⁶ *Id.* at *4.

²¹⁷ See *id.* at *3.

²¹⁸ *Id.*

²¹⁹ See *id.* at *3–4.

²²⁰ 474 F. Supp. 2d 622, 623, 626–27 (D. Del. 2007).

to adjust its search results and advertising policies would equate to compelling the corporation to speak.²²¹ Citing the Supreme Court's ruling in *Miami Herald Publishing Co. v. Tornillo* regarding a right-of-reply law that would have required newspapers to print responses from those they criticized, the court explained that the First Amendment does not allow such directives.²²² Interestingly, the *Langdon* decision pays little attention to the nature of search results, never mentioning the algorithms. Instead, the court emphasized that the corporation cannot be compelled to "speak," as the petitioner sought.²²³ Thus, in both algorithm-centric cases, federal judges found limiting the search outputs would violate the First Amendment. Legal scholar Eugene Volokh and attorney Donald Falk came to similar conclusions regarding these cases in a white paper they wrote for Google, contending that algorithm-based search results constitute a form of editorial judgment, which makes them analogous to newspapers or book publishers.²²⁴ Legal scholar Tim Wu, however, contended that an algorithm does not *express* ideas, it simply gathers existent data, or ideas, in response to a query.²²⁵ In this conceptualization, it is a vehicle, not a speaker.²²⁶ Both approaches, as well as the courts' decisions, provide building blocks regarding how we should understand the rights of AI communicators.

2. Corporations and Blackie the Cat

Search King and *Langdon*, while two of the most AI-focused cases thus far in the United States court system, were not principally about the rights of such communicators.²²⁷ Thus, to address the problem posed in this Article, we must turn to cases that involve other forms of non-human actors. In particular, the courts have provided strong precedents regarding corporate speech and the rights of animals. In terms of animals, a federal appeals court ruled in 1983 that a couple suing on behalf of the First Amendment rights of their talking cat had no real claim.²²⁸ Carl and Elaine Miles had taught their cat, Blackie, to say "I love you" and "I want my Mama."²²⁹ When the city of Augusta, Georgia, required them to buy a business permit because they were collecting money for their cat's performances, they contended their First Amendment

²²¹ *See id.* at 629–30.

²²² *See Langdon*, 474 F. Supp. 2d at 630 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)).

²²³ *See id.* at 629–30.

²²⁴ Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J. L. ECON. & POL'Y 883, 899 (2012).

²²⁵ *See Wu*, *supra* note 8, at 1529–30.

²²⁶ *See id.*

²²⁷ *See generally Langdon*, 474 F. Supp. 2d 622; *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

²²⁸ *Miles v. City Council*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983).

²²⁹ *Miles v. City Council*, 551 F. Supp. 349, 350 (S.D. Ga. 1982).

rights were violated.²³⁰ The circuit court was not convinced. The court concluded, in a footnote at the end of its opinion, that “[t]his Court will not hear a claim that Blackie’s right to free speech has been infringed. . . . [H]e cannot be considered a ‘person’ and is therefore not protected by the Bill of Rights.”²³¹ The court explained, finally, that, “if Blackie had such a right . . . [he] can clearly speak for himself.”²³² More recent rulings have reinforced the court’s reasoning regarding Blackie’s rights. In 2004, animal rights groups sued the Bush Administration on behalf of the world’s whales, porpoises, and dolphins.²³³ The court concluded the marine life lacked standing because they were not human.²³⁴ Similarly, animal rights groups sued Sea World in 2012 on behalf of Tilikum, the focus of the award-winning documentary “Blackfish,” and four other orcas.²³⁵ The group contended the whales’ captivity violated the Thirteenth Amendment, which prohibits slavery.²³⁶ The judge, much as was the case with Blackie the Cat, concluded that the Thirteenth Amendment “applies to humans, and not orcas.”²³⁷ Finally, in *Naruto v. Slater*, better known as the “Monkey Selfie” Case,²³⁸ the Ninth Circuit concluded that Naruto, the seven-year-old crested macaque that picked up photographer David Slater’s unattended camera and took several pictures of himself, could not claim authorship of the images under U.S. copyright law.²³⁹ The court reasoned, citing the *Cetacean Community v. Bush*²⁴⁰ and *Tilikum v. Sea World Parks and Entertainment, Inc.*,²⁴¹ that “this monkey—and all animals, since they are not human—lacks statutory standing under the Copyright Act.”²⁴² Thus, these cases suggest American courts have generally not been amenable to extending human-like rights to non-humans. Fundamentally, judges communicated the expectation in these cases that those who claimed fundamental human rights be, well, human. This conclusion, however, is contradicted in one important area of the law.

²³⁰ *Id.* at 351.

²³¹ *Miles*, 710 F.2d at 1544 n.5.

²³² *Id.*

²³³ *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

²³⁴ *Id.* at 1179 (quoting *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)).

²³⁵ *See* *Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012); *see also* Camila Demonoske, *Tilikum, Sea World’s Famed Orca and Subject of ‘Blackfish,’ Dies*, NPR (Jan. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/06/508534005/tilikum-seaworlds-famed-orca-and-subject-of-blackfish-dies> [<https://perma.cc/MQF5-9UVC>].

²³⁶ *Tilikum*, 842 F. Supp. 2d at 1261.

²³⁷ *Id.* at 1264–65.

²³⁸ *See* 888 F.3d 418, 421 n.3 (9th Cir. 2018) (discussing PETA’s blog post which refers to the litigation as the “Monkey Selfie” Case).

²³⁹ *Id.* at 420.

²⁴⁰ 386 F.3d 1169 (9th Cir. 2004).

²⁴¹ 842 F. Supp. 2d 1259.

²⁴² *Naruto*, 888 F.3d at 420.

Since the 1970s, the Supreme Court has consistently concluded that corporations, another type of artificial entity, have freedom-of-expression rights similar to those enjoyed by citizens.²⁴³ Importantly, the Court reasoned that corporations can contribute to discourse in important ways, a consideration that was not present in the animal-related cases. In *First National Bank v. Bellotti*, a 1978 case that dealt with whether a Massachusetts law that limited corporations from taking part in discourse was constitutional, the Court concluded that, “[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”²⁴⁴ In the same passage, the Court reasoned “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source.”²⁴⁵ The Court, in striking down the law, overturned the state’s highest court’s ruling to uphold the law and limit corporations’ speech rights.²⁴⁶ The Supreme Judicial Court of Massachusetts’s ruling, which was in many ways similar to the reasoning found in the animal rights cases, explained, “It seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person”²⁴⁷

In 2010, the Supreme Court reaffirmed and expanded its conclusions from *Bellotti* in *Citizens United v. FEC*.²⁴⁸ Justice Anthony Kennedy, in writing the opinion for a deeply divided Court, explained that, “on certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”²⁴⁹ Crucially, “artificial intelligence” could easily be substituted for “[c]orporations” in Justice Kennedy’s opinion for the Court.²⁵⁰ In his concurring opinion in the same case, Justice Scalia explained that the First Amendment was “written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker.”²⁵¹ His conclusion that the courts should not concern themselves with *who* is speaking provides further support for corporate-speech-based protections for AI communicators. Using this line of precedents from the Court, the potential AI communicators have to benefit public discourse and their ability to act as speakers, despite their fundamental lack of human characteristics, could be enough for the Court to justify treating them similarly to citizens in First Amendment cases.

²⁴³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

²⁴⁴ 435 U.S. at 777.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 767.

²⁴⁷ *First Nat’l Bank of Bos. v. Attorney Gen.*, 359 N.E. 2d 1262, 1270 (Mass. 1977).

²⁴⁸ 558 U.S. at 340 (citing *Bellotti*, 435 U.S. at 784).

²⁴⁹ *Id.* at 364.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 392–93 (Scalia, J., concurring).

B. AI Speech Rights in Europe

Much like the American court system, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have not squarely addressed the rights of AI communicators.²⁵² Several ECJ applications have made passing references to algorithms since the early 2000s, but the nature of such tools and stronger, higher-functioning programs, have not been central or controlling in any of the instances, particularly in regard to freedom of expression as it is outlined in article 10 of the European Convention on Human Rights (ECHR).²⁵³ The most notable discussion of algorithms came in *Google Spain v. AEPD* in 2014, which involved a challenge put forth by the nation's data protection agency against Google's practice of gathering information from those who conduct searches using its services.²⁵⁴ Ultimately, the Court found that Google must, under parts of a few different sections of European Parliament law and the ECHR, fulfill requests made by individuals to remove information that appears about them when their name is searched.²⁵⁵ The advocate general's opinion devoted a few different passages to the nature of the algorithms that are involved in Google's search engine.²⁵⁶ The advocate general wrote, "Google's search engine's crawler function, called 'googlebot', crawls on the internet constantly and systematically and, advancing from one source web page to another on the basis of hyperlinks between the pages, requests the visited sites to send to it a copy of the visited page."²⁵⁷ As with the United States cases, the judgment and the opinion were not focused on the nature of AI communicators. They were instead focused on the "right to be forgotten," which gained substantial attention after this decision.²⁵⁸

While the courts have not directly considered the rights of AI communicators, the Legal Affairs Committee of the European Parliament voted in January 2017 to urge the European Commission to create legislation that explicitly recognizes that "robots' autonomy raises the question of their nature in the light of the existing legal categories—of whether they should be regarded as natural persons, legal persons, animals or objects—or whether a new category should be created."²⁵⁹ The sweeping report also raised questions about liability for physical injuries caused by robots, the

²⁵² Searches for "artificial intelligence," "bot," "chatbot," "AI," "robot," and other key words did not return any relevant applications on the European Court of Human Rights' case search website: <https://hudoc.echr.coe.int> [<https://perma.cc/65ZS-XXGQ>].

²⁵³ ECHR, *supra* note 139, art. 10(1).

²⁵⁴ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317.

²⁵⁵ *Id.* at 21.

²⁵⁶ Opinion of Advocate General Jääskinen ¶¶ 72–75, *Google Spain, SL*, 2014 E.C.R. 317.

²⁵⁷ *Id.* ¶ 73.

²⁵⁸ *Google Spain*, 2014 E.C.R. 317, at 8–9.

²⁵⁹ *Draft Report with Recommendation to the Commission on Civil Law Rules on Robotics*, at 5, 2015/2103(INL) (May 31, 2016), http://www.europarl.europa.eu/doceo/document/JURI-PR-582443_EN.pdf?redirect [<https://perma.cc/Y5C8-L9U7>].

potential impact the technologies will have on the workforce, and copyright and data-ownership concerns.²⁶⁰ Importantly, the report further recognized that AI should be regulated based on its impact upon human rights and that, “increasing communication and interaction with robots have the potential to profoundly impact physical and moral relations in our society.”²⁶¹ Though the report balanced substantial concerns about the impact and influence of AI communicators with recognitions that they can also be a benefit to society,²⁶² it did not convey the types of understandings in the American corporate-speech cases, in which the Supreme Court rationalized its decision to extend protections to artificial entities, in this case corporations, because they could contribute meaningful information to democratic discourse.²⁶³ Ultimately, the European Parliament has created a robotics committee, which continues to investigate legal, ethical, and commercial concerns as they relate to the development and incorporation of AI into citizens’ lives.²⁶⁴

The ECtHR has not been silent, however, regarding corporate speech. Precedents from this court extend similar protections to non-human communicators as compared to the American cases, but the legal questions that led to such applications arose from substantially different circumstances. While United States corporate-speech cases generally arose from campaign finance law and political speech questions,²⁶⁵ European decisions have primarily dealt with the nature of for-profit media companies. In *Autronic AG v. Switzerland* in 1990, a broadcast television company applied for the rights to rebroadcast content from a Russian television satellite.²⁶⁶ A Swiss agency rejected the company’s request and, ultimately, its appeal reached the ECtHR as an article 10 concern.²⁶⁷ The court ruled in favor of the corporation, reasoning, “[N]either Autronic AG’s legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10.”²⁶⁸ Crucially, in the same passage, the court explained that article 10 “applies to ‘everyone’, whether natural or legal persons. . . . Article 10[] applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.”²⁶⁹ A year earlier, the court came to a similar decision in a case that involved a retail-oriented

²⁶⁰ *Id.* at 3–4.

²⁶¹ *Id.* at 22.

²⁶² *Id.* at 16.

²⁶³ *See supra* Section III.A.2.

²⁶⁴ *See Robotics*, COMM. ON LEGAL AFFAIRS, EUR. PARL. COMMS. (July 13, 2017), <http://www.europarl.europa.eu/committees/en/juri/robotics.html?tab=Background> [<https://perma.cc/SS79-AXEN>].

²⁶⁵ *See supra* Section III.A.2.

²⁶⁶ 178 Eur. Ct. H.R. (ser. A) (1990).

²⁶⁷ *Id.* at 15.

²⁶⁸ *Id.* at 17.

²⁶⁹ *Id.*

print publication based in Germany.²⁷⁰ In the face of a government-imposed injunction against further publication, the company argued that its article 10 rights were violated.²⁷¹ The government contended that the publication was a for-profit institution, not a news organization, and thus could not claim the restraint on publication was an article 10 matter.²⁷² The Court found, “The applicants did not deny that they defended the interests of the specialised retail trade. . . . To restrict the freedom of expression to news items of a political or cultural nature would result in depriving a large proportion of the press of any protection.”²⁷³ Thus, the court constructed a similar line of reasoning in this case as the American Supreme Court did in *Citizens United v. FEC*²⁷⁴ and other corporate-speech-related cases.²⁷⁵ The judges reasoned that to limit this organization’s rights because it was not a traditional news organization would endanger the rights of journalists.²⁷⁶ Chief Justice John Roberts opened his concurring opinion in *Citizens United* with the similar concern that letting the campaign finance laws in question stand would “empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations.”²⁷⁷

Thus, when it comes to these cases, the two legal systems share a common allowance for one particular “artificial legal entit[y]”—corporations, which receive freedom-of-expression rights that have historically only otherwise been associated with human communicators.²⁷⁸ While the corporate-speech-rights precedents are not identical, the two court systems communicated understandings that such non-human speakers should be protected because they contribute to discourse.²⁷⁹ Also, neither system has substantially considered questions that surround the rights of AI communicators. The crucial difference, however, is that the European Parliament has moved forward with a document—however limited in legislative power it might be—that recognizes many concerns and is beginning a dialogue regarding how to approach the challenges that, as Web 4.0 arrives, will likely substantially affect discourse within society.²⁸⁰

²⁷⁰ *Markt Intern Verlag GmbH v. Germany*, 165, Eur. Ct. H.R. (ser. A) at 1–2 (1989), <http://hudoc.echr.coe.int/eng?i=001-57648> [<https://perma.cc/YR94-LTW6>].

²⁷¹ *Id.* at 11.

²⁷² *See id.* at 12.

²⁷³ *Id.*

²⁷⁴ 558 U.S. 310 (2010).

²⁷⁵ *See, e.g.*, *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

²⁷⁶ *Markt Intern Verlag GmbH*, 165 Eur. Ct. H.R. at 12.

²⁷⁷ *Citizens United*, 558 U.S. at 373 (Roberts, C.J., concurring).

²⁷⁸ *Id.* at 390 (Scalia, J., concurring).

²⁷⁹ *Compare Citizens United*, 558 U.S. at 312 (majority opinion), and *First Nat’l Bank*, 435 U.S. at 766, with *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990) at 17, <http://hudoc.echr.coe.int/eng?i=001-57630> [<https://perma.cc/E2QK-MKDJ>], and *Markt Intern Verlag GmbH*, 165 Eur. Ct. H.R. at 12.

²⁸⁰ *See Draft Report with Recommendation to the Commission on Civil Law Rules on Robotics*, *supra* note 259.

C. *International Treaties and Non-human Entities*

While the European Parliament has taken steps toward understanding the growing influence of AI communicators on democratic discourse, neither it nor other governing bodies related with the European Union or the United States have created laws, guidelines, directives, or other tools regarding how communicators and jurists should understand the questions that surround the extent to which freedom of expression protections should be extended to AI communicators. As with the preceding sections, in the absence of direct statements regarding such questions, this Section examines the extent to which existent covenants, many of which have been signed by the United States and European nations, outline how such rights for non-human entities might be understood. Importantly, while many European nations' constitutions have allowances for international law built into their rights and protections,²⁸¹ the U.S. Constitution includes no such expectation. The "Basic Law for the Federal Republic of Germany," for example, proscribes "[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."²⁸² Similarly, the French and Spanish constitutions outline the role of international law in the nation's society.²⁸³

Thus, while the U.S. and European nations have signed and ratified or voted for the United Nations's Universal Declaration of Human Rights (UDHR),²⁸⁴ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),²⁸⁵ and the International Covenant on Civil and Political Rights (ICCPR),²⁸⁶ these documents are far more likely to influence European courts' decisions than those in the U.S.²⁸⁷ The U.S. Supreme Court in *Sosa v. Alvarez-Machain* in 2004, for example, emphasized that the UDHR, though it "does bind the United States as

²⁸¹ See, e.g., 1958 CONST. arts. 52–55 (Fr.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], art. 25 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0141 [<https://perma.cc/KH37-B696>]; Constitución Española, B.O.E. nn. 93–96, Dec. 29, 1978 (Spain).

²⁸² GRUNDGESETZ [GG] [Basic Law], art. 25.

²⁸³ See 1958 CONST. arts. 52–55; C.E. B.O.E. nn. 93–96, Dec. 29, 1978.

²⁸⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

²⁸⁵ G.A. Res. 2106 (xx), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) [hereinafter CERD].

²⁸⁶ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

²⁸⁷ See Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 586–90 (1997); Christopher Wittman, *Information Freedom, A Constitutional Value for the 21st Century*, 36 HASTINGS INT'L & COMP. L. REV. 145, 172–73 (2013); Terry D. Johnson, Note, *Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System*, 56 RUTGERS L. REV. 231, 245 (2003).

a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”²⁸⁸ Four years later, in *Medellin v. Texas*, the Court repeated that, absent congressional direction regarding international law, claims based on non-domestic covenants and agreements will not be compelling.²⁸⁹ Despite this theme, however, the international covenants provide important perspectives regarding the potential scope and limitations of freedom of expression for non-human entities on global levels.

1. Limited Room for Human Rights for Non-human Entities

All four of these documents explicitly and specifically focus on human rights. As one scholar indicated, “[A]ll thirty articles of the Universal Declaration of Human Rights are predicated on the individual as the subject of human rights.”²⁹⁰ The preamble of the ICCPR, for example, states that the document focuses on “the equal and inalienable rights of all members of the human family,” characterizing them as “the foundation of freedom, justice and peace in the world.”²⁹¹ Similarly, CERD emphasizes “all human beings are equal before the law.”²⁹² Alternatively, the documents do not use wording such as “entities” or “artificial persons,” which might cause confusion about whether the promised rights extend to AI or other non-human actors. Despite this theme, courts’ interpretations of the ECHR have created some limited openings for non-human entities, primarily in the form of corporations, to receive the promised protections.²⁹³ Article 10 explains that “[e]veryone has the right to freedom of expression.”²⁹⁴ Its wording, at the outset, is nearly the same as the UDHR and ICCPR’s article 19 and CERD’s article 5.²⁹⁵ Unlike the others, however, the ECHR continues by allowing nations to require licensing for broadcast, television, and cinema “enterprises.”²⁹⁶ As indicated with the *Autronic AG*²⁹⁷ and *Markt Intern Verlag GmbH*²⁹⁸ cases, this aspect of article 10 has led to support in the

²⁸⁸ 542 U.S. 692, 735 (2004).

²⁸⁹ 554 U.S. 759, 760 (2008) (per curiam).

²⁹⁰ Anna Yeatman, *Who Is the Subject of Human Rights?*, 43 AM. BEHAV. SCIENTIST 1498, 1505 (2000); see also UDHR, *supra* note 284, arts. 1–30.

²⁹¹ ICCPR, *supra* note 286, at preamble.

²⁹² CERD, *supra* note 285, at preamble.

²⁹³ See *supra* Section III.B.

²⁹⁴ ECHR, *supra* note 139, art. 10(1).

²⁹⁵ See ICCPR, *supra* note 286, art. 19; CERD, *supra* note 285, art. 5; UDHR, *supra* note 284, art. 19.

²⁹⁶ ECHR, *supra* note 139, art. 10(1); see also Peter Oliver, *Companies and Their Fundamental Rights: A Comparative Perspective*, 64 INT’L & COMP. L. Q. 661, 677 (2015).

²⁹⁷ *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990), <http://hudoc.echr.coe.int/eng?i=001-57630> [<https://perma.cc/E2QK-MKDJ>].

²⁹⁸ *Markt Intern Verlag GmbH v. Germany*, 165 Eur. Ct. H.R. (ser. A) (1989), <http://hudoc.echr.coe.int/eng?i=001-57648> [<https://perma.cc/YR94-LTW6>].

courts for corporate speech protections.²⁹⁹ The ECtHR has also extended article 8–based privacy protections to corporations.³⁰⁰ Article 8 ensures that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”³⁰¹ In *Société Colas Est v. France* and *Niemietz v. Germany*, the court interpreted article 8 as extending beyond individual citizens’ homes to businesses.³⁰² In *Société Colas Est*, a 2002 judgment that dealt with French officials’ raids of businesses during a corruption investigation, the court reasoned that “it has previously held, the word ‘*domicile*’ (in the French version of Article 8) has a broader connotation than the word ‘home’ and may extend, for example, to a professional person’s office.”³⁰³ Perhaps more importantly, in the ensuing paragraph, the court explained that the ECHR “is a living instrument which must be interpreted in the light of present-day conditions.”³⁰⁴ Finally, article 1 of Protocol I, which was added shortly after the initial ECHR document was drafted, indicates that “[e]very natural or *legal person* is entitled to the peaceful enjoyment of his possessions.”³⁰⁵ Such a statement opens the door for non-human entities to be classified as a “legal person,” and to therefore receive rights.

Importantly, the preceding examples identify instances where the wording found in the ECHR left room for the courts to interpret otherwise human-focused rights as extending to non-human entities. None of these instances dealt with AI communicators. Also, the other three documents’ statements regarding human rights include little, if any, indication that any such protections, particularly in regard to freedom of expression, should be extended to AI communicators.³⁰⁶ As sociologist Anna Yeatman concluded in her analysis of human rights treaties and covenants, AI may deserve some form of rights, but “these will not be human rights, but the rights of such entities.”³⁰⁷ While this is one possible conclusion, the inherent interaction between humans and AI communicators within societal discourse makes the international human rights documents an important contributor to questions regarding free expression safeguards for AI.

2. Balancing Public Need and Free Expression Rights

The international covenants provide significant support for lawmakers and different nations’ courts to curtail the ability of AI communicators to take part in

²⁹⁹ See *supra* Section III.B.

³⁰⁰ ECHR, *supra* note 139, art. 8.

³⁰¹ *Id.*

³⁰² *Société Colas Est v. France*, 2002-II Eur. Ct. H.R. at 131, <http://hudoc.echr.coe.int/eng/?i=001-60431> [<https://perma.cc/62HG-WKEG>]; *Niemietz v. Germany*, 251 Eur. Ct. H.R. (ser. A) (1992), <http://hudoc.echr.coe.int/eng/?i=001-57887> [<https://perma.cc/G7CW-J94J>].

³⁰³ *Société Colas Est*, 2002-II Eur. Ct. H.R. at 14–15.

³⁰⁴ *Id.* at 15.

³⁰⁵ ECHR, *supra* note 139, art. 1 (emphasis added).

³⁰⁶ See generally ICCPR, *supra* note 286; CERD, *supra* note 285; UDHR, *supra* note 284.

³⁰⁷ Yeatman, *supra* note 290, at 1510.

public discourse, particularly when these non-human entities put forth unpopular ideas. Crucially, this theme turns on the substantially different constructions of freedom of expression in the United States and within the European nations. These different interpretations are reflected within the international treaties, which, as previously indicated, are substantially more aligned with traditional European legal understandings.³⁰⁸ The documents all include relatively strong statements regarding the importance of freedom of expression,³⁰⁹ which, on the surface makes them similar to the First Amendment freedoms that are outlined in the Bill of Rights.³¹⁰ Importantly, however, the international documents generally include caveats that indicate that such expression must be done responsibly and respectfully. Article 19 of the ICCPR, for example, notes that “[e]veryone shall have the right to hold opinions without interference.”³¹¹ The third paragraph of the Article, however, indicates that the right to free expression “carries with it special duties and responsibilities” and “it may therefore be subject to certain restrictions.”³¹² Article 19 of the UDHR also safeguards free expression, but article 29 indicates that “[e]veryone has duties to the community” and that everyone must have “respect for the rights and freedoms of others.”³¹³ The passage continues by explaining that morality, public order, and societal welfare are crucial goals to democratic society.³¹⁴ These passages in the UDHR are mirrored in the other documents, which generally, in sections that are separate from where freedom of expression is outlined, include proscriptions against racist, immoral, or other communication that is deemed unhealthy to democratic society.³¹⁵ CERD outlines the expectation that “all dissemination of ideas based on racial superiority or . . . against any race or group of persons of another colour or ethnic origin” must be criminalized.³¹⁶ The ICCPR explains that freedom of expression can be limited “[f]or the protection of national security or of public order[,], or of public health or morals.”³¹⁷ Article 10 of the ECHR includes similar concerns.³¹⁸ It ensures that “[e]veryone has the right to freedom of expression. . . . without interference by public authority and regardless of frontiers.”³¹⁹ This passage, however, is followed

³⁰⁸ See generally ECHR, *supra* note 139; ICCPR, *supra* note 286; CERD, *supra* note 285; UDHR, *supra* note 284.

³⁰⁹ ECHR, *supra* note 139, art. 10(1); ICCPR, *supra* note 286, art. 19; CERD, *supra* note 285, art. 5; UDHR, *supra* note 284, art. 19.

³¹⁰ See U.S. CONST. amend. I.

³¹¹ ICCPR, *supra* note 286, art. 19(1).

³¹² *Id.* art. 19(3).

³¹³ UDHR, *supra* note 284, arts. 19, 29.

³¹⁴ *Id.* art. 29(2).

³¹⁵ See CERD, *supra* note 285, art. 4; ICCPR, *supra* note 286, art. 20(2); ECHR, *supra* note 139, art. 10.

³¹⁶ CERD, *supra* note 285, art. 4.

³¹⁷ ICCPR, *supra* note 286, art. 19(3)(b).

³¹⁸ See ECHR, *supra* note 139, art. 10.

³¹⁹ *Id.* art. 10(1).

by expectations that citizens have “duties and responsibilities” regarding “formalities, conditions, restrictions or penalties as . . . are necessary in a democratic society.”³²⁰

Interpretations of the First Amendment generally do not include any parallels in this regard. Instead, as it is perhaps most concisely expressed in *Texas v. Johnson*, a 1989 U.S. Supreme Court case in which justices struck down a law that criminalized flag-burning, the government generally cannot, in keeping with the First Amendment, make content-based restrictions on expression.³²¹ Justice William Brennan characterized the “bedrock principle” of the First Amendment as “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³²² Years earlier, in a defamation case, Justice Lewis Powell provided a similar interpretation by invoking the marketplace concept.³²³ He concluded, “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”³²⁴ The Court has upheld and expanded upon these rulings in more recent cases that involved actions and ideas that the international covenants almost certainly sought to discourage. In particular, the Court in 2011 upheld Westboro Baptist Church’s right to protest using messages such as “God Hates Fags” and “Thank God for Dead Soldiers.”³²⁵ Eight years earlier, the Court struck down a state law that criminalized cross burning, despite the practice’s long history in the United States as a tool to threaten and intimidate a group of people because of their race.³²⁶ The deeply divided Court allowed that cross burning with the intent to intimidate a certain group could be criminalized, but the practice in general could not be.³²⁷ Justice Sandra Day O’Connor, in writing for the Court, reasoned, “It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings.”³²⁸ Such rulings provide a substantially different approach to limitations on expression, particularly as they are outlined in international covenants and how European courts have interpreted them.

European efforts to limit the types of speech that were at the heart of U.S. cases such as the Westboro Baptist and cross-burning decisions have led to struggles regarding how to both safeguard expression while still limiting immoral, unhealthy, or racist ideas. In *Mouvement Raëlien Suisse*, the details of which are discussed in

³²⁰ *Id.* art. 10(2).

³²¹ 491 U.S. 397, 412 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

³²² *Id.* at 414.

³²³ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 322, 339–40 (1974).

³²⁴ *Id.*

³²⁵ *See Snyder v. Phelps*, 562 U.S. 443, 448 (2011).

³²⁶ *See Virginia v. Black*, 538 U.S. 343, 343–44 (2003).

³²⁷ *Id.* at 366.

³²⁸ *Id.*

Part II, the ECtHR rationalized its decision to uphold Swiss authorities' rights to halt an organization's poster—not because of its content, but because of the organization's ideas.³²⁹ The court agreed that the poster did not include anything “unlawful or likely to offend the general public,”³³⁰ but found that the local authorities had wide latitude to pursue “the legitimate aims of the prevention of crime, the protection of health and morals, and the protection of the rights of others.”³³¹ The court indicated that the content of the group's website could offend “the religious beliefs of certain persons” and, later in its reasoning, that the concept of an ideal genetic society “might offend the democratic and anti-discriminatory beliefs” on which democratic society is based.³³² In *Delfi AS*,³³³ the court rationalized its decision to hold the service responsible for the comments users posted via its message boards by concluding a balance must be struck between freedom of expression and irresponsible communication.³³⁴ The court reasoned that “the case concerns the ‘duties and responsibilities’ of Internet news portals,” as outlined in article 10, section 2, when users “engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them.”³³⁵ Ultimately, the court found that Delfi had not done enough to protect its audiences and that its claims that its article 10 protections had been violated were not valid.³³⁶

A year later, the fourth section of the ECtHR faced a similar question regarding the extent to which forum providers are liable for how their services are used in *MTE v. Hungary*.³³⁷ Once again, the court sought to *balance* the free expression rights of the forum holders with concerns regarding the falsity, offensiveness, and reputational impact the ideas that were published might have.³³⁸ The court found that third-party providers, such as the industry self-regulating body and the for-profit company involved in the case “assume duties and responsibilities.”³³⁹ Ultimately, the court concluded that Hungarian courts had limited the third party providers' rights when they held them liable for the content that was published on their forums.³⁴⁰

³²⁹ See *supra* Section II.C; see also *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 385, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/27NM-XN9U>].

³³⁰ *Id.*

³³¹ *Id.* at 391.

³³² *Id.* at 394–95.

³³³ *Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. 319, <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/8U5J-5KVG>].

³³⁴ *Id.* at 345 (quoting Declaration on Freedom of Communication on the Internet, Council of Europe, May 28, 2003).

³³⁵ *Id.* at 372.

³³⁶ *Id.* at 388.

³³⁷ *Magyar Tartalomszolgáltatók Egyesülete v. Hungary*, App. No. 22947/13, Eur. Ct. H.R. 7 (2016), <http://hudoc.echr.coe.int/eng?i=001-160314> [<https://perma.cc/83D8-NWQL>].

³³⁸ *Id.* at 3.

³³⁹ *Id.* at 14–15.

³⁴⁰ *Id.* at 21–22.

While the court in *MTE* sided with free expression, it still emphasized that communicators are responsible for conveying ideas that are moral and beneficial to society.³⁴¹ Such concerns generally have had no place in free expression cases in the United States. Finally, in 2013 the same ECtHR upheld a British administrator's decision to reject for broadcast an animal rights group's advertisement.³⁴² The court in *Animal Defenders International v. United Kingdom* reasoned that it must balance the NGO's rights with the nation's ability to "mould its own democratic vision."³⁴³ The court explained that it was required "to balance, on the one hand, the applicant NGO's right to impart information and ideas of general interest . . . with, on the other, the authorities' desire to protect the democratic debate and process from distortion."³⁴⁴

Beyond these balancing efforts, the court in these judgments consistently communicated that it understood the government as the keeper of the public debate.³⁴⁵ It also conveyed that it conceptualized the goal of the ECHR and similar efforts as creating a pluralist society.³⁴⁶ The state-as-caretaker role was evident in *Mouvement Raëlien Suisse*, where the court acknowledged, and ultimately upheld, the officials' concern that the State "did not wish its name to be associated with certain non-majority but lawful ideas."³⁴⁷ Similarly, this concern was central to the *Animal Defenders* judgment, where the court reasoned that individual nations, because of its knowledge of "societies and their needs . . . are best placed to assess the particular difficulties in safeguarding the democratic order in their State."³⁴⁸ In several cases, the government's role as a steward for public debate manifests itself within the "pressing social need" approach, which judges attributed to article 10, section 2.³⁴⁹ The court indicated that if the limitation on expression was found to be a "pressing social need," it could be upheld.³⁵⁰ This was evident in *Hertel v. Switzerland*, a 1997 case that involved a journal article that made claims that damaged the appliance industry.³⁵¹ The Court concluded that restraining the author from communicating his ideas did not represent "pressing social need."³⁵² Similarly, in *Steel and Morris v. United Kingdom*, a

³⁴¹ *Id.* at 22.

³⁴² *See* *Animal Defs. Int'l v. United Kingdom*, 2013-II Eur. Ct. H.R. 203, <http://hudoc.echr.coe.int/eng?i=001-119244> [<https://perma.cc/X6W3-7RBX>].

³⁴³ *Id.* at 235.

³⁴⁴ *Id.*

³⁴⁵ *See id.* at 234.

³⁴⁶ *See id.* at 235.

³⁴⁷ *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 392, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/27NM-XN9U>].

³⁴⁸ *Animal Defs. Int'l*, 2013-II Eur. Ct. H.R. at 235.

³⁴⁹ *See, e.g., Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 403; *Steel and Morris v. United Kingdom*, 2005-II Eur. Ct. H.R. 19, <http://hudoc.echr.coe.int/eng?i=001-68224> [<https://perma.cc/634C-PHH9>]; *Hertel v. Switzerland*, 59 Eur. Ct. H.R. 31 (1998), <http://hudoc.echr.coe.int/eng?i=001-59366> [<https://perma.cc/Y6VT-84UF>].

³⁵⁰ *See Mouvement Raëlien Suisse*, 2012-IV Eur. Ct. H.R. at 403.

³⁵¹ *Hertel*, 59 Eur. Ct. H.R. at 3–4.

³⁵² *Id.* at 31–35.

2005 chamber judgment regarding whether a Greenpeace pamphlet defamed the McDonald's Corporation, the Court turned to the "pressing social need" standard in rejecting the fast-food giant's claims.³⁵³ Such a standard, along with the other efforts to balance social concerns with freedom of expression protections have led to substantially different lines of precedent between the U.S. and European legal systems.

Ultimately, the legal systems' differing approaches to interpreting freedom of expression, particularly in light of the international covenants, create the potential for markedly different frameworks regarding emerging questions about the freedom of expression rights of AI communicators. The European system, which prioritizes cultural pluralism and seeks to balance free expression with public concerns, such as morality and health, includes numerous existing safeguards against many of the potentials harms that AI entities can inflict on democratic discourse. The U.S. system, which pays little attention to the international documents and is far more oriented toward a relatively unfettered marketplace-of-ideas approach, has fewer existing tools for limiting AI expression.

IV. AN ARTIFICIAL MARKETPLACE

The growing presence of AI entities within the global, instantaneous discourses that take place in virtual communities around the world raises fundamental questions about how the freedom of expression rights of an entirely new form of communicator should be understood. Alongside such entities' increasing presence within our discourse, the nature of our own communication has changed. Within the virtual environments where AI entities are flourishing, people are forming weaker ties, producing less nuanced messages, and grouping into fragmented, like-minded, and intentional communities.³⁵⁴ These shifts in human discourse cannot be ignored when considering how the rights of non-human communicators should be conceptualized, since these changes have made it easier for AI communicators to take part in human discourse.

While the U.S. and European court systems diverge in fundamental and important ways regarding how they have interpreted safeguards for freedom of expression, both models are likely to struggle as AI communicators become more complex, and as they introduce novel problems into legal systems that have yet to squarely address the rights of such entities, even in their more basic forms. U.S. Supreme Court precedents, which have remained closely associated with the Enlightenment-oriented marketplace model for nearly a century, provide few avenues for lawmakers and jurists to limit the potentially harmful effects AI entities might have on democratic discourse without limiting human free-expression rights.³⁵⁵ At the same time,

³⁵³ *Steel and Morris*, 2005-II Eur. Ct. H.R. at 36–39.

³⁵⁴ See, e.g., SHIRKY, *supra* note 49, at 71–75; SUNSTEIN, *supra* note 51, at 44; Iyengar & Hahn, *supra* note 51, at 20–21.

³⁵⁵ See, e.g., Massaro & Norton, *supra* note 5, at 1173–74; Schroeder, *supra* note 66, at 383–84, 401–02.

however, the marketplace model cannot—in its current form—account for the power of AI entities to use their fundamentally non-human qualities to artificially boost some ideas while drowning out the ability of human ideas to organically compete in the marketplace. They can, essentially create marketplaces where only one product, or truth, is available for consideration.

The U.S. court system could turn to the animal rights cases in seeking a way to delineate protected human expression from that of non-humans. The outcomes in these cases indicated that when non-human actors—animals—claimed rights that have traditionally only been made available to humans, they were consistently found to lack standing.³⁵⁶ They therefore were not afforded human-like protections. These cases, however, fail to account for the potential contributions AI entities can make to discourse. AI communicators are simply, by their nature, not *like* animals. Animals generally struggle to communicate messages that are created by others and are not capable of creating meaningful messages that contribute ideas to the flow of information. Some AI communicators can not only repeat messages from human actors, but also construct ideas and make them available to citizens.³⁵⁷ These capabilities should only advance over time.

Another option is to approach AI entities as being more like corporations, which have found substantial First Amendment protection in the U.S. and strong freedom of expression support in European courts.³⁵⁸ Corporate-speech protections have been substantially supported because of their abilities, despite being artificial entities, to contribute to democratic discourse.³⁵⁹ A blanket decision to protect all AI actors' free-expression rights, based on the corporate-speech precedents, however, would open the door to crippling market failure in the marketplace of ideas. With no power to limit AI actors' messages, these communicators could drown out human ideas, build artificial appearances that some ideas are more accepted than others, and do much of this work while remaining indistinguishable from human communicators online. Thus, a more nuanced approach is needed.

The international covenants that have guided European lawmakers and jurists, and the precedents that courts have put forth as a result of them, have provided a far wider spectrum of tools for managing the impact of AI entities on discourse. European

³⁵⁶ See, e.g., *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018); *Tilikum v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1264–65 (S.D. Cal. 2012); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004); *Miles v. City Council*, 710 F.2d 1542, 1544 (11th Cir. 1983).

³⁵⁷ See *Massaro & Norton*, *supra* note 5, at 1171–72 (“Such computer speakers also are increasingly self-directed or ‘autonomous’—which is to say, the computer generates content further afield from human direction.”).

³⁵⁸ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 364 (2010); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 766 (1978); *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at 115 (1990), <http://hudoc.echr.coe.int/eng?i=001-57630> [<https://perma.cc/E2QK-MKDJ>]; *Markt Intern Verlag GmbH v. Germany*, 165 Eur. Ct. H.R. (ser. A) 11–12 (1989), <http://hudoc.echr.coe.int/eng?i=001-57648> [<https://perma.cc/YR94-LTW6>].

³⁵⁹ See, e.g., *Bellotti*, 435 U.S. at 777.

court decisions have balanced freedom of expression protections with concerns regarding morality, public health, and the preservation of a healthy democratic society.³⁶⁰ They have also expressed consistent concerns for safeguarding a pluralist and tolerant society.³⁶¹ By doing so, lawmakers and courts have constructed more diverse understandings of freedom of expression. These approaches provide some promising building blocks regarding how certain types of AI communication can be limited while human expression remains protected. The difficulty with this approach, however, is that it becomes likely that individual nations will create a patchwork of varying rigid restrictions upon AI communicators' expression. Such a patchwork would, in all likelihood, be relatively ineffective in addressing a challenge that is essentially borderless. Furthermore, the ECtHR's relatively recent efforts to rule on freedom-of-expression concerns have been based more on case-by-case, balancing approaches, rather than constructing a clear precedential line that would allow lawmakers and jurists in individual nations to understand how the ECHR's rights are to be interpreted.³⁶² Indeed, the Court's careful, deferential approach toward individual nations' legal concerns, while understandable, works against the broader effort to remedy this global concern.

A potential avenue for addressing this global concern, however, would be to revise the fundamental assumptions of the marketplace model to emphasize the evolution of truth as the result of discourse rather than as a competition between truth and falsity.³⁶³ In other words, the foundational aspects of the marketplace rationale could be shifted from a focus on protecting the *discovery* of truth to safeguarding the *development* of truth. By constructing and applying a model that incorporates more discursive assumptions about truth, rather than the more traditional Enlightenment-founded building blocks, the theory helps to create a dividing line between AI that contribute to the development of truth and AI that mislead, create or convey falsity, and simply artificially overwhelm the marketplace. This foundational revision to the theory would create a stronger rationale for protecting the *flow of information*, rather than the *competition of ideas*, which in this case would mean safeguarding the potential contributions that AI entities can make to discourse.³⁶⁴ Thus, lawmakers could regulate AI-based expression that does not contribute or damage the flow of information, but the First Amendment and article

³⁶⁰ See *Defi AS v. Estonia*, 2015-II Eur. Ct. H.R. 345 (quoting Declaration on Freedom of Communication on the Internet, Council of Europe, May 28, 2003), <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/DXF3-VFT6>]; *Animal Defs. Int'l v. United Kingdom*, 2013-II Eur. Ct. H.R. 234, <http://hudoc.echr.coe.int/eng?i=001-119244> [<https://perma.cc/X6W3-7RBX>]; *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 391, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/27NM-XN9U>].

³⁶¹ See, e.g., *Animal Defs. Int'l*, 2013-II Eur. Ct. H.R. at 234–35.

³⁶² See, e.g., *id.* at 235.

³⁶³ See DEWEY, *supra* note 179, at 158; HABERMAS, *supra* note 179, at 3–7; HABERMAS, *supra* note 182, at 21.

³⁶⁴ See Schroeder, *supra* note 66, at 428–30.

10 of the ECHR would safeguard AI communicators' expression on the assumption that halting their contributions would damage discourse. Such an approach aligns with the wording found in other international covenants. Article 19 of the ICCPR emphasizes that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers."³⁶⁵ The ICCPR's wording substantially draws from the UDHR, which also highlights that people have a right to both express and receive information.³⁶⁶ Protecting AI that contribute to the flow of information aligns with the right-to-receive aspects of the articles.

Such a shift in the theory's assumptions regarding truth would also align more with Justice Holmes's more pragmatic approach to the nature of truth. Justice Holmes, according to his legal and personal writings, did not believe in absolute, objective truth.³⁶⁷ Instead, he understood truth as being conditional, an approach that, while it does not line up entirely with discursive thought, appears to be more amenable to it than the more Enlightenment-related assumptions that the marketplace approach has come to be associated with.³⁶⁸ Of course, even if a more discursive approach is used, such an approach still leaves unresolved the crucial question of who will decide which AI-based expression contributes to the flow of information and the eventual emergence of truth and which does not. This is not a simple question. The European courts, along with the international covenants, have established precedents regarding expression that is harmful to individuals or society. These standards were particularly on display in the *Mouvement Raëlien Suisse, Delfi*, and *Animal Defenders* judgments.³⁶⁹ While the reasoning in these judgments does not provide a clear precedent regarding the extent to which certain types of harmful expression can be limited, the rulings, along with the covenants, have at least broken trail in that direction. Similar approaches could be employed for AI communicators,

³⁶⁵ ICCPR, *supra* note 286, art. 19(2).

³⁶⁶ *See id.*; *see also* UDHR, *supra* note 284, art. 19.

³⁶⁷ *See* HOLMES, *supra* note 110, at 107; Holmes, *supra* note 113, at 40–41.

³⁶⁸ While Justice Holmes and Dewey never met in person, they read each other's work. Justice Holmes commented to a friend that in Dewey's *Experience & Virtue*, he "read sentences that I didn't understand, for his style is horrid, but I thought that I never anywhere had read a philosophical work that felt our Universe so deeply and so widely." Letter from Oliver Wendell Holmes to Nina Gray (Jan. 2, 1927) (on file with Harvard Law School Digital Suite), <http://library.law.harvard.edu/suites/owh/index.php/item/42882378/11> [<https://perma.cc/M49U-3MYN>]. At the time of his death in 1935, Justice Holmes had three of Dewey's books on his shelf. *See* Oliver Wendell Holmes, Jr. Digital Suite (on file with Harvard Law School Library Digital Suite).

³⁶⁹ *Delfi AS v. Estonia*, 2015-II Eur. Ct. H.R. 345 (quoting Declaration on Freedom of Communication on the Internet, Council of Europe, May 28, 2003), <http://hudoc.echr.coe.int/eng?i=001-126635> [<https://perma.cc/DXF3-VFT6>]; *Animal Defs. Int'l v. United Kingdom*, Eur. Ct. H.R. 234–35, <http://hudoc.echr.coe.int/eng?i=001-119244> [<https://perma.cc/X6W3-7RBX>]; *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 391, <http://hudoc.echr.coe.int/eng?i=001-112165> [<https://perma.cc/27NM-XN9U>].

which would provide a framework for limiting the false and misleading information that such communicators often interject into discourse.

In the U.S., however, the courts would have to take the step of giving AI communicators fewer rights than humans. The revised, more discursive marketplace approach, provides a theoretical rationale for such a change. Of course, this line of thinking would go against the precedents from the corporate-speech cases, which provided strong support for protecting artificial entities' First Amendment rights.³⁷⁰ Of course, corporations were protected because they can contribute to discourse.³⁷¹ They are also collections of citizens.³⁷² The courts could reason that allowing the regulation of AI entities that damage the flow of information does not conflict with the corporate-speech precedents, or the First Amendment more generally, because they are doing quite the opposite regarding the Supreme Court's rationale from cases such as *Bellotti* and *Citizens United*.³⁷³ These types of AI are *not* contributing to discourse and the development of truth that comes with it. Thus, AI, in this scenario, would receive lesser freedom-of-expression protections than human communicators, but would still receive limited, conditional safeguards. Such an approach, one that emphasizes protecting the *development* of truth, rather than its *discovery*, aligns with the more discursive marketplace approach. If courts rationalize freedom of expression protections as safeguards for the development of truth, dividing AI communicators between those that contribute to discourse and those that do not becomes a more achievable task.

³⁷⁰ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 364 (2010); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978).

³⁷¹ See *Citizens United*, 558 U.S. at 364.

³⁷² Jared Schroeder, *Marketplace Theory in the Age of AI Communications*, 17 FIRST AMEND. L. REV. 22, 58 (2018).

³⁷³ See generally *Citizens United*, 558 U.S. 310; *Bellotti*, 435 U.S. 765.