The Marketplace of Ideas Mandate: What the Postal Power Requires from Congress in the Age of AI

Kevin Frazier

Follow this and additional works at: https://ir.lawnet.fordham.edu/iplj

Part of the Intellectual Property Law Commons

Recommended Citation
Kevin Frazier, The Marketplace of Ideas Mandate: What the Postal Power Requires from Congress in the Age of AI, 34 Fordham Intell. Prop. Media & Ent. L.J. 779 (). Available at: https://ir.lawnet.fordham.edu/iplj/vol34/iss4/1

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
The Marketplace of Ideas Mandate: What the Postal Power Requires from Congress in the Age of AI

Cover Page Footnote
* Kevin Frazier is an Assistant Professor at St. Thomas University College of Law and a Director of the Center for Law & AI Risk. He is thankful to Ana Barreto for her research assistance and to the entire IPJL editorial team for their thoughtful edits.
The Marketplace of Ideas Mandate: What the Postal Power Requires from Congress in the Age of AI

Kevin Frazier

Given the impending glut of AI-altered content that threatens to distort the flow of information on social media platforms, this Article comes at an inflection point. Absent the widespread adoption of a historically-accurate understanding of the obligation of the federal government to facilitate the spread of news and views on current affairs, the public may soon lose its ability to speak, listen, and learn to the extent required by a functioning deliberative democracy.

This is not hyperbole. By 2026, experts forecast that “synthetic” information may account for ninety-percent of online content. The anticipated deluge of AI-altered content will hinder the ability of speakers to reach their intended audiences as well as audience members to locate speakers. Yet, arbitrary and ahistorical tests developed by courts decades after the founding of the country limit and, arguably, foreclose government efforts to prevent a market failure in the marketplace of ideas.

This Article urges a review of the government’s responsibility to maintain a national information exchange. In particular, akin to founding-era congresses expanding the postal network and significantly lowering the postage rate of newspapers, the current Congress should subsidize the creation of “Reality Exchanges” on major social media platforms. These exchanges would only host

* Kevin Frazier is an Assistant Professor at St. Thomas University College of Law and a Director of the Center for Law & AI Risk. He is thankful to Ana Barreto for her research assistance and to the entire IPJL editorial team for their thoughtful edits.
content unaltered by AI that is also posted by verified individuals or institutions. Such exchanges would align with the historical role of the government in creating and maintaining marketplaces of ideas and avoid some of the major barriers set forth by current First Amendment doctrine.
INTRODUCTION ................................................................. 782

I. THE “POST OFFICE ERA”: GOVERNMENT
INTERVENTION IN THE MARKETPLACE OF IDEAS FROM
1775 TO 1845 ................................................................. 793

A. The Founder’s Limited Conception of Freedoms
Under the First Amendment ........................................... 794

B. What the Post Office Act Reveals About the First
Amendment ........................................................................ 799

1. The Post as a Source of Protest and
Revolutionary Communication ........................................ 799

2. A New Purpose for the Post ............................... 803

   a) The Channels of
      Communication ..................................................... 804

   b) The Creation and Distribution of
      “Civic Communication” ......................................... 806

   c) The Results of a Government-
      supported Marketplace of
      Ideas ...................................................................... 811

II. THE “TELEGRAPH ERA”: THE BEGINNING OF THE END
    OF GOVERNMENT EFFORTS TO MAINTAIN, EXPAND,
    AND IMPROVE A COMMON
    MARKETPLACE OF IDEAS ........................................... 812

III. THE “PLATFORM ERA”: FINDING SPACE FOR
    DEMOCRATIC DISCOURSE ON SOCIAL MEDIA
    PLATFORMS ........................................................................ 825

A. Why Social Media Platforms Constitute the Latest
   Primary Channel of Communication ............................. 826

B. How AI-altered Content Will Exacerbate
   Preexisting Failures in the Marketplace of Ideas
   on Social Media Platforms ........................................... 828

C. How “Reality Exchanges” Could Ameliorate
   Some of the Anticipated Market Failures Caused
   by AI-Altered Content .................................................. 834

CONCLUSION ........................................................................ 838
INTRODUCTION

A comparison between the government’s role in the exchange of information during the founding era and the contemporary government’s failure to aid the public in accessing timely and accurate information on public affairs makes clear that First Amendment jurisprudence has evolved in a way unintended by the Founders. Early American leaders knew that a deliberative democracy requires marketplaces of ideas that allow suppliers of information to meet the public’s demand for news covering everything from national politics to local cultural events.¹ This is First Amendment 101, at least according to Justice Holmes. He summarized the “theory of our Constitution” as follows: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”² In short, “sellers” (i.e., speakers) and “buyers” (i.e., members of the audience) need information exchanges that allow for relatively frictionless transfers of information on civic affairs.

America’s Founders also knew that there must be an information exchange that permits the nationwide dissemination of news and views in order to prevent the formation of closed markets in which buyers only have access to a limited set of sellers. In other words, they recognized that as a democracy increases in population and expands in area, so must the size of the marketplace of ideas. Perhaps this lesson is First Amendment 201, as taught by President George Washington. In his fourth State of the Union address, President Washington spoke to the significance of ensuring the steady supply of substantive information to all citizens.³ He stressed the

¹ See Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HArv. L. REV. 2299, 2308 (2021) (“The task of maintaining a democratic society . . . requires . . . extensive coordination between different government actors, and a sufficient flow of information between the government and the people to enable citizens to critically analyze the government’s activities and to maintain control over it (rather than the other way around).”). This Article refers interchangeably to “marketplaces of ideas” and “information exchanges” to discuss spaces that permit the flow of information.


³ President George Washington, Fourth Annual Address to Congress (Nov. 6, 1792) (transcript available at https://www.presidency.ucsb.edu/documents/fourth-annual-address-congress-0 [https://perma.cc/AA9U-CHR4]).
“importance of facilitating the circulation of political intelligence and information. . . .”\textsuperscript{4} Further, the President implied that such circulation ought not be limited to local markets when he argued for the “transmission of news papers to distant parts of the country.”\textsuperscript{5} Other Founders shared the understanding that it “was the business of government to ensure a national distribution of news. . . .”\textsuperscript{6}

Given this understanding of governmental responsibilities, the Founders unsurprisingly did not leave the establishment of a national information exchange nor the dissemination of current affairs to chance. Instead, just a year after the ratification of the Bill of Rights—which included the First Amendment and its supposed prohibition on government interference with the marketplace of ideas\textsuperscript{7}—Congress used government funds to create a national exchange of ideas and seed it with information that would empower the people to participate in their democracy.\textsuperscript{8}

In passing the Post Office Act of 1792,\textsuperscript{9} the leaders of the founding generation of the United States revealed two aspects of their conception of the proper role of the government with respect to maintaining a marketplace of ideas. The first is that the government can and should ensure that all Americans have access to a national

\textsuperscript{4} Id.

\textsuperscript{5} Id.


\textsuperscript{8} \textit{See generally} An Act to Establish the Post-Office and Post Roads Within the United States, Pub. L. No. 2-7, §§ 19, 21, 1 Stat. 232, 237–38 (1792). \textit{See also} Kochin, supra note 6, at 357–59 (describing the positions of various members of the founding generation with respect to the importance of ensuring the public’s access to newspapers).

\textsuperscript{9} \textit{See generally} An Act to Establish the Post-Office and Post Roads Within the United States §§ 19, 21.
information exchange. In the late eighteenth century and early nineteenth century, that meant expanding the postal network to the far corners of the ever-expanding country. In 1788, the United States had just 69 post offices. Thanks to the decision by the Second Congress to build a larger market for ideas, that number rapidly expanded—by 1800, 903 post offices had been built; by 1820, 4,500; and by 1840, more than 13,000. Clearly, Congress was deeply invested and committed to a truly national exchange.

Second, the government can and should assist in the creation and consumption of information relaying “current intelligence” (e.g., news and views on current affairs). The Post Office Act included a litany of subsidies both to seed the supply of qualifying information and to prompt demand for said qualifying information. Notably, only publications that qualified as “newspapers” could tap

---

10. For an example of this opinion being echoed, see Benjamin Rush, Address to the People of the United States, AM. MUSEUM, Jan. 1787, https://archive.csac.history.wisc.edu/Benjamin_Rush.pdf ("For the purpose of diffusing knowledge . . . every state—city—county—village—and township in the union, should be tied together by means of the post-office.").


12. Id. at 59–60.

13. See LAWS INSTRUCTIONS AND FORMS, FOR THE REGULATION OF THE POST-OFFICE DEPARTMENT 34 (1832) ("A newspaper is a printed sheet, containing current intelligence . . ."); Morris E. Cohn, The Censorship of Radical Materials by the Post Office, 17 ST. LOUIS L. REV. 95, 95 (1932) (noting that “[t]he mails are the arteries of current intelligence,” which meant that the mails provided “an intellectual link between each individual and the sources of information and critical opinion”).

into those subsidies. Per a subsequent opinion by the Attorneys General, only publications that “convey[ed] news, not mere dissertation and discussion, or literary and poetical miscellanies” constituted “newspapers” for the purposes of the Act. Under the Post Office Act, printers of such newspapers could exchange copies of their newspapers at no cost, thereby helping local papers share stories from across the country. In terms of demand, Congress subsidized postage rates for newspapers such that Americans from all financial backgrounds could access the news of the day with relative ease. This substantial government involvement in the production and distribution of news continued well into the nineteenth century. For example, in 1836, Congress authorized newspapers to use express mail routes for a fraction of the regular rates. These express routes often enabled the Post Office to deliver news stories in half the time required by alternative routes.

The extent of government involvement in the marketplace of ideas at the Founding becomes even more clear upon analysis of the dearth of alternative mechanisms of information exchange. Communities that did not have reliable access to the mail could not as actively participate in civic affairs because they could not receive

---

16 Postage—Definition of “A Newspaper,” 4 Op. Att’y’s Gen. 10, 13 (1842); see also id. at 10–13 (noting that the Post Office Act did not define “newspaper,” and turning to a litany of historical sources to determine an appropriate definition).
17 See generally An Act to Establish the Post-Office and Post Roads Within the United States § 21.
21 See Kielbowicz, Timeliness, supra note 18, at 11.
22 See Marvin Ammori, First Amendment Architecture, 2012 Wis. L. REV. 1, 37 (“Since before the Constitution and well into the twentieth century, the ‘post office and press working together’ were ‘intertwined’ as one ‘major communication system.’” (citation omitted)).
“the vehicles of knowledge and intelligence” of the era—specifically, newspapers. Members of one such community said as much in a letter to President Washington. They expressed concern that communities beyond the reach of the postal network were “destitute of regular information. . . .” The President recognized the importance of their concerns in his response; he wrote, “I doubt not the means of diffusing useful information will be duly considered.” President Washington followed up on that idea by calling for the complete elimination of any postage charges for newspapers and the maintenance of “a postal system of imperial reach.”

Nearly two centuries later, the marketplace of ideas is teetering on the edge of collapse. The postal network of today is essentially made up of a multitude of privately-owned social media platforms that serve as a main source of news for millions of Americans. The actual postal network no longer plays as meaningful of a role in the dissemination of current intelligence. In stark contrast to the

23 Rush, supra note 10; see also id. (alleging that the people of Sweden “lost [their] liberties” because the country’s “citizens were so scattered, that they had no means of acting in concert with each other”); Ammori, supra note 22, at 37 (asserting that prior to the spread of the telegraph, the postal network served as the sole exchange for widespread and frequent distribution of the news).
25 Id.
26 Id.
27 Kochin, supra note 6, at 355.
28 Id. at 349.
founding era, during which Americans had no choice other than to receive news via the post, just five percent of Americans today prefer to receive their news via a print publication. Moreover, half of Americans “sometimes” or “often” turn to social media platforms to “get news.”

Elected officials and government entities also rely on social media platforms to receive and share news. By way of illustration, Pew estimated that “[a]s a collective, the 116th Congress maintain[ed] over 2,000 active official, campaign and personal accounts on Facebook and [X] . . .” Similarly, even as far back as 2011, the Government Accountability Office tallied twenty-three major federal agencies that operated a headquarters-level Facebook page, X account, and YouTube channel. Americans disconnected or uninterested in joining such platforms theoretically may turn to news via traditional television outlets. However, that is akin to trying to glean your news from a community bulletin board—according to the Local News Initiative, “numerous research studies have concluded that more than 90% of the news stories that air [on local TV] are about events, issues and people in the city where the station is located.”

This predominant online marketplace, though, has fallen short of the aspirations of the Founders with respect to serving as a common source of information that empowers the people to fulfill their democratic duties. Whereas an expansive postal network and broadly available postage rate subsidies generated a truly national

---

31 Liedke & Wang, supra note 29.
32 Id.
market for the exchange of information about public affairs, social media platforms—by virtue of prioritizing partisan content and directing users to engage with a small subset of the “sellers” and “buyers”—manage distorted information markets in which members of “[d]ifferent parties are operating in what seem like different realities, with different sets of facts or at least completely different reactions to those facts.”

Recent advances in artificial intelligence (‘AI’) threaten to distort these markets even further. Some observers anticipate that “[s]ynthetic photos, audio, and videos . . . threaten[] to destabilize society and push us into a full-blown ‘infocalypse.’” Yet, two developments—one technological, the other legal—have rendered the government unable to legally intervene to ensure the preservation of the foundation of our deliberative democracy.

To start, successive waves of technological developments have slowly and completely eliminated the government from having any stake in the main exchanges of information. The telegraph network, though initially operated by the government and popularly thought

36 Research by John Nerone suggests that though many of the founding era papers had a partisan angle, many more avoided such skewed coverage; importantly, both types of papers had equal access to the postal rate subsidy. See John Nerone, The Media and Public Life: A History 57–61 (2015).


38 See Josh A. Goldstein et al., Generative Language Models and Automated Influence Operations: Emerging Threats and Potential Mitigations 6 (2023), https://cdn.openai.com/papers/forecasting-misuse.pdf [https://perma.cc/A5KC-XQXN] (discussing threats posed by bad actors using new AI tools to conduct influence operations); Allie Funk et al., Freedom on the Net 2023: The Repressive Power of Artificial Intelligence I (2023), https://freedomhouse.org/report/freedomnet/2023/repressive-power-artificial-intelligence [https://perma.cc/GX4E-JVC9] (“AI-based tools that can generate text, audio, and imagery have quickly grown more sophisticated, accessible, and easy to use, spurring a concerning escalation of these disinformation tactics. Over the past year, the new technology was utilized in at least 16 countries to sow doubt, smear opponents, or influence public debate.”).

to have a “special civic purpose,” eventually fell into private hands. As will be discussed in more detail below, telegraphy overturned newsgathering arrangements built on the government’s postal system. . . . This new marketplace displaced what had previously been an open exchange that was more or less “open to all newspapers with few costs and formal constraints. . . .” Within a few decades, telegraphy “reordered the nation’s news commons.” The development and entrenchment of the Internet caused another such reordering. These technological developments and other modern advances have increasingly moved exchanges of information into private hands.

Such privatization would not pose a threat to the nation’s information markets if Congress retained some authority to prevent those markets from failing and to assist in the distribution of the information necessary for all Americans to “keep abreast of matters of public interest.” However, through decades of judicial decisions amounting to a substantial transformation of the legal understanding that existed at the Founding, the First Amendment has become a

40 Joshua D. Wolff, Western Union and the Creation of the American Corporate Order, 1845–1893 3 (2013).
41 See discussion infra Part II.
42 Kielbowicz, Timeliness, supra note 18, at 6.
43 Id.
44 Id.
bar on government efforts to foster an informed public. This disconnect between the explicit, expansive, and necessary role of the government in protecting exchanges of information and providing access to critical information with the current, limited role of the government in information exchanges is partially explained by the fact that the First Amendment “first came to life in the early twentieth century, when the main threat to the nation’s political speech environment was state suppression of dissidents.”

Considering that the Supreme Court only presided over a handful of First Amendment cases between 1791 and 1889, it stands to reason that the Court had few opportunities to cement popular recognition of and legal justification for a duty on the government to distribute the news of the day via a national exchange. In this relative void, the First Amendment doctrine that emerged in the twentieth century came to reflect concerns about government suppression of information more so than fears about the government’s failure to

49 A narrow conception of the First Amendment has framed it as a private right rather than a public right. See Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 WM. & MARY L. REV. 1939, 1972–75 (2003) (detailing an alternative conception of the First Amendment in which it is conceived as a public right that strives to afford public access to the information required for self-governance rather than as a narrow right that predominantly serves the interests of a few). The latter conception would significantly upend and, for the sake of efforts to promote self-governance, radically improve the First Amendment doctrine. See id. (noting the scholarship of Alexander Meiklejohn, who asserted that contemporary First Amendment doctrine seemed to assume the Amendment was “written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game . . . .” (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 45 (1948))); see also Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 HOFSTRA L. REV. 1379, 1395 (2006) (discussing the merits of the argument that the contemporary First Amendment does not permit private actors who hold increasing sway over popular discourse and expression).


provide access to that information. Decades of additional case law have drawn First Amendment doctrine further away from the Founders’ conception of a proper marketplace of ideas, cementing a doctrine devoid of the values and actions that steered the federal government for a century, if not longer.

A particularly unsettled aspect of that case law—“the state action” requirement—has undermined the government’s capacity to anticipate and respond to failures in the marketplace of ideas. In the name of “individual liberty,” the U.S. Supreme Court has come to regard the “state action doctrine” as a threshold limitation to government regulation of the marketplace of ideas. In short, absent a private entity fitting into an increasingly narrow set of exceptions, the First Amendment affords little to no means for the government to maintain a marketplace of ideas. In direct contradiction to the actions taken by the Founders, the government now finds itself unable to respond to the “most important change in the expressive environment”—a deluge of mis- and dis-information and a diminishing capacity of the public to find and understand regular information on civic affairs.

This Article fills a substantial gap in First Amendment scholarship by augmenting the sources of interpretative guidance—in particular, by analyzing congressional action with respect to the Post

---

52 See Lakier, supra note 1, at 2303 (contending that inadequate consideration of legislative action related to freedom of the press taken in the eighteenth century results in an incomplete picture of possible scope of First Amendment protections). Specifically, Lakier argues that such inattention omits one historical basis for legislative intervention into the marketplace of ideas—“the threat that the concentration of economic power” posed to freedom of the press. Id. Meiklejohn shares Lakier’s concerns that First Amendment jurisprudence developed in a way too focused on the protection of a private speech right instead of the furtherance of a public right to speech as well as to the information required for self-governance. MEIKLEJOHN, supra note 49, at 45–46.

53 Lakier, supra note 1, at 2304 (pointing out that First Amendment doctrine has come to reflect a “court-centric conception of freedom of speech”).

54 See Huhn, supra note 49, at 1380–83.


56 Id. at 1934.


58 Wu, supra note 50, at 548.
Office Act of 1792 and inaction (followed by regret) with respect to the introduction of the telegraph. ⁵⁹ This broader perspective corrects for a bias among scholars to solely focus on courts and statutory interpretation. ⁶⁰ This bias has had a particularly pernicious effect on both First Amendment jurisprudence and scholarship. ⁶¹ The decades-long gap between the Founding and robust judicial consideration of the First Amendment should lead to scholars placing less weight on the latter—yet, that has generally not been the case. Scholars have perpetuated the Supreme Court’s understanding of the proper role of the government in maintaining a marketplace of ideas despite that understanding being developed in temporally, demographically, politically, and, most importantly, technologically distinct periods from the Founding. ⁶² This undue deference to a small set of judicial decisions as the conclusive and complete sources of First Amendment meaning must come to a close. ⁶³

By virtue of this expanded historical analysis, this Article provides jurists and scholars alike with a new understanding of the First Amendment at a time of increasing concern about our nation’s capacity to debate and discover the truth. ⁶⁴ Part I details the extensive role the government historically played in ensuring access to

---

⁵⁹ See discussion infra Part II. Of course, other scholars, such as Genevieve Lakier, have covered this topic, but they too have admitted that this broad free speech inquiry stands outside the traditional lane of judicial and scholarly analysis of the First Amendment and free speech more generally. See, e.g., Lakier, supra note 1, at 2304.

⁶⁰ See Roman J. Hoyos, The People’s Privilege: The Franking Privilege, Constituent Correspondence, and Political Representation in Mid-Nineteenth Century America, 31 L. & Hist. Rev. 101, 102 (2013); see also David M. Rabban, The First Amendment in Its Forgotten Years, 90 Yale L.J. 514, 518 (1981) (“[N]o scholar has made a comprehensive attempt to generalize about the theoretical or practical meaning of the First Amendment during any period between 1798 and 1917.” (footnote omitted)).

⁶¹ Lakier, supra note 1, at 2304 (“[S]cholars have largely accepted the [Supreme] Court’s claim that what freedom of speech means in the United States—at least as a legal matter—is what the First Amendment cases say it means. But this is a mistake.”).

⁶² Rabban, supra note 60, at 518–20.

⁶³ See Lakier, supra note 1, at 2304 (detailing the difference between conceptions of the freedom of speech set forth by contemporary case law and by legislative action as well as inaction in the eighteenth and nineteenth centuries).

⁶⁴ See G. Michael Parsons, Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas, 104 Minn. L. Rev. 2157, 2175 (2020) (“The theory that the marketplace of ideas necessarily functions as an ‘engine of truth production’ is simply false.” (citation omitted)).
“current intelligence” via the postal network. This review makes clear that the First Amendment did not bar government investment in marketplaces of ideas, prohibit government support for the distribution of content essential to a deliberative democracy, nor limit the government to only maintaining and expanding the nation’s marketplace of ideas through the postal network.65

Part II exposes how a major technological advance—the telegraph—upended the Founder’s assumption that the federal government would have control over the primary marketplace of ideas. Nevertheless, Congress’ initial inclination to develop a public telegraph network reinforces the widespread understanding that the government had a duty to preserve a functioning marketplace of ideas.

Part III begins by exploring the transition of democratic discourse onto social media platforms. Next, an examination of the preexisting supply and demand for “current intelligence” on those platforms reveals the need for government intervention to prevent AI-generated content from accelerating the already high costs of finding information related to civic affairs. Specifically, Congress ought to subsidize the creation of “Reality Exchanges”—reserved spaces for content unaltered by AI and shared between verified users on major platforms—to restore some semblance of a marketplace for “current intelligence.” Finally, the Article concludes with ideas for further scholarship related to the implementation and design of Reality Exchanges.

I. THE “POST OFFICE ERA”: GOVERNMENT INTERVENTION IN THE MARKETPLACE OF IDEAS FROM 1775 TO 1845

Analysis of the historical development of the freedom of press, speech, and expression66 reveals no limitation on the government

65 See Lakier, supra note 1, at 2304 (faulting modern First Amendment theory for neglecting the conception of freedom of speech that existed at the Founding—a theory “much less laissez-faire in its understanding of the government’s responsibilities vis-a-vis the marketplace of ideas”).

66 Though the First Amendment has specific clauses related to each of these freedoms and courts have interpreted those clauses as affording specific protections, this Article
establishing and expanding channels for the distribution of information, such as the postal network; likewise, though the Founders opposed prior censorship, they did not affirmatively undercut the authority of the government to regulate the dissemination of published content unaligned with the public’s understanding of meaningful democratic criticism. This Part first provides a brief overview of how members of the revolutionary and founding generations perceived the freedoms protected by the First Amendment. Next, this Part looks to the actions taken by congresses in the late eighteenth century and early nineteenth century to further assist in the demarcation of the scope of the First Amendment. Finally, this Part concludes with a review of the extent to which the government was involved in maintaining the channels of distribution of newspapers as well as in dictating which “sellers” could access those channels.

A. The Founder’s Limited Conception of Freedoms Under the First Amendment

Freedom of the press in the revolutionary and founding eras held a different meaning than it does today. According to John Peter Zenger (yes, that Zenger),

67 “liberty of the press” entitled “every man to communicate his sentiments freely to the public, upon political or religious points." Put differently, Zenger qualified the

generally refers to this “bundle of rights” as the freedom of the press. For an adoption of a similar approach, see id. at 2300 n.1 (taking this approach given the Supreme Court’s tendency to treat the isolated clauses as a common, mega-right). Importantly, the freedom of the “press” does confer protections solely to members of a single profession. See Eugene Volokh, “Freedom of the Press” as the Equal Freedom of All to Using Printing Press Technology, from the 1820s to 1930, REASON: VOLOKH CONSPIRACY (May 6, 2018, 1:41 PM), https://reason.com/volokh/2018/05/06/freedom-of-the-press-as-the-equal-freedom/ [https://perma.cc/K37L-4TRA] (“[A]round the time of the Framing and in the decades following, the freedom of the press was understood as protecting the right of all to use the printing press, and not just a right of a particular industry (the professional media).”).


“liberty of the press” to a certain kind of expression—commentary on the central issues of current affairs at that time. Note also that Zenger said nothing about government financial assistance in the creation of newspaper content, nor in the distribution of those newspapers infringing on that right. As will be discussed in more detail below, for anyone to have called “foul” on such government involvement in the marketplace of the ideas would have been nonsensical— if Zenger, for example, urged the government to step away from operating the postal network, then newspaper circulation likely would have collapsed.

Importantly, Zenger’s nuanced approach to freedom or liberty of the press was not unique. Another essayist set forth a limited definition of liberty by excluding from it the freedom to “traduc[e] those gentleman who are appointed our lawful governors. . . .” They continued: “[W]hen they behave themselves well, they ought to be treated with all the respect and gratitude, that’s due from an obliged people; should they behave themselves ill, their measures are to be remonstrated against in terms of decency and moderation, not of fury or scurrility.” Here, again, it becomes clear that freedom of the press, as understood by members of the founding generation, stopped short of permitting the distribution of any and all content. Though Zenger and others sought freedom to criticize the government, they did not endorse a license to denigrate individuals. The same essayist instead encouraged any man, so long as they complied with the law, “to communicate to the public his sentiments on the important points of religion and government; of proposing any laws, which he apprehends may be for the good of his country, and of applying for the repeal of such, as he judges pernicious.” He expected such challenges to be done “by the light of scripture and reason.”

This approach to the freedom of the press would welcome, and perhaps even celebrate, the denial of ink to a “troll.” The freedom of the press according to the founding generation was contingent upon

69 See discussion infra Section I.B.2.b.
70 Leder, supra note 68, at 7.
71 Id.
72 Id.
73 Id. at 8.
adherence to social norms—particularly the maintenance of decency. Even those who pushed back on Zenger’s conception of liberty of the press admitted that “abuses that dissolve society, and sap the foundations of government, are not to be sheltered under the umbrage of the liberty of the press. . . .” Likewise, another author, Jonathan Blenman, accepted that the freedom of the press should only extend to certain individuals and publications; but this finite group did not include “every discontented fool or designing knave.” Blenman would have supported only “[m]en of sense,” those “deserv[ing of] public attention,” having an unfettered ability to “convey proper ideas to the people. . . .” Only such “men of sense” could voice important and perhaps controversial ideas “without running counter to all Order and Decency. . . .”

Freedom of the press also hinged on whether the content had some benefit to popular discourse, such as the “advancement of truth, science, morality, and arts in general” and the “ready communication of thoughts between [individuals], and its consequential promotion of union among them. . . .” The editors of the American Weekly Mercury, for instance, pledged in 1740 to comply with the

---

74 See Jud Campbell, Natural Rights and the First Amendment, 127 YALE L.J. 246, 310 (2017) (“[T]he Founders constantly mentioned that the inalienable right to speak was limited to those who spoke with decency and truth . . .”).

75 Leder, supra note 67, at 8 (citation omitted).

76 Id. at 9 (quoting Jonathan Blenman, Remarks on Zenger’s Tryal, Taken out of the Barbados Gazette’s 3, 31 (1737), https://quod.lib.umich.edu/cgi/t/text/textidx?c=evans;idno=N09066.0001.001;rgn=div1;view=text;cc=evans;node=N09066.0001.001:2 [https://perma.cc/Z3SZ-HCDY]).

77 Id.

78 Jonathan Blenman, Remarks on Zenger’s Tryal. Taken out of the Barbados Gazette’s 3, 31 (1737), https://quod.lib.umich.edu/cgi/t/text/textidx?c=evans;idno=N09066.0001.001;rgn=div1;view=text;cc=evans;node=N09066.0001.001:2 [https://perma.cc/Z3SZ-HCDY].

79 Letter from the Continental Congress, An Appeal to the Inhabitants of Quebec (1774) (transcript available at https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=4104#~:text=Annotation%3A%20The%20Continental%20Congress%20in%201774%20did%20not%20need%20an%20explanation [https://perma.cc/MLW6-CF5Y]); see also Stewart Jay, The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century, 34 WM. MITCHELL L. REV. 773, 793 (2007) (summarizing scholarship concluding that the First Amendment in the founding era was “far from a bastion of unbridled expression).
freedom of the press by permitting submissions from all individuals, so long as those submissions did not “contri[but]e to the [l]icentious-ness of the [p]ress.” Jeremiah Gridley similarly celebrated the right of the individual to speak out against their government when doing so had the potential to help society avoid threats to the well-being of the collective.

By 1754, on the verge of the Revolutionary period, members of the founding generation had seemingly reached somewhat of a consensus on the meaning and scope of the liberty of the press: first, individuals have an “exclusive right” to “study” and “investigate” the government; second, individuals have a “right to divulge [their] sentiments, either relating to the conduct of the person intrusted [sic] with the execution of the laws; or those . . . intrusted [sic] with certain powers for the public good” because those officials only exercise such power as a result of the assent of the public; and, third, such rights should be exercised to further the public’s interest by, for example, “oppos[ing] the undue measures of an arbitrary ruler” and providing “timely notice” of official action that may endanger that interest. In sum, “[t]he persistent image of colonial America . . . as a society in which freedom of expression was cherished is an hallucination of sentiment that ignores history.”

The same understanding of the freedom of the press as directed toward societal well-being more than individual entitlement continued in the wake of the Revolutionary War. Hugh Williamson, for instance, defended the Constitution against concerns by the Anti-Federalists that the document failed to protect the press, not by detailing some expansive ideas about that freedom, but by simply pointing out that the government would lack the authority to impose prior restraints. Tellingly, constitutions adopted at the state level

---

82. *Id.* at 13 (quoting the Watch Tower #10, N.Y. MERCURY, JAN. 27, 1755 (No. 129)).
83. *Id.*
84. *Id.* at 14.
85. *Id.* at 16 (citation omitted).
during the same period generally left out any specific “freedom of speech” protection, with legislatures instead opting to solely include the freedom of the press from prior restraint.\(^{87}\)

On the whole, then, the Founders crafted the First Amendment not as an expansive and inflexible bar on government participation in the marketplace of ideas, but more narrowly as a prohibition on the sort of licensing regime used by Henry VIII, Elizabeth I, and the like.\(^{88}\) This humbler conception of the First Amendment still indicates a desire among the Founders to increase the quantity and quality of democratic discourse; after all, given that prior restraints had been deployed as an effective means to stifle speech, even this limited version of the First Amendment fostered a more deliberative society.\(^{89}\)

This background on the freedom of the press, speech, and expression exposes the inconsistency of modern First Amendment tests with the original understanding of protections related to the press.\(^{90}\) Early speech regulations suggest that a majority of the Amendment’s drafters agreed on a relatively narrow set of protections.\(^{91}\) For instance, while they welcomed investigation and study of the government, they also expected that publication of those findings would “encompass[] truthful, respectful criticism of government measures.”\(^{92}\) Beyond limits on the tone and tenor of discourse, they also cabined permissible speech by its consequences by clarifying an intent to protect “expression that could be demonstrated to cause no harm of any kind to any person.”\(^{93}\) Likewise, they maintained that content not aligned with the general welfare could “be

\(^{87}\) See Bogen, supra note 68, at 441–42.
\(^{88}\) See id. at 442–43.
\(^{89}\) See id. at 441 (“A major impact of [the abolition of prior censorship in England] was to extend public participation in political debate from among the privileged few to the general populace.”).
\(^{90}\) See generally Rabban, supra note 60 (discussing First Amendment challenges before the Supreme Court and the evolution of related judicial doctrines in the late nineteenth and early twentieth centuries).
\(^{91}\) See Bogen, supra note 68, at 464 (listing “[i]ntemperate language, personal remarks that harm others, discussion of sexual matters, incorrect statements attacking the government, and advocacy of any harmful activity” as such content).
\(^{92}\) Id. at 463.
\(^{93}\) Id. at 464.
condemned as abuses of speech and punished if within the purview of matters confided to government.” 94 Nevertheless, they emphasized that speech—whether violative of those norms or not—should be free from prior restraint. 95 Omitted from that list is a prohibition on government efforts to increase access to substantive information.

B. What the Post Office Act Reveals About the First Amendment

As stated above, the Founders’ limited conception of freedom of the press ought not to be interpreted as them opposing a resilient and lively marketplace of ideas. A review of the history behind Congress’ Postal Power and the Post Office Act of 1792 illustrates that the Founders not only intended the federal government to help set up a national exchange of information, but also to ensure that the scope and speed of information delivery progressed over time, as discussed below. This review exposes the distinguishing feature of the postal network—that its purpose included serving as a cross-country “medium of civic communication and nation-building . . . .” 96

1. The Post as a Source of Protest and Revolutionary Communication

Article I, Section 8, Clause 7 of the U.S. Constitution does not receive much attention. 97 In short, it authorizes Congress to “establish post offices and post roads.” 98 A purely textual reading of the Postal Power generates a number of questions. Chief among them: whether “the power to establish offices and roads embraces either

94 Id.
95 Id.
97 The Shepard’s report on cites to the clause in law reviews returned just twenty-three articles. U.S. Const. art. I sec. 8 cl. 7, LE
XIS +, https://plus.lexis.com/shepards/shepardspreviewpod/?pdmfid=1530671&crid=0a70ec9d-0880-4d96-8d06-2d5f5364bc88&pdshepid=urn%3AcontentItem%3A805G-4VJ1-2NSD-M06N-00000-00&pdshepcat=pddoctabclick=false&pdispendingadopted=false&pid=0bd701ea- (last visited Apr. 16, 2024) (click “Other Citing Sources,” then hover over the horizontal pink bar) (screenshot of results on file with author).
98 U.S. Const. art. I, § 8, cl. 7.
the power to provide delivery service or to create a monopoly.”99 The Founders did not bother to answer those questions during the Constitutional Convention.100 It follows that the scope and purpose of the Postal Power necessitates a look back at the Articles of Confederation, as well as a look forward (relative to the ratification) at how Congress initially acted on its power.

The text of the relevant clause of the Articles of Confederation suggests, if anything, that Congress had greater authority under the previous governing document. In line with the historical treatment of the postal service as a significant and reliable source of revenue,101 the Articles of Confederation assigned Congress the “power of . . . exacting such postage . . . as may be requisite to defray the expenses of the said office.”102 Policymakers at the time interpreted that language as providing Congress with a monopoly over the creation and regulation of post offices.103

---

100 Id. at 46.
102 See ARTICLES OF CONFEDERATION of 1777, art. IX, para. 4.
103 See Priest, supra note 99, at 46 (“There is so little doubt that the authors of the Constitution intended to authorize a postal monopoly that the issue has never again appeared worth litigating.”); Federal Police Power Turns to the Postal Clause, 5 FORDHAM L. REV. 302, 303 (1936) (“Carriage of the mails was early made a government monopoly.”). Christina Bates, a senior manager at Orion Advisory, LLC, challenged this interpretation of the Postal Power in a 2003 article. See generally Christina Bates, From 34 Cents to 37 Cents: The Unconstitutionality of the Postal Monopoly, 68 MO. L. REV. 123 (2003). Despite acknowledging that “little discussion” about the Postal Power occurred at ratification, id. at 124, Bates maintains that an 1848 article authored by “the first [person] to challenge the constitutionality of the postal monopoly,” id. at 125, and efforts by citizens throughout the 1850s to create a private mail service warrant a different understanding of the clause. See id. at 124. I do not find this evidence persuasive given its temporal distance from the Founding nor relevant given that the author of the 1848 article seemed not to contest whether the Founders intended to create a postal monopoly but instead the constitutionality of that decision.
Given that the U.S. Constitution dropped language suggestive of Congress having exclusive power over the post—omitting “exact postage” and “sole and exclusive”—scholars, such as George Priest, rightfully question whether such changes indicated a substantive shift in the postal policy of the Founders. As noted above, the Founders failed to clarify the purpose of their amended language. Debates over the ratification of the Constitution held in the states also failed to churn up discussion of the Postal Power. What’s more, few contemporaneous judicial opinions addressed the scope of the power. Rather than read the new clause narrowly, though, Priest interprets the absence of debate and litigation as strong evidence that “there must have been general agreement” on the proper interpretation of the Postal Power—specifically, that it merely “validate[d] in the Constitution the powers the Continental Congress had exercised in the Articles.”

The decision of the Continental Congress to delegate control over the postal network reflects not just a desire to reap the resulting revenue but also their recognition of the network as essential to the flow of civic communication. The Founders had experienced a postal network under the control of a repressive authority and, when given the chance, swiftly foreclosed the possibility of a return to such a system. The colonial postal system operated under British hands. When the British government attempted to enforce the Stamp Act, colonists quickly realized that control over the means of

---

104 Priest, supra note 99, at 45–46.
105 Id. at 46.
106 See Federal Police Power Turns to the Postal Clause, supra note 103, at 302.
107 See The Expanding Postal Power, 38 COLUM. L. REV. 474, 475 (1936) (reporting a dearth of analysis by the Supreme Court with respect to the government’s monopoly over the Postal Power); Priest, supra note 99, at 46 (reporting few relevant court opinions in the nineteenth century but pointing out two opinions in which different district court judges, albeit “feebly,” supported a congressional monopoly of the Postal Power). For the two cases described by Priest as “feebly” supporting a congressional monopoly of the Postal Power, see generally United States v. Thompson, 28 F. Cas. 97 (D. Mass. 1846) (No. 16) (concluding that Congress had the power to deny the creation of a private express route); United States v. Hall, 26 F. Cas. 75 (C.C.E.D. Penn. 1844) (No. 15,281).
108 Priest, supra note 99, at 46.
110 See Priest, supra note 99, at 46.
civic communication could aid their revolutionary cause. They responded by vigorously protesting the Act and generally opposing the post office in the years that followed, given its ties to the British government. What’s more, many colonists actively challenged the government’s monopoly over the postal network—delivering mail on their own and relying on sympathetic jurors to avoid holding them to account.

This background information helps explain why the Continental Congress made the creation of an independent postal network one of its top priorities; the revolutionaries launched their own network in 1775. Notably, this revolutionary era postal network was managed by the Continental Congress and granted a legal monopoly. As much as this was a conscious policy choice, it was also a reflection of the absence of an alternative. A state-run system, for instance, would have been an operational nightmare given problems of “interchange and apportionment of postal charges.” Moreover, and perhaps most importantly, the Congress needed each and every source of financial support it could locate—though the postal network did not produce tremendous revenue, the Congress refused to allow any private entity to profit from it.

By the time of the Constitutional Convention, however, the need for emergency correspondence had passed, and more reliable and sizable sources of revenue had been identified—still, the

---

111 See id. at 46–8.
113 See Priest, supra note 99, at 4.
114 See id.
115 See id.
116 Id.
118 Priest, supra note 99, at 51.
119 Id. at 48 (“Once the Continental Congress had established its postal system, it did not hesitate to prohibit private carriage of letters.”).
120 See FERGUSON, supra note 117, at 290 (“The new scheme of government had conferred unlimited power of taxation upon Congress.”).
delegates voted to retain the government’s postal monopoly.\textsuperscript{121} This apparent policy choice again likely reflected a dearth of alternatives. As summarized by Priest, “[t]he Post Office required managing by a firm capable of national operations, and the only firm satisfying that requirement in 1787 was the U.S. Congress.”\textsuperscript{122} Congress assumed the obligation, even if it intended to do so on a temporary basis.\textsuperscript{123} This perhaps ambivalent and ambiguous history as to the intent of the Founders with respect to the Postal Power means that Congress’ exercise of that power—specifically, its passage of the Post Office Act of 1792—provides the most reliable guide for understanding its meaning and purpose.

2. A New Purpose for the Post

The postal network took on new significance soon after ratification of the Constitution. Despite initially being quite small, the network still provided the “only channels” through which information could reach the public with the “necessary ground of enlightened confidence.”\textsuperscript{124} The absence of any other information exchange helps explain why President George Washington and his political allies realized that the development and use of the postal network could advance their political ambitions and foster a national identity.\textsuperscript{125} The maturation of newspapers into a primary source of information on current affairs also accentuated the need for a reliable and

\textsuperscript{121} See generally An Act for the Temporary Establishment of the Post-Office, Pub. L. No. 1-16, 1 Stat. 70 (1789).

\textsuperscript{122} Priest, supra note 99, at 49; see also id. at 53–54 (discussing the opinion of some congressmen that the President should have the power to establish post offices and roads, given that he alone had a responsibility to advance the political welfare of the entire nation).

\textsuperscript{123} See id. at 50 (“There is no reason to believe that Congress in 1789 would have insisted upon management of the Post Office, had a private party made a credible offer to manage the post and to provide reliable service for government correspondence . . . .”).

\textsuperscript{124} Richard R. John, Spreading the News: The American Postal System from Franklin to Morse 36 (1998).

expansive information exchange. As of 1788, newspapers had yet to be “considered as part of the mail…” 126

This increased interest in the postal network led Congress to immediately start debating the scope of its Postal Power; the length of that debate—three years—indicates the importance of the decisions under evaluation. 127 Rather than rush to cobble together an inadequate piece of legislation, Congress passed three temporary measures in as many years until they settled on the contents of the Post Office Act of 1792—what would become “the most important single piece of postal legislation enacted in the early republic.” 128 On the whole, the Act “represented a conscious effort to create a national political system.” 129 More specifically, the provisions of the Act disclose two important roles for Congress with respect to the nation’s marketplace of ideas: first, Congress can and should develop the infrastructure for the national exchange of information; and, second, Congress can influence the market to help spread information critical to a healthy democracy.

a) The Channels of Communication

“Though in 1789 postal operations barely scratched the eastern seaboard, by 1800 service was provided to the farthest reaches of the western and southern frontiers.” 130 This extension required substantial political and financial support; yet President Washington deemed it a prudent investment in nation building. 131 The Federalists, though in control of the White House, did not assume that support for the national government would endure. In particular, the

127 See Priest, supra note 9999, at 50–51.
129 Richard Kielbowicz, A History, supra note 126, at 12.
130 Priest, supra note 99, at 52.
Federalists (including Washington) worried about “the lukewarm allegiance of citizens living west of the mountains. . .”\footnote{Priest, supra note 99, at 52. Note that Priest cited this concern as evidence that Washington advocated for the expansion of the postal network “as a potent tool for political propaganda.” Id. at 51. This analysis, however, fails to consider that newspapers, for the most part, did not publish that sort of content in this era. Kielbowicz points out that many of the papers of the time lacked a partisan angle. See Kielbowicz, A History, supra note 126, at 12. Regardless of which scholar’s interpretation hues closer to the truth, the fact of the matter is that Washington regarded a national postal network as important to developing a cohesive nation and, thus, aimed for the postal network to inform and connect all Americans. See President George Washington, Fourth Annual Address to Congress, supra note 3 (advocating for “the transmission of news papers to distant parts of the country . . . [to] facilitate[e] the circulation of political intelligence and information “); see also President Washington, Third Annual Address to Congress, supra note 131 (“The importance of the post office and post roads on a plan sufficiently liberal and comprehensive, as they respect the expedition, safety, and facility of communication, is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government.”).} The creation of a national postal network, then, would disseminate information to the far reaches of the country and unite regional factions; this ambition, more so than political success, motivated the likes of Benjamin Bache and other early champions of the postal network.

Bache, grandson of Benjamin Franklin (yes, that Franklin), led the effort to reverse the popular conception of the postal network; he set forth a vision for the post office that diverged from its roots as a revenue generator and instead perceived it as an essential democratic institution.\footnote{JOHN, supra note 124, at 35–36.} As reported by Richard John, Bache concluded that “the central government had an almost sacred duty to publicize its ongoing affairs.”\footnote{Id.} Bache aimed to rally the public and politicians behind this lofty and novel conception of a postal network. He penned “a remarkable series of editorials” that advanced his view of the postal network.\footnote{Id. at 35.} This outreach to the public provides at least a modicum of evidence that the public and political class had reason to see the postal network as something much more than a means for person-to-person communication and the distribution of propaganda. Congress appears to have been at least partially swayed by Bache’s vision as they voted to heavily subsidize the distribution of

\footnote{\textsuperscript{132} Priest, supra note 99, at 52. Note that Priest cited this concern as evidence that Washington advocated for the expansion of the postal network “as a potent tool for political propaganda.” Id. at 51. This analysis, however, fails to consider that newspapers, for the most part, did not publish that sort of content in this era. Kielbowicz points out that many of the papers of the time lacked a partisan angle. See Kielbowicz, A History, supra note 126, at 12. Regardless of which scholar’s interpretation hues closer to the truth, the fact of the matter is that Washington regarded a national postal network as important to developing a cohesive nation and, thus, aimed for the postal network to inform and connect all Americans. See President George Washington, Fourth Annual Address to Congress, supra note 3 (advocating for “the transmission of news papers to distant parts of the country . . . [to] facilitate[e] the circulation of political intelligence and information “); see also President Washington, Third Annual Address to Congress, supra note 131 (“The importance of the post office and post roads on a plan sufficiently liberal and comprehensive, as they respect the expedition, safety, and facility of communication, is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government.”).}
all newspapers. Moreover, they voted, time and again, to invest in an even larger postal network.

Thanks to congressional support, the postal network first expanded along the coast before pushing westward at a rate commensurate with the ever larger share of Americans moving to the frontier. From 1790 to 1800, total mileage of post roads jumped from 1,875 to 20,817; the next decade saw the addition of nearly 16,000 more miles of roads; and the next reported 36,000 miles of new roads. Congress’ continual and substantial financial backing and the Post Office’s rate of construction leave no doubt as to the importance officials accorded to this endeavor.

b) The Creation and Distribution of “Civic Communication”

Founders regarded the marketplace of ideas as an instrument of good governance as well as self-governance. With that purpose in mind, Congress did not shy away from discriminating against certain content—though they did so one step removed from directly regulating what printers published and distributed. Put simply, Congress engaged in “genre” rather than “content” discrimination by favoring newspapers more likely to contain educational content.

---

136 See An Act to Establish the Post-Office and Post Roads Within the United States, Pub. L. No. 2–7, § 21, 1 Stat. 232, 238 (1792). The subsidization of all qualifying papers cuts against Priest’s argument that Washington and the federalists backed the postal network mainly, if not solely, to spread partisan messaging. See Priest, supra note 99, at 51.
137 See U.S. Post Serv., supra note 101, at 2.
138 See id.
139 Id. at 233 (displaying the remarks of Congressman Laurance, who argues against the expansion of the postal network out of concern for the budget of the Post Office); see 3 ANNALS OF CONG. 229–30 (1791) (displaying the remarks of Congressman Livermore).
140 Cf. Priest, supra note 99, at 53 (“The President in expanding postal operations simply was buying political support. Washington’s objective was to act to bring unity to the country; to do so he bought the support of western and southern citizens by subsidizing services that those citizens valued, but services that they were unwilling to afford.”).
141 Cf. Anuj C. Desai, The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine, 58 HASTINGS L.J. 671, 677 (2007) (“One prominent feature of these subsidies was the fact that they were based on the format of the communication (i.e., printed newspaper, as opposed to handwritten letter) but were independent of its content.”).
over magazines, pamphlets, and letters. With that preference (or bias) in mind, Congress set a fixed, low postage rate for newspapers. The combination of an expansive network and promotion of newspapers that, for the most part, distributed news on current affairs meant that the Post Office Act would result in “the widespread circulation of public information, [in particular, information] about politics, [which could] help[] foster a national political community.”

Arguably, “[t]he encouragement given to newspapers through cheap postage was the most striking innovation in early U.S. postal policy.” Given the determinative impact of how a publication was categorized (i.e., as newspaper or not), “newspapers” is then best understood as a term of art. Papers of the time had specific characteristics that persuaded Congress to grant them special treatment. For one, most lacked a partisan bent. Second, they often resembled political journals. Third, they contained information relevant to a functioning democracy and thriving society, including content related to “commodity prices, history, exploration, philosophy, and agricultural practices.” Fourth, in comparison to newspapers of the modern era, they had substantially less advertising. And, fifth

———. See id. (“Viewing newspapers as one of the principal means to strengthen the republican foundations of the young nation, early American policymakers provided significant postal subsidies for the delivery of newspapers.”).

———. See KIELBOWICZ, A HISTORY, supra note 126, at 11.

———. KIELBOWICZ, A HISTORY, supra note 126, at 11; see also Desai, supra note 142, at 674 (discussing the connection between postal regulations and, more generally, “the right to receive ideas”).

———. KIELBOWICZ, A HISTORY, supra note 126, at 9.

———. Id. at 12.

———. See id.

———. See id.

———. Id.

———. See id. at 11–12 (omitting any mention of advertisements in an overview of the typical contents of a newspaper in the late eighteenth century); see also The Rise of Mass Communication, Digit. Hist., https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3315 [https://perma.cc/64HW-WSD5] (last visited Apr. 8, 2024) (describing the rise of national advertising in the late 1800s). As an aside, it is worth pointing out the significance of Congress’ decision to exclude publications with high ratios of advertisements to news content from any sort of subsidy. This decision benefited the information ecosystem in two ways: first, it ensured that printers focused on the news could remain more or less
and finally, newspapers of the founding era had much more limited distribution and so they, by necessity, predominantly covered issues of immediate and tangible importance to its readers. So, though Congress theoretically admitted all newspapers (over the objection of some who would have more narrowly defined the term), Congress “considered the relative merits of different kinds of mail matter in the 1790s, [and] it decided that [the] political intelligence [conveyed through newspapers] deserved the greatest encouragement.”

Note that Congress did not identify “magazines” as among the publications that could receive a lower postage rate. This omission had consequences on the marketplace of ideas. Lacking the subsidy afforded to papers, some major magazines suspended publication; those magazines that persisted often relied on alternative means of circulation or on a friendly postmaster who subjected them to newspaper rates. Other printers altered their publications to fit within the “newspaper” category, but they did so subject to scrutiny from a postal official. Officials had tremendous discretion over such decisions—weighing the type of content as well as the format of the publication when trying to properly categorize a publication.

Two years later, Congress amended the Post Office Act and, important for this inquiry, perpetuated “genre” discrimination. The amendment resulted in magazines and pamphlets being declared independent from commercial interests that might have otherwise exerted pressure on news coverage and other editorial decisions; second, by virtue of publications containing more substantive content than ads, it lowered the search costs for members of the public with respect to finding relevant news and views on current affairs. In short, Congress effectively created an information exchange relatively free from the distortive effects of advertisements—at least in comparison to the information exchanges of today.

153 See John, supra note 124, at 36.
154 Kielbowicz, A History, supra note 126, at 11.
155 See Kielbowicz, A History, supra note 126, at 12.
156 Id. at 14.
157 See id. at 13.
mailable under specific conditions: first, they would still face postage rates that vastly exceeded those faced by newspapers; and, second, postmasters could refuse to carry these types of publications if they proved difficult to distribute (e.g., because of their size). Guidance issued by Postmaster General Joseph Habersham suggests that postmasters often erred on the side of leaving magazines and pamphlets out of circulation. Habersham estimated that few magazines would be mailable due, in part, to postmasters not having an easy way to record whether they had received adequate postage for a magazine. This policy continued under subsequent postmasters general. One postmaster general, for instance, went so far as to order that postmasters were not to receive magazines and pamphlets that may prove difficult to transport.

Eventually, the Post Office set forth slightly more objective guidelines for identifying “newspapers,” though the guidelines still aligned with the popular conception of a marketplace of ideas that would foster good governance and self-governance. Likewise, over time, Congress attempted to clarify what qualified as a newspaper and tailored its efforts to maintain a national exchange of information on current affairs. In 1825, for sake of illustration, Congress raised the postage rates for magazines. The amendment also reinforced the public interest purpose of the subsidy scheme by defining newspapers as publications that provide “an account of political or other occurrences.”

This test underwent refinement by Postmaster General John McLean. Case in point, in 1828, McLean instructed postmasters to

---

158 See id. at 12–13.
159 See id. at 13.
160 See id.
161 See Kielbowicz, The Press, supra note 30, at 268.
162 See id. (outlining efforts by the Post Office to more clearly distinguish between newspapers and other publications).
163 See An Act to Reduce into One the Several Acts Establishing and Regulating the Post-Office Department, Pub. L. No. 28-64, § 30, 2 Stat. 102, 111 (1825).
label publications as newspapers if they “contain[] leading articles of intelligence, a summary of political events, or what is generally termed news, and is published weekly, or oftener....” In short, Postmaster McLean desired the spread of what this Article will summarize as “civic information” and willingly excluded publications that did not serve that end. This relatively unchecked but congressionally condoned discretion led several postmasters general to exclude content outside of their own definition of “public utility.” In 1815, for example, the exercise of that discretion resulted in magazines published by “the several Bible societies” receiving favorable treatment. Such decisions had a discernible impact on the marketplace of ideas—most magazines reached only local audiences; those that received lower postage rates, though, enjoyed national circulations and an expansive readership. Tellingly, the classification system’s differentiation based on content did not give rise to judicial challenge or congressional petition. Instead, magazine printers advocated for receiving the same rate as newspapers because magazines could not only cover the same topics as newspapers but also do so in more detail—consequently, greater circulation of magazines, they argued, could advance the national welfare and “prevent our falling behind the rest of the world in knowledge and improvement.”

The upshot is that Congress and the Post Office jointly oversaw and condoned a loosely objective test that turned on the content and format of a publication. Adoption, refinement, and continued use of that test makes clear that Congress did not perceive the First Amendment as a limit on legislation to increase the supply of certain information nor to develop, maintain, and expand the primary channel of distribution. The longevity of this scheme and strategy for a nationwide exchange of civic communication further evidences the limited role Founders and their progeny assigned to the First Amendment.

165 Circular to Postmasters, supra note 164.
166 KIELBOWICZ, A HISTORY, supra note 126, at 13–14.
167 Id. at 14.
168 Id. at 16 (emphasis omitted).
c) The Results of a Government-supported Marketplace of Ideas

Congressional control over the scope of the postal network as well as its influence over its contents did not lead to the sort of disastrous results one can read about in contemporary writings expressing fear over any government intervention in the marketplace of ideas. By the mid-nineteenth century, the postal network permitted even those in the “far-off solicitudes of the forest” to “feel that he is an integral part of [the world].”169 Moreover, thanks to the joint effort by Congress and the Post Office to incent the creation and spread of civic information,170 the “fragile nature of nationalism” at the time—as indicated by events such as the 1794 Whiskey Rebellion—was partially addressed by “help[ing] dispersed groups coalesce into one nation” as well as by enabling citizens to form and maintain political affiliations.171 In short, through the “ever active agency of the [Post Office],” the postal network provided access to “the current interests of every-day life, and the vaster concerns of national existence. . . .”172

At risk of repetition, it is worth pointing out that even into the 1850s, the extensive intervention by the government into the marketplace of ideas did not give rise to popular concern. The public and publications alike accepted that the Post Office, as a “mighty arm of civil government,” had a role to play in fostering a deliberative democracy; in fact, printers acknowledged that absent the assistance and support of the government, the press would be “crippled and disabled.”173 In conclusion, content creators and the content distributor (e.g., the post) had an “incalculable [influence] in the

170 Charles A. Heiss, 79th Cong., Rep. on Second-Class Mail to the Postmaster General 119 (1946) (“The low rate has helped to stimulate an enormous mass of periodicals . . .”).
172 Post Offices of the United States, supra note 169.
173 Id.
diffusion of knowledge, the control of public opinion, and the dissemination of every species of truth.”174

II. THE “TELEGRAPH ERA”: THE BEGINNING OF THE END OF GOVERNMENT EFFORTS TO MAINTAIN, EXPAND, AND IMPROVE A COMMON MARKETPLACE OF IDEAS

The framers of the Constitution probably never dreamed of postage stamps, railway postal cars, canceling machines, pneumatic tubes, telegraphs, telephones, aeroplanes, and radio equipment. They specified nothing concerning means of transportation or methods of distribution, but wisely left to future generations a broad provision under which they would have the right to avail themselves of such improved means of communication as might be discovered and developed. It was clearly their intention that the Government should control all means for the transmission of intelligence.175

Postmaster General

Congress’ commitment to ensuring broad access to the nation’s primary information exchange persisted, at least initially, upon the introduction of the telegraph.176 Popular acceptance of the government’s primary role in maintaining and shaping the marketplace of ideas resulted in an assumption that the telegraph would operate in the same way as the mail—under public ownership and in the interest of the public.177 For a brief moment, the telegraph network was indeed operated by the Post Office—thereby becoming just a new

174 Id.
175 POSTMASTER GEN., GOVERNMENT OWNERSHIP OF ELECTRICAL MEANS OF COMMUNICATION 7 (1914).
176 Notably, even Samuel Morse, the inventor of the telegram, had an “earnest hope” that the government would play “a more prominent role in the history of electric telegraphy.” JOHN, supra note 124, at 256.
177 See Kielbowicz, Timeliness, supra note 18, at 12; WOLFF, supra note 40, at 2 (“None of the telegraph entrepreneurs of the 1850s envisioned a private telegraph system managed by a single firm.”).
mechanism for the continuation of the policies and practices that shaped distribution of the news over the mail.\textsuperscript{178}

This approach furthered the aims of the marketplace as determined by the Founders—\textsuperscript{179} it allowed papers to share news and consumers to more timely receive updates on events around the world.\textsuperscript{180} Yet, perhaps underestimating the importance of the technology,\textsuperscript{181} Congress did not retain control over the telegraph network. Consequently, for the first time in the nation’s history, the marketplace of ideas moved out of the government and into private hands. By the time Americans concerned about democratic discourse realized the ramifications of this decoupling, congressional intervention into the market was financially impossible and on shakier legal ground following a shift in First Amendment case law.\textsuperscript{182}

The introduction of the telegraph did not cause the postal network to immediately lose its status as the primary channel of communication.\textsuperscript{183} In fact, the telegraph network got off to a slow start. In 1838, Morse introduced the concept of the telegraph to

\textsuperscript{178} See Kielbowicz, Timeliness, supra note 18, at 12.  
\textsuperscript{179} See Kielbowicz, The Press, supra note 30, at 280 (presenting a quote from John Calhoun, who advocated for Americans being able to access a wide range of news).  
\textsuperscript{181} Consider, for instance, the remarks of one Senator who, when mulling whether to allocate federal funds to the creation of a telegraph line between Baltimore and New York City, questioned, “What was this telegraph to do? Would it transmit letters and newspapers? Under what power in the constitution did Senators propose to erect this telegraph?”\textsuperscript{182} See id.  
\textsuperscript{182} See, e.g., POSTMASTER GEN., supra note 175, at 5 (“A study of the constitutional purposes of the postal establishment leads to the conviction that the Post Office Department should have control over all means of the communication of intelligence. The first telegraph line in this country was maintained and operated as a part of the Postal Service, and it is to be regretted that Congress saw fit to relinquish this facility to private enterprise.”).  
\textsuperscript{183} See 1830s–1860s: Telegraph, supra note 181 (“Printing remained the key format for mass messages for years afterward, but the telegraph allowed instant communication over vast distances for the first time in human history.”).
Congress. That same year, he forecasted that “[t]his mode of instantaneous communication must inevitably become an instrument of immense power, to be wielded for good or for evil, as it shall be properly or improperly directed.” Five years later, the federal government backed the creation of the first telegraph line between Washington, D.C. and Baltimore in 1843.

The initially slow spread of the technology likely lured Congress into a false sense of comfort that the postal network would remain the dominant means for distributing ideas. Skepticism among congresspersons may have also caused the government to doubt the “immense power” of the new information exchange. The combination of technological doubt and a lack of funds to support additional line construction initially led Congress to leave it to the private sector and states to invest in a telegraph network. It is possible that Congress’ hands-off approach to the development of the telegraph network was an intentional decision to bolster the marketplace of ideas (i.e., an attempt to advance the policies most likely to ensure widespread dissemination of civic information). State-based charters granted to a litany of different telegraph companies had the potential to encourage healthy competition, thereby keeping rates

---

184 Id.
185 Id.
186 Id.
187 See id. (“The telegraph system progressed slowly, and many attempts failed to make the system work for the entire country.”).
188 See, e.g., id. (reporting that Senator Smith of Indiana said the following after Morse demonstrated the technology before members of Congress in 1842: “I watched his countenance closely, to see if he was not deranged . . . and I was assured by other senators after we left the room that they had no confidence in it.”). Cf. POSTMASTER GEN., supra note 175, app. A at 18 (“Henry Clay advocated Government ownership of the telegraph in 1844, saying: ‘It is quite manifest it is destined to exert great influence on the business affairs of society. In the hands of private individuals they will be able to monopolize intelligence and perform the greatest operations in commerce and other departments of business. I think such an engine should be exclusively under the control of the Government.”).
189 See POSTMASTER GEN., supra note 175, at 7.
low and facilitating broad access to the network among speakers and listeners alike.\textsuperscript{190}

The actual development of the telegraph network, however, resulted in a very different outcome. Private actors quickly built out the most profitable lines (i.e., those connecting big cities), catered to the most profitable users (i.e., “business people”), and by 1857, leveraged market forces to force competitors out and divvy up territories into regional monopolies operated by single companies.\textsuperscript{191} In turn, the companies and their telegraph lines became incredibly valuable. As of 1864, Western Union, the leading company of the time, “operated on 44,000 miles of wire and was valued at $10 million.”\textsuperscript{192} Just a year later, the company’s valuation doubled; between 1857 and 1867, that valuation may have increased by as much as 11,000 percent.\textsuperscript{193} The success of private actors did not necessarily benefit the public. For most Americans—likely making less than twenty-five cents an hour\textsuperscript{194}—the rate for a single telegraph message (about $1.09) was far beyond their means.\textsuperscript{195}

Despite the public largely lacking access to the network, Congress settled for a wait-and-see approach as to whether it would need to regulate what appeared destined to become the primary method


\textsuperscript{191} See Edmund Russell & Lauren Winkler, \textit{Uniting the States with Telegraphs, 1844–1862}, CARNEGIE MELLON UNIV. LIBRS., https://telegraph.library.cmu.edu [https://perma.cc/8N8G-MP5E] (last visited Apr. 8, 2024) (describing the years 1851–1857 as a consolidation phase, where, by 1857, “six companies formed a cartel to help each company monopolize a different region”).

\textsuperscript{192} 1830s–1860s: Telegraph, supra note 181.

\textsuperscript{193} Id.

\textsuperscript{194} See CLARENCE D. LONG, WAGES BY OCCUPATIONAL AND INDIVIDUAL CHARACTERISTICS IN WAGES AND EARNINGS IN THE UNITED STATES, 1860–1890 94 tbl.39 (1960) (reporting an average wage of around sixteen cents for skilled workers in 1860).

\textsuperscript{195} See Helen Fessenden, \textit{The Great Telegraph Breakthrough of 1866}, 23 ECON FOCUS 28, 30 (2018).
for exchange of information. In 1866, for instance, Senator John Sherman—recognizing that telegraph rates had soared while coverage remained far from universal—tried to rally his colleagues to break up Western Union’s market power and encourage some competition. Sherman succeeded in rallying support for his bill, the Post Roads Act. Western Union, however, made sure that the Act itself did not succeed. The Act’s objective—“to obtain, for the benefit of the people of the entire country, every advantage in the matter of communication by telegraph which might come from competition between corporations of different states”—amounted to a regulatory stone slung by David against the Goliath Western Union. As summarized by Bob Cannon, “Western Union took advantage of the Act to expand its market and to railroad any authority that attempted to get in its way.”

Other events rendered the well-intentioned Post Roads Act of 1866 even less efficacious and reduced the odds of the telegraph network ever becoming a publicly operated exchange. That summer,

---

196 See, e.g., Postmaster Gen., supra note 175, app. A at 19 (statement of Postmaster General Cave Johnson in 1846) (“[T]he [Post Office], created under the Constitution and designed to exercise exclusive power for the transmission of intelligence, must necessarily be superseded in much of its important business in a few years if the telegraph be permitted to remain under the control of individuals.”).


199 See Cannon, supra note 197, at ii.


201 Cannon, supra note 197, at ii.


203 See, e.g., Postmaster Gen., supra note 175, app. A at 20 (restate Postmaster General Creswell’s observation that turning the telegraph network into a public utility would come at “great expense”).
the first transatlantic telegraph cable came online.\textsuperscript{204} In the same way the introduction of the Internet introduced a new chapter in the exchange of information, this international line confirmed a “new era of ‘real-time’ journalism.”\textsuperscript{205} In no time, the line became a source of “[i]ntelligence of vast importance;”\textsuperscript{206} the first message, which relayed the cotton prices in New York and Liverpool and provided an update on the Austrian army, presaged the sort of economic and political information that would flow through the network.\textsuperscript{207} The telegraph network now offered Americans more content at faster speeds than any other channel of communication.

Unsurprisingly, those industries most reliant on timely information “quickly found important applications” for the network.\textsuperscript{208} In particular, the telegraph became essential to the cotton trade. According to economist Claudia Steinwender, the transatlantic telegraph breakthrough caused a shock to the cotton markets—by reducing information friction, buyers and sellers could more accurately assess market conditions and execute trades.\textsuperscript{209} This had immense economic consequences for the United States. In the immediate aftermath of the breakthrough, cotton exports soared by thirty-seven percent.\textsuperscript{210} The regulatory implications of this development are somewhat obvious—interference with the telegraph network now threatened to disrupt sizable economic exchanges. In turn, substantial support for regulation took decades to fully develop. In the interim, the privately-operated telegraph network spread across the nation—by the early 1870s, a more-or-less national telegraph network existed (at least for those who could afford the high rates).\textsuperscript{211}

\textsuperscript{204} Fessenden, supra note 195, at 28.
\textsuperscript{205} Id.
\textsuperscript{206} Id. (citation omitted).
\textsuperscript{207} See id.
\textsuperscript{208} Id. at 30.
\textsuperscript{210} See id. at 675.
\textsuperscript{211} See Fessenden, supra note 195, at 30 (reporting that although telegraph rates fell over time—from around $1.09 per message in the late 1860s to $0.30 in 1900—mail postage amounted to pennies, and that the latter amount represented the much more economical (and slower) option for the average worker, who, as of 1901, made about $0.25 per hour).
Near the turn of the century, federal policymakers caught on to the fact that they had squandered their chance to seize and shape the immense power forecasted by Morse, though states led the effort to push back on telegraph companies that occasionally appeared to hinder rather than help the distribution of civic communication. In 1902, Congress instructed the postmaster general to report back with “the probable cost of connecting a telegraph and telephone system with the Postal Service by some feasible plan.” As discussed below, that abstract instruction did not jumpstart regulatory fervor.

Several states, however, took a more direct approach to regulation by granting individuals “the right to recover for mental anguish unaccompanied by physical injuries . . . in actions against telegraph companies for the nondelivery or misdelivery of certain messages.” Additionally, according to Overton, the majority of state courts had “emasculated” deceptive contracts relied on by telegraph companies. These regulatory efforts demonstrate the extent to which the public had come to rely on the network and suggest that state officials had been trying to fill in the regulatory holes left by their federal counterparts.

The next meaningful regulatory attempt by Congress came in 1910 when a concerned congressman managed to squeeze interstate telegraph operators in the Mann-Elkins Act. The fact that the Act pertained to the Interstate Commerce Commission (“ICC”) which, up to that point, had exclusively regulated transportation entities, reveals the extent to which inclusion of the telegraph companies amounted to a desperate effort to regulate their activities.

---

213 POSTMASTER GEN., supra note 195, at 5.
214 Wm. Overton Harris, Applicability of the United States Commerce Act to Interstate Telegraph Companies, 2 VA. L. REV. 98, 98 (1914).
215 Id. at 99.
216 See Dixon, supra note 212, at 595.
217 See id. at 596–97 (rationalizing the inclusion of the telegraph industry on the basis that the ICC had some practice in rate-setting regulation, which would come in handy in governing the telegraph companies).
Nevertheless, the bill passed and imposed three new constraints on the telegraph industry. First, the ICC could now exercise jurisdiction over the industry. Second, the companies received authority to vary their rates based on different classes of messages—"day, night, press, government, and other forms of service." And, third, the telegraph companies now qualified as "common carriers," a designation that prohibited telegraph companies from "giv[ing] any undue or unreasonable advantage to any particular [individual or entity], or any particular description of traffic in any respect whatever. . . ." The Act left untouched a key area of regulatory concern with respect to the telegraph network: companies could carry on with their practice of granting "passes or franks [for] officers, agents, employees, and their families."

This questionable approach to regulate the telegraph network unsurprisingly did not cover all the concerns held by Congress and the public. The need for additional regulation became clear as World War I broke out in Europe—at that point, Overton Harris observed that "[t]he important position occupied by the great . . . telegraph companies in modern life is just now particularly evident to this country. . . ." Congress may have finally realized that the postal network no longer served as the primary exchange of information and that the government had lost its capacity to meaningfully shape the marketplace of ideas—whether by altering the market itself (i.e., building new post offices and post roads) or by influencing the distribution of content (i.e., by incentivizing the creation and spread of newspapers with civic content).

Seeking to restore the government’s role in the marketplace of ideas, several powerful actors, including the Postmaster General, explored how Congress could intervene in a telegraph network that had evaded regulation for decades. Pursuant to a resolution passed by

\[218\] See id. at 596.
\[219\] Id.
\[220\] Id.
\[222\] Dixon, supra note 212, at 611.
\[223\] Harris, supra note 214, at 98.
the Senate in 1913, Postmaster General A.S. Burleson researched how the Post Office could gain ownership and control over the “means of communication”—namely, the telegraph and telephone facilities. Burleson made two key conclusions, explored in turn below.

First, Congress had clear legal authority to exercise greater control over the primary channel of communication. “A study of the constitutional purposes of the postal establishment,” per Burleson, “leads to the conviction that the Post Office Department should have control over all means of the communication of intelligence.” Burleson’s study may have included a review of the legal analysis conducted by Joseph Joyce and Howard Joyce. The pair set forth a technology-neutral interpretation of the Postal Power:

[T]he constitutional power of Congress to . . . establish post-offices and post roads cannot be held to include merely such instrumentalities of commerce or of the postal service, as were known and employed at the time of the adoption of the Constitution or of the enactment of Federal statutes, but must extend to and embrace such means, instrumentalities, discoveries and inventions as to keep pace with the progress, growth and developments of the country.

Notably, they were not the first to argue such an interpretation. In 1882, Postmaster General Howe maintained that “[t]he business of the telegraph is inherently the same as that of the mail.” He reasoned that this similarity in function, in conjunction with the fact that the telegraph “was not known when the Constitution was adopted,” meant that he could “not doubt that the power to employ one is as clear as to employ the other.” Connecting these strands

---

224 S. Res. 242, 63rd Cong. (1913) (enacted).
225 POSTMASTER GEN., supra note 175, at 5. The committee that Burleson tasked with researching telegraph regulation similarly concluded that “[i]t has been competently decided and long accepted that the power thus delegated to the National Government was that of transmitting intelligence and not merely of employing the then known means of transmitting intelligence.” Id. app. A at 18.
226 Joyce & Joyce, supra note 202, § 42.
227 POSTMASTER GEN., supra note 175, at 7 (quoting, without citation, Howe).
228 Id.
makes clear that the idea that the government has an affirmative duty to establish some channel for democratic discourse persisted throughout the nineteenth century and well into the twentieth century.

Importantly, the U.S. Supreme Court repeatedly and clearly embraced that idea, too. In *Pensacola Telegraph Company v. Western Union Telegraph Company*, the court considered and upheld both the knowledge dissemination purpose of the Postal Power, as well as a technology-neutral reading of that power. In considering whether the State of Florida could grant a company sole control over the state’s telegraph network, the majority did not specifically address “whether Congress may assume that telegraph as part of the postal service,” but nevertheless stressed that the channels for transmission of knowledge “were intrusted to the general government for the good of the nation,” even if those channels evolved from those in use at the signing of the Constitution. In turn, the Court held that Congress “not only [has] the right, but the duty . . . to see to it that . . . the transmission of intelligence [is] not obstructed or unnecessarily unencumbered by State legislation.” This duty meant that Congress would have to update its use of the Postal Power “to meet the demands of increasing population and wealth.”

The Court did not limit Congress’ duty to be solely preventing obstructions to the marketplace of ideas; this duty permitted proactive efforts to aid in developing the system. By way of example, the Court reviewed Congress’ initial subsidization of the telegraph network. The Court drew on the Act of 1866, which gave Congress the right to acquire any telegraph line, for additional support. To the Court, the Act was a manifestation of Congress’ power over the postal service—despite the fact that the Act came

---

229  96 U.S. 1, 9–10 (1877).
230  *Id.* at 10.
231  *Id.* at 9.
232  *Id.*
233  *Id.*
234  *Id.*
235  *Id.* at 10.
236  *Id.*
237  *Id.* at 12.
decades after Congress had sold off its telegraph line.238 In short, this decision undergirds an expansive reading of the Postal Power that permits Congress to regulate the transmission of intelligence.239

Justice Hugo Black’s 1945 opinion in Associated Press v. United States built upon the reasoning of the Pensacola Court, Postmaster General Burleson, and the Joyces.240 In that case, Black asserted that the First Amendment “affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.”241 Black further noted that “[i]t would be strange indeed . . . if the grave concern for the freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”242 Though Black did not specifically outline the sort of protective measures the government could pursue, he specifically challenged the idea that the government should grant “non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.”243

Policy grounds supported a broad interpretation of the Postal Power as well. Analysis of policies adopted by other countries clearly shows that sound communication policy dictates that the primary channel of communication resides in public hands. For instance, in Britain, the government treated the telegraph system as one part of the larger postal service and, therefore, exercised public control over its operation.244 As a result, Daniel Roper and two other Post Office researchers argued that the telegraph network there operated “in the interest of the whole people . . .”245 They supported their claim by noting that the British telegraph network reached a far

---

238 Id. at 11.
239 Id. at 9.
240 326 U.S. 1 (1945).
241 Id. at 20.
242 Id.
243 Id.
244 POSTMASTER GEN., supra note 175, at 8.
245 Id.
greater share of residents than the U.S. network. This more expansive network also lent itself to popular use by the British public—for sake of illustration, between 1869 and 1900, the number of telegraph messages sent over the British network saw a thirteen-fold increase; in the United States, the number of messages only increased eight-fold. More generally, Roper and his fellow researchers remarked: “There is a radical difference between the policies of a public and private monopoly, both as regards the extension of service and the fixing of rates. In the extension of service and the determining factor with the Government is the needs of the people. . . .”

Despite the legal and policy justifications bolstering the case that Congress could and should exercise control over the telegraph network, a short-sighted Congress time and again ignored the pleadings of postmasters general that, absent public control of the telegraph network, it would operate as an inclusive and informative marketplace of ideas. In 1871, Postmaster General Creswell urged Congress to seize control of this important communications network, writing:

Some may hesitate to adopt it in this country because of the great extent of our territory, the paucity of our population in certain large sections, and the great expense involved in extinguishing the rights of telegraph companies. The first two are the same objections that were urged for many years against all ameliorations of our Postal Service; nevertheless postages have been cheapened and made uniform and at the same time the postal system has been maintained and improved.

This argumentation-by-analogy did not have the intended persuasive effect. After another year of inaction, Creswell again urged Congress to step in, writing:

---

246 Id.; see also id. app. A at 22 (reporting that the CEO of Western Union delivered congressional testimony around 1873 in which he admitted only one out of every forty U.S. residents used the telegraph).
247 Id. at 8.
248 Id. at 10.
249 Id. app. A at 20.
The time having now come . . . when the benefits of a Government telegraph should be secured to the people, it is desirable that advantage should be taken of the provisions of this act and the lines of some or all of the above companies brought under control of this department.\textsuperscript{250}

Congress punted on taking action and continued to do so despite similar messages from Postmaster General Maynard in 1880, Postmaster General Gresham in 1883, and Postmaster General Wanamaker in 1889, 1890, 1891, and 1892.\textsuperscript{251} Pleas from postmasters general came to an end only amid a “disastrous financial panic” in 1893.\textsuperscript{252}

A look back at the emergence of the telegraph network underscores that an expansive view of the Postal Power readied many members of Congress and other federal officials to create a “postal telegraph” to ensure Americans continued to have access to the primary channels of communication. Financial woes rather than legal uncertainty prevented the telegraph from becoming a new platform for the marketplace of ideas. Congress’ subsidization of the first telegraph line and preservation of an option to acquire future telegraph lines evidences as much. Yet, unlike the Founders, federal officials in the mid-eighteenth century no longer regarded the maintenance of a robust marketplace of ideas as a priority or at least not one that merited substantial investment.

Congress’ acquiescence to corporate control of the marketplace of ideas lent credence to a flawed interpretation of the Constitution: that the Postal Power was frozen at the Founding. Courts eventually confirmed and crystallized that flawed view, as discussed in the next part. The result has been predictably problematic. Congress’ authority to intervene in the channels of communication has waned as the need for such intervention has increased.

\textsuperscript{250} Id. app. A at 22.
\textsuperscript{251} See generally id. app. A at 22–27.
\textsuperscript{252} Id. app. A at 28–29.
IIII. THE “PLATFORM ERA”: FINDING SPACE FOR DEMOCRATIC DISCOURSE ON SOCIAL MEDIA PLATFORMS

From the last issuance of a warning from a postmaster general that the telegraph network required public intervention in 1892 to today, First Amendment case law has veered in a different direction.253 As summarized by David Rabban, “neglect of the [First Amendment case law before World War I] has left a distorted view of the social and intellectual history of the First Amendment.”254 Rabban’s analysis of that neglected era corrects accounts of First Amendment jurisprudence that mark the twentieth century as the starting point of legislative and judicial consideration of free speech questions.255 Rabban reminds contemporary scholars that in the decades leading up to the supposed “start” of First Amendment jurisprudence, “a rather wide range of free speech cases . . . did reach the Supreme Court.”256 Though the Court did not set forth a clear doctrine in deciding those cases, with one exception, it “uniformly found against the free speech claimants;” lower courts likewise “were generally as restrictive. . . .”257 Yet, in the aftermath of World War I, several justices relied on historically inaccurate legal scholarship to set First Amendment doctrine in a new direction.258

This Part will not thoroughly trace that divergence given the excellent and comprehensive scholarship by Rabban and others that already covers the topic.259 Instead, this Part first makes the case for

253 See Rabban, supra note 60, at 521.
254 Id. at 519.
255 See, e.g., Wu, supra note 50, at 548 (“The First Amendment first came to life in the early twentieth century . . . “); see also Nadine Strossen, The Paradox of Free Speech in the Digital World: First Amendment Friendly Proposals for Promoting User Agency, 61 Washburn L.J. 1, 8 (2021) (listing the “maximiz[ation] of user agency” as the “preeminent touchstone for online (and offline) free speech” without consideration of First Amendment doctrine in the eighteenth and nineteenth centuries).
256 Rabban, supra note 60, at 520.
257 Id.
258 See id. at 521.
259 See generally id. See, e.g., Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (1991) (exploring the negative consequences on freedom of expression of America’s current free-speech tradition reflecting and emerging from the writings of a single jurist, Zechariah Chafee, Jr.). This redirection to preexisting scholarship aligns with what I have encouraged other scholars to
social media platforms as the modern equivalent of the postal net-
work in Section III.A. Put differently, just as the post served as the
primary means of distributing current intelligence during the Found-
ing, social media platforms have become the main information ex-
change in the twenty-first century. Section III.B enumerates the rea-
sons why social media platforms have failed to facilitate the flow of
information necessary for a functioning democracy. In particular,
this Section flags that AI-altered content may heighten the barriers
users face to “discovering” the truth with respect to news and views
on current affairs. Section III.C argues that the creation of “Reality
Exchanges” on these platforms could bolster the supply of and de-
mand for current intelligence. Reality Exchanges would be created
via a subsidy enacted by Congress—major social media companies
could lower their respective tax burdens by reserving space on their
platforms for such exchanges. This subsidy would constitute a mod-
ern take on Congress’ prior efforts to seed the production and dis-
semination of civic content via newspapers.

A. Why Social Media Platforms Constitute the Latest Primary
Channel of Communication

Cyberspace, according to the U.S. Supreme Court in Packing-
ham v. North Carolina, constitutes a “vast democratic forum
. . . .”260 Specifically, the Court has recognized that social media
platforms are among the most significant fora for democratic delib-
eration and, more generally, the exchange of values and opinions.261
Since the Court reached that conclusion in 2017, the evidence it used
to support its assertion has become even more convincing. First, the
Court noted that many American adults (seventy percent) used at
least one social media platform;262 in the subsequent years, the num-
ber of users has only grown, and forecasters anticipate that it will
continue to do so.\textsuperscript{263} In addition to the total number of users seeing an increase, user engagement on platforms has also jumped. X users posted roughly 500 million pieces of content \textit{per day} in 2023,\textsuperscript{264} a massive increase from the one billion or so messages sent \textit{per month} as of 2010.\textsuperscript{265}

Second, the Court detailed that many users rely on platforms for activities essential to a deliberative democracy such as consuming news and interacting with elected officials.\textsuperscript{266} Reliance on social media platforms for news has held steady since.\textsuperscript{267} This reliance has become more important given that fewer Americans follow the news as vigorously as they did in prior years; in other words, social media platforms may act as the only source of regular news for many Americans.\textsuperscript{268}

Likewise, since \textit{Packingham} came down, political discourse and interactions have also continued to move onto platforms. By way of example, Pew Research Center analysts concluded that since 2016, members of Congress have, on average, doubled their number of X posts sent and attracted three times as many followers.\textsuperscript{269} Users have also turned to the platform to engage with their local officials and to garner support for public causes. As elaborated on by Professor Russell Weaver, Facebook users have utilized the platform to advocate for larger school budgets as well as to lobby for more community-

\begin{flushright}


\textsuperscript{265} \textit{On the Media: The Point of Twitter}, \textsc{WNYC Studios} (Apr. 23, 2010), https://www wnycstudios.org/story/132752-the-point-of-twitter [https://perma.cc/WU5L-3DQ9].

\textsuperscript{266} See \textit{Packingham}, 582 U.S. at 104–05.

\textsuperscript{267} See Liedke & Wang, supra note 29


\end{flushright}
friendly traffic patterns. Additionally, platforms have of course been used by campaigns and voters alike to attempt to sway electoral outcomes.

Yet, despite these platforms serving as marketplaces of ideas, they do not lead to the sorts of outcomes envisioned by the Founders (i.e., the exchange of information empowering residents to engage in self-governance and hold officials to account); in fact, those who rely on social media for political news, “tend to be less likely than other news consumers to closely follow major new stories . . . [a]nd, perhaps tied to that, . . . also tend to be less knowledgeable” about major issues.

B. How AI-altered Content Will Exacerbate Preexisting Failures in the Marketplace of Ideas on Social Media Platforms

Social media platforms differ from prior iterations of information exchanges in ways that hinder the public’s ability to meaningfully discover and deliberate on the news and views of the day. One key difference is that platforms empower all participants to be both the supplier and buyer of information. As a result, those attempting to search for the truth have to spend more time verifying the reliability of the speaker.

Moreover, absent the sort of market segmentation facilitated by the Post Office Act of 1792 (i.e., safeguarding an exchange for publications with relatively low advertisement to content ratios), the search for the truth is made costlier as a result of users having to

---

271 See id. at 1397–99.
274 See id. at 78 (“Even if people wanted to gather true information, the homogenous presentation of content within and across platforms makes it difficult to ascertain an idea’s veracity without additional context.”).
275 See discussion supra Section I.B.2.b.
distinguish different types of content. In fact, in a complete reversal to the decisions of the Founders to subsidize content likely to inform the public, social media platforms subsidize and prioritize advertisements and commercial posts likely to distract users in the name of revenue generation. Users also have to struggle through more content in an attempt to find the truth. Fake news pervades Facebook, for example. Likewise, bad actors have commonly turned to the platforms to spread propaganda. Additionally, as highlighted by Professor Tim Wu, the information market on platforms is further distorted by bad actors intentionally flooding social media feeds with content so as to render the speech of others more difficult to find. To borrow from Garrett Morrow and Josh Wihbey, the sum of these changes is that the marketplace of ideas via social media platforms is similar to the used car market. In both cases, the seller has more information than the buyer about the veracity and purpose of the content in question. And, in both cases, the buyer (and, by extension, the public) suffers as a result.

These distortions have been amplified and accelerated by AI-altered content. On the supply side, generative AI tools have lowered the costs of modifying or producing synthetic media that may add to the search costs of those seeking the truth. Notably, this shift in supply adds to a preexisting glut of information of questionable democratic value. Morrow and Wihbey point out that social

---

276 See Morrow & Wihbey, supra note 273, at 78.
277 See id. at 88–89 (providing an overview of how social media companies attempt to earn more revenue through incentivizing certain kinds of content creation and dissemination); see also Weaver, supra note 270, at 1401 (detailing how bad actors may exploit the willingness of platforms to favor ad content to skew the information received by users).
278 See Weaver, supra note 270, at 1399–1400.
280 See Wu, supra note 50, at 565 (“[T]here are techniques [that] depend on the idea of generating a sufficient volume of information to drown out disfavored speech, or at least distorting the sense of how much support any given view has.”).
281 See Morrow & Wihbey, supra note 273, at 75.
282 See id.
media platforms as primary exchanges of information facilitates a greater volume of information, greater velocity of information production, and broader geographic scale of information production—cumulatively serving as “impediments” to the ability of the public “to obtain, make use of, and benefit from” the information they may encounter on a platform.\footnote{Morrow & Wihbey, supra note 273, at 67–68 (quoting Kay Matheisen, Facets of Access: A Conceptual and Standard Threat Analysis, in iConference 2014 Proceedings 605, 607 (2014), https://www.ideals.illinois.edu/items/47422 [https://perma.cc/37ST-ZQBX]).} To that list of impediments—"volume, velocity, and scale”—generative AI adds “veracity.” In other words, the surge in AI-altered content adds a new variable—the extent to which the content is synthetic—for users to consider when evaluating the reliability of that content.

This supply of AI-altered content likely has a knock-on effect of increasing the costs and, by extension, lowering the supply of “organic” media. By way of example, traditional producers of “organic” content likely to foster democratic discourse such as The New York Times, the BBC, and CBC/Radio Canada have invested sizable resources in mechanisms to authenticate their content.\footnote{See Hany Farid, Creating, Using, Misusing, and Detecting Deep Fakes, J. ONLINE TR. & SAFETY. Sept. 22, 2022, at 24, https://www.tsjournal.org/index.php/jots/article/view/56/36 [https://perma.cc/2YR4-DZNZ].} If and when this sort of authentication becomes a norm or regulatory standard, it will mark yet another cost to the production of such content at a time when said costs have already caused reliable purveyors of “organic” content (like local newspapers) to close their doors.\footnote{See Abernathy, supra note 30 (“Newspapers are continuing to vanish at an average rate of more than two a week. Since 2005, the country has lost almost 2,900 newspapers, including more than 130 confirmed closings or mergers over the past year.”).}

On the demand side, this content, though not necessarily unaligned with the public interest,\footnote{See Farid, supra note 285, at 7 (reporting instances in which new content tools can aid individuals who might otherwise not have the means to fully contribute to civil discourse).} nevertheless makes discovery of truth more time intensive by forcing the public to evaluate more information. The “liar’s dividend” partially explains this additional cost on users, which
THE MARKETPLACE OF IDEAS MANDATE 831

posits that when we enter a world where any audio, image, or video recording can be manipulated, then nothing has to be real, providing the liar with the double-fisted weapon of both spreading falsehoods and using the specter of digital manipulation to cast doubt on the veracity of any inconvenient truths.288

This uncertainty not only forces users to question the veracity of information upon first receiving it but also upon the liar subsequently retracting or doubling down on the veracity of that information.

The possibility of content being manipulated will worsen an ongoing decrease in trust among the public. “News consumers,” warns Steven Brill, CEO of NewsGuard, “trust news sources less and less in part because of how hard it has become to tell a generally reliable source from a generally unreliable source.”289 Brill forecasts that the “new wave of A.I.-created sites will only make it harder for consumers to know who is feeding them news, further reducing trust.”290 Other experts, such as Professor Krishnan Vasudevan, worry that some members of the public may come to appreciate and exploit the liar’s dividend and general uncertainty about the reliability and provenance of information.291 He speculates that people may not worry about whether content has been altered and instead search out and favor any content that “reinforce[s] their viewpoints. . . .”292

Importantly, the proliferation of unreliable sites and content may contribute to a related issue: a decrease in the willingness of the public to allocate their finite “attention” budget to searching for news

288 Id. at 10.
290 Id.
292 Id. (quoting Vasudevan).
on current affairs.\textsuperscript{293} Research by Naomi Forman-Kitz of the Pew Research Center revealed that while fifty-one percent of U.S. adults claimed to closely follow the news as of March 2016, that percentage dipped to just thirty-eight percent by August of 2022.\textsuperscript{294} Among those who still regularly follow the news, many increasingly rely on social media platforms such as TikTok that host AI-generated content.\textsuperscript{295}

Ideas for how best to help users identify reliable content, though, often do not reduce the additional time required to be a savvy content consumer—time many members of the public may not have or may not be willing to allocate toward reviewing the latest news and views. A common suggestion among experts turns on users more closely scrutinizing content. An associate professor in the Graduate School of Education at Stanford University, for example, urged people “to exercise caution when looking at AI-generated materials.”\textsuperscript{296} This advice, though, requires that users either receive notice that materials have been altered or have the skills and time to discern such alterations. The first option—notice—seems unlikely. For one, not all social media platforms nor news sites have pledged to disclose the extent to which content has been altered.\textsuperscript{297} and, even

\begin{footnotesize}
\begin{itemize}
\item Forman-Katz, supra note 268; see also Wu, supra note 50, at 554–55 (discussing how technological and economic developments have contributed to the scarcity of listener attention).
\item See Forman-Katz, supra note 268.
\item See Liedke & Wang, supra note 29.
\item Block, supra note 292 (quoting Victor Lee, who “specializes in AI”); see also Shannon Bond, AI-Generated Images Are Everywhere. Here’s How to Spot Them., NPR (June 13, 2023), https://www.npr.org/2023/06/07/1180768459/how-to-identify-ai-generated-deepfake-images [https://perma.cc/G3AP-3HEV].
\item See, e.g., Kate Irwin, Meta Will Label AI-Generated Content, But There’s a Catch, PC MAG (Feb. 6, 2024), https://www.pcmag.com/news/meta-will-label-ai-generated-content-but-theres-a-catch [https://perma.cc/S2JD-EJ8H] (discussing Meta’s plans to label content generated by AI tools in the near future); Mike Isaac, Meta Calls for Industry Effort to Label A.I.-Generated Content, N.Y. TIMES (Feb. 6, 2024), https://www.nytimes.com/2024/02/06/technology/meta-ai-standards-labels.html [https://perma.cc/JR9V-X6C8] (outlining Meta’s calls for more platforms to follow its approach).
\end{itemize}
\end{footnotesize}
among those that do, the tools they use to identify such content may not reliably do so.298

The second option—user detection—fails for two reasons. First, at a time when the public generally is consuming less news,299 asking them to spend more time trying to find it likely will not reverse that trend. And, second, prompts and mechanisms for users to assess the reliability of information may have the unintended consequences of making them more skeptical of the content.300 In a related study about whether informing voters of fake news aided in their identification of reliable information, researchers found that “warnings about fake news may help readers reject misinformation but may have the undesirable effect of increasing Americans’ disbelief in true news stories.”301 Notably, this finding was in line with numerous studies that have “consistently” found similar results.302

Correcting the failings of the marketplace of ideas on social media platforms requires grappling with the incentives faced by those companies. Those advocating for a healthier digital marketplace of ideas ought to address head-on the need for social media companies to cater to advertisers.303 Tarleton Gillespie’s investigation of why social media companies make certain platform design choices and content moderation decisions stresses their dependence on


299 See Forman-Katz, supra note 268.


302 Id. (citing several such studies).

recruiting and retaining advertisers. So long as social media platforms are beholden to those economic realities and commercial interests, the marketplace of ideas will skew away from the public interest. The policy proposal below presents one way to reduce platform reliance on ad revenue and, in doing so, free them to create space for the exchange of civic information.

C. How “Reality Exchanges” Could Ameliorate Some of the Anticipated Market Failures Caused by AI-Altered Content

If platforms lack a reliable means to quell the supply of AI-altered information or aid the public in identifying such information, then alternative remedies merit consideration to ensure the existence and use of a marketplace of ideas that facilitates the exchange of news and views essential to a deliberative democracy. One such remedy involves the creation of new marketplaces that exclusively host organic content related to current intelligence and prevent the participation of unverified sellers and buyers. The federal government could provide a subsidy to major social media platforms that create such “Reality Exchanges.” This sort of subsidy draws on the historical support the federal government lent to the expansion of the postal system and to the distribution of qualifying newspapers.

To err on the side of specificity, “organic” content is confined to content that has not been edited, altered, manipulated, or otherwise changed by any tool, including but not limited to generative AI tools. “Current intelligence” refers to content “published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry,” as it did—with some variation—throughout the nineteenth and early twentieth centuries. Application of this definition would come with the same

305 An Act Making Appropriations for the Service of the Post Office Department for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Eighty, and for Other Purposes, ch. 180, § 14, 20 Stat. 355, 359 (1879)).
limitation imposed by the U.S. Supreme Court in *Hannegan v. Esquire* with respect to assessments of the scope of the newspaper postage subsidy—in short, without any sort of evaluation as to whether the content was “good” or “bad.”³⁰⁷ Importantly, only traditional news outlets would have permission to post content;³⁰⁸ users, though, could comment on such posts. This limitation would foster more meaningful deliberation and discourse by reducing the friction associated with users trying to determine whether a source is reliable. Though some may challenge this provision as unaligned with individual free speech, such difficult choices may be necessary to further the deliberative democracy goals behind this proposal in addition to preventing Reality Exchanges from reverting to the flaws with current feeds. Finally, platforms could satisfy the verification requirement by confirming the identity of the account holder and securing the commitment of the individual or institution to share “organic” content related to “current intelligence.”³⁰⁹ This requirement aims to prevent bots and bad actors from creating accounts for use on the Reality Exchange; it does not foreclose anonymous posting. How to setup and design a Reality Exchange on each social media platform exceeds the scope of this paper (as well as the technical background of the author). That said, one could imagine that a Reality Exchange on Facebook, for example, would operate as a separate news feed that users could view instead of the normal feed.

³⁰⁸ Note this is one of several aspects of the proposal that merits further attention and, perhaps, revision. One could imagine this restriction being loosened to include non-traditional sources of news that have perhaps been reviewed by an independent panel of journalists.
³⁰⁹ Alex Stamos of the Stanford Internet Observatory recently discussed a means for verifying the age of users that could apply in this context as well. In short, rather than have platforms verify the age or, in this case, identity of users, Apple or the manufacturer of the phone could do so upon purchase. See Evelyn Douek & Alex Stamos, *MC Weekly Update 11/21: ClosedAI (Happy Thanksgiving!)*, MODERATED CONTENT (Nov. 27, 2023), https://law.stanford.edu/podcasts/mc-weekly-update-11-21-closedai-happy-thanksgiving/ [https://perma.cc/U8M5-BSF5].

“newspaper.” President George Washington, however, indirectly set forth his expectations (likely shared by others given his status) for the sort of content newspapers would publish in his Fourth Annual Address—also delivered in 1792. While endorsing low postage rates for newspapers, Washington explained the “importance of facilitating the circulation of political intelligence and information . . . .” George Washington, Fourth Annual Address to Congress, supra note 3.
This proposal builds off of the legal and policy recommendations of several scholars. For instance, this is not the first call among modern scholars for government investment in the generation and distribution of news in line with democratic discourse. Professor Kyle Langvardt, for one, has cited challenging economic conditions facing local newspapers as justification for the subsidization of such publications.310 Nor is this the first exploration of means to ease the public’s identification of “trusted communicators.”311 Professor Ashutosh Bhagwat notes the belief that “trusted communicators” serve as authoritative sources of information that, through their distribution of reliable content, can help “maintain a common base of facts” that are “accepted by the broader public.”312 Bhagwat’s historical analysis of the availability and identity of such communicators reveals that they may play a critical role in facilitating the sort of information ecosystem required for democratic self-governance.313 Other scholars have also analyzed the most effective ways to reduce the spread of AI-altered content produced by bad actors.314

Several scholars have likewise noted potential failures in the current marketplace of ideas. On the supply side, Wu warned that social media platforms have failed to stem the production and consumption of “manipul[ate], distort[], [or] corrupt[]” content.315 On the demand side, Parsons revealed the extent to which inaccurate assumptions about “buyer” behavior have prevented jurists from understanding the extent to which the marketplace has failed.316

---

310 See Kyle Langvardt, Structuring a Subsidy for Local Journalism, 3 J. FREE SPEECH L. 297, 299–301 (2023).
312 Id. at 41–42.
313 See id. But see id. at 55 (“Instead of trying to recreate a bygone (and, frankly, deeply flawed) era, perhaps we should be thinking about how to reinvigorate a marketplace of ideas and encourage genuine democratic deliberation that both surmount political polarization.”).
314 See, e.g., Goldstein et al., supra note 38, at 4 tbl.2.
315 Wu, supra note 50, at 550.
316 See Parsons, supra note 64, at 2159 (“[W]here the Court envisions calculating individuals dispassionately comparing and contrasting information in a vacuum, a growing scientific consensus reveals intuitive beings construing content based on relationships, associations, social identities, and innate biases.”).
Additionally, with respect to the establishment and maintenance of a marketplace itself, Ammori called out modern First Amendment doctrine for inadequately recognizing the “incredibly important practical role in ensuring that Americans can access spaces for speech.”

In many ways, Reality Exchanges are distinguishable from other policy proposals. In contrast to proposals reliant upon labeling or otherwise disclosing content generated by AI, this approach does not ignore research questioning the accuracy and efficacy of those interventions. Put differently, Reality Exchanges reflect the simple premise that the surest way to mitigate the distortive effects of AI-altered content is to bar the inclusion of that content in the relevant marketplace of ideas. Moreover, this approach creates a possibility for positive externalities that seem unlikely or insubstantial under alternative options. By creating a specific “space” for content producers and consumers to exchange information intended to foster democratic discourse, Reality Exchanges may spur the creation of new outlets specifically focused on a certain kind of journalism, such as the news-heavy and locally-based outlets that have disproportionately disappeared in the current marketplace. Importantly, this theory has held true earlier in U.S. history. The subsidies and free newspaper exchanges provided by the Post Office Act of 1792 “may have indirectly supported local news by adding to local papers’ financial viability” and “directly increased the circulation and local republication of nonlocal news and opinion”—an outcome important to building a national community at a time of expanding borders and an exploding population.

---

317 Ammori, supra note 22, at 5.
318 See, e.g., Goldstein et al., supra note 38, at 4 tbl.2.
320 Whether this bar would apply to all uses of AI tools in content creation is subject to change given that, in limited cases, such tools may permit the participation of individuals who might otherwise be excluded from full participation in the marketplace of ideas. See, e.g., Farid, supra note 285, at 7 (retelling how new technologies recreated the voice of an actor who had lost the ability to speak).
321 See generally Abernathy, supra note 30.
How to structure the subsidy needed to induce the creation of Reality Exchanges to survive legal challenges and produce the intended outcomes warrants further inquiry that this scholar will save for another day as well as for other scholars. Notably, sketchpad scrutiny of whether the major platforms could be lured to take the subsidy in the first place suggests that they would potentially have billions of reasons to do so based on their current tax burdens. Scholars should also investigate how to monitor compliance among platforms that opt to take the subsidy. Other areas of inquiry include but are not limited to: whether Reality Exchanges should prioritize the distribution of local news so as to counteract decades of depleting local coverage; and whether Reality Exchanges should mandate the use of certain platform design practices, such as directing comment boxes that direct participants into smaller group conversations which may foster more productive online discourse.

CONCLUSION

The federal government must “ensure that the individual citizen can effectively participate in and contribute to our republican system
of self-government." The Founders recognized and acted on this obligation by passing the Post Office Act of 1792. This Act led to two significant interventions in the marketplace of ideas. First, it shored up and expanded the postal system to ease the dissemination of information. Second, it sanctioned “genre” discrimination that subsidized the production of newspapers that—compared to other mediums—had greater odds of contributing to democratic discourse.

Decades later, federal officials still recognized that obligation. By way of example, generations of postmasters general called on Congress to create a “postal telegraph” that made it possible for all citizens to participate in the most efficient and extensive marketplace of ideas. Congress, though, decided the costs of fulfilling its duties were simply too high with respect to providing citizens with access to the latest information exchange; consequently, the potential of the telegraph network to improve democratic discourse went untapped and was built out to cater to the interests of shareholders rather than vote casters.

This squandered opportunity facilitated an inaccurate turn in First Amendment doctrine that severely constrained the circumstances under which the federal government could intervene in the marketplace of ideas. One part of that turn was the evolution of the state action requirement into a threshold question prior to any invocation of the Constitution; this muddled requirement has confused courts, scholars, and the public—yet it persists and severely limits the extent to which the Constitution can be relied on for

330 See supra note 251 and accompanying text.
331 See supra note 251 and accompanying text.
332 See WOLFF, supra note 40, at 2 (“[I]f Western Union’s founders had any far-reaching strategy, it was that telegraph investors, not customers, could be better served by a market free from competition.”).
333 See Baker, supra note 306, at 127–28 (arguing that a flawed understanding of the First Amendment has led the Supreme Court to unnecessarily narrow the circumstances under which the government may engage in “content-motivated structural regulation”).
relief. Another twist was the recasting of the First Amendment more as an individual right than a societal right.

The cumulative impact of these shifts has significantly restrained the application of the First Amendment in an era dominated by private entities that shape democratic discourse and affect societal well-being. So, despite social media platforms often being designed in ways that hinder the ability of the public to accurately and efficiently identify the information required to be good democratic participants, the government has taken a backseat to corporate manipulation of the marketplace of ideas—effectively delegating the immense power of communication to the private sector. In turn, the supply of information unaligned with meaningful democratic discourse has proliferated.

AI-generated content threatens to exacerbate the widening cracks in our marketplace of ideas. Rather than perpetuate a flawed First Amendment doctrine by acquiescing to this impending collapse, scholars, jurists, policymakers, and members of the public alike should recall the Court’s holding that the First Amendment “does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas.” One such step that merits more consideration is a “Reality Exchange.” This reserved space for the dissemination of “organic” information between verified users could tap into the long-held hope that the Internet would foster more democratic deliberation rather than sow the seeds of polarization.

A reminder from one of the leading First Amendment scholars, Jack Balkin, offers a poignant closing: “Government regulation that

\[\text{See Howard, supra note 57, at 253–58.}\]
\[\text{See Rabban, supra note 60, at 521.}\]
\[\text{See WOLFF, supra note 40, at 3 (“Communication, especially rapid communication, has always been associated with power . . . ”).}\]
\[\text{See Richard Wike et al., Social Media Seen as Mostly Good for Democracy Across Many Nations, but U.S. Is a Major Outlier, PEW RSCH. CTR. (Dec. 6, 2022), \url{https://www.pewresearch.org/global/2022/12/06/social-media-seen-as-mostly-good-for-democracy-across-many-nations-but-u-s-is-a-major-outlier/} [https://perma.cc/VCA8-BG2M] (reporting that nearly two-thirds (sixty-four percent) of Americans agree with the statement that “social media has been more of a bad thing for democracy”).}\]
\[\text{Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 657 (1994).}\]
decentralizes control over innovation and knowledge production does not necessarily violate the First Amendment.\textsuperscript{339} In fact, he maintains that such regulation “may even be required to promote its central values.”\textsuperscript{340}

\textsuperscript{339} Jack M. Balkin, \textit{The First Amendment Is an Information Policy}, 41 Hofstra L. Rev. 1, 6 (2014).
\textsuperscript{340} \textit{Id.}