

October 2022

## Speech Markets & Web3: Refreshing the First Amendment for Non-Fungible Tokens (NFTs)

Tanner Dowdy

Follow this and additional works at: <https://scholarship.law.uc.edu/uclr>



Part of the [Constitutional Law Commons](#), and the [Science and Technology Law Commons](#)

---

### Recommended Citation

Tanner Dowdy, *Speech Markets & Web3: Refreshing the First Amendment for Non-Fungible Tokens (NFTs)*, 91 U. Cin. L. Rev. 206 (2022)

Available at: <https://scholarship.law.uc.edu/uclr/vol91/iss1/6>

This Student Notes and Comments is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact [ronald.jones@uc.edu](mailto:ronald.jones@uc.edu).

## SPEECH MARKETS & WEB3: REFRESHING THE FIRST AMENDMENT FOR NON-FUNGIBLE TOKENS (NFTS)

*Tanner Dowdy\**

### I. INTRODUCTION

“[A] technological genie has been unleashed from its bottle” and its name is blockchain.<sup>1</sup> Blockchain first garnered acclaim as the technology underlying Bitcoin, a digital alternative to fiat currency and the payment networks it rests on.<sup>2</sup> Today, blockchain developers are working to make the technology “applicable to . . . any asset in the world.”<sup>3</sup> Developers espouse that in the future, blockchain will usher in a new Internet era, dubbed “Web3.”<sup>4</sup> On Web3, blockchains will be the universal medium for value exchange—or so some propose.<sup>5</sup>

Non-Fungible Tokens (“NFTs”) are digital tokens, minted on blockchain applications, that are contributing to the evolution of Web3.<sup>6</sup> Each NFT includes a cryptographic signature that provides its holder exclusive *access*—but not always the copyright—to an unique digital asset,<sup>7</sup> many of which are expressive.<sup>8</sup> In other words, each time an NFT is sold, the holder gains exclusive ownership over a line of code that contains a “pointer to an off-chain location where the work associated with the NFT is stored.”<sup>9</sup>

The NFT business can be lucrative.<sup>10</sup> Picture this: an NFT of the YouTube phenomenon *Nyan Cat* (a digital cartoon depicting a flying cat)

---

\* Notes & Comments Editor, *University of Cincinnati Law Review*, Vol. 91.

1. DON TAPSCOTT & ALEX TAPSCOTT, BLOCKCHAIN REVOLUTION: HOW THE TECHNOLOGY BEHIND BITCOIN AND OTHER CRYPTOCURRENCIES IS CHANGING THE WORLD 1 (2018 ed.).

2. *Id.* at 5.

3. *Id.* at xxxv.

4. SHELLY PALMER, BLOCKCHAIN - CRYPTOCURRENCY, NFTS & SMART CONTRACTS: AN EXECUTIVE GUIDE TO THE WORLD OF DECENTRALIZED FINANCE 44 (2021).

5. TAPSCOTT & TAPSCOTT, *supra* note 1, at 6.

6. PALMER, *supra* note 4, at 86–88. *See also* An P. Doan et al., *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, 24 FINTECH L. REP. NL 1 (2021).

7. *Id.*

8. Stuart Levi et al., *Legal Considerations in the Minting, Marketing, and Selling of NFTs*, GLOBAL LEGAL INSIGHTS (Oct. 7, 2022), <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/09-legal-considerations-in-the-minting-marketing-and-selling-of-nfts> (depending on the underlying contract, holders of NFTs can obtain licensing rights, copyrights, and other property rights, but such provisions must be contracted for).

9. *See e.g.*, Chris Bennett & Cody Koblinsky, *Non-Fungible Tokens: Emerging Issues in the Emerging Marketplace*, 26 CYBERSPACE LAW. NL 1 (2021).

10. Erin Griffith, *Why an Animated Cat With a Pop-Tart Body Sold for Almost \$600,000*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/02/22/business/nft-nba-top-shot-crypto.html>.

sold at auction for roughly \$560,000 in February 2021.<sup>11</sup> And later that same year, digital artist Beeple sold an NFT for \$69,000,000.<sup>12</sup> The year-over-year growth for the NFT market in 2021 was estimated at 38,060%.<sup>13</sup> But moods changed in 2022.<sup>14</sup> Recessionary forces triggered a contraction in demand for digital assets, bringing the future of the crypto industry into question.<sup>15</sup>

The hype and volatility around NFTs during the past two years has inspired scholars, regulators, and industry participants to better understand their nature.<sup>16</sup> Due to their functional variety, NFTs are currently regulated based on their properties in a case-by-case manner.<sup>17</sup> In a case-by-case environment, it would be logical to assume that First Amendment protections are implicated when NFTs for expressive assets are examined. Further, one might assume the Responsible Financial Innovation Act (“RFIA”), a federal crypto bill proposed in 2022, would include a comprehensive approach to NFTs. Yet neither assumption would be correct: though crypto assets have been likened to speech,<sup>18</sup> the First Amendment remains largely absent from NFT literature and the RFIA is silent on the legal status of NFTs.<sup>19</sup>

This Comment plugs the First Amendment gap in NFT literature by offering the following proposition: if the widespread adoption of blockchain is the key to realizing the promise of Web3, then expressive NFTs and their markets should receive First Amendment protection. To arrive at that conclusion, this Comment proceeds as follows. Part II provides background on blockchain technology, Web3, NFTs, and the RFIA. Part II also summarizes two First Amendment doctrines that protect original expression—the marketplace model and the public forum doctrine. Part III ties all of these strands together by demanding that, in order to protect the potential of Web3, the First Amendment should be updated for expressive NFTs and their markets.

---

11. *Id.*

12. Bennett & Koblinsky, *supra* note 9.

13. *NFT Market Sales and Trends for 2021*, NFT’S ST. (Nov. 6, 2021), <https://www.nftstreet.com/nft-market-sales-and-trends-for-2021>.

14. Editorial, *Be Grateful for Crypto’s Well-Timed Meltdown*, BLOOMBERG (July 8, 2022), <https://www.bloomberg.com/opinion/articles/2022-07-08/crypto-crash-comes-at-an-opportune-moment>.

15. *Id.*; Corrie Driebusch & Paul Vigna, *The Crypto Party Is Over*, WALL ST. J. (June 18, 2022), <https://www.wsj.com/articles/the-crypto-party-is-over-1165524807>.

16. See Catherine Zhu & Louis Lehot, *Legal guide to launching an NFT marketplace*, 26 WESTLAW J. SECS. LITIG. & REGUL. 12 (2021), for an extended discussion of the regulatory hurdles to launching an NFT marketplace.

17. *Id.*

18. Justin S. Wales & Richard J. Ovelman, *Bitcoin Is Speech: Notes Toward Developing the Conceptual Contours of Its Protection Under the First Amendment*, 74 U. MIAMI L. REV. 204, 209 (2019).

19. See Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. § 301 (2022).

## II. BACKGROUND

To understand NFTs, a foray into the origins of blockchain is required. Accordingly, Section A of this Part starts with an overview of why blockchain was created, how it functions, and how it is evolving with the proliferation of NFTs. Section B follows with an exploration into the value proposition behind NFTs. Section C highlights the struggle that regulators face when grappling with NFTs. Section D covers two important First Amendment doctrines—the marketplace model and the public forum doctrine. Section E highlights NFT use cases that implicate the First Amendment. And lastly, Section F introduces the RFIA.

### A. *What is the Blockchain and Web3?*

Human beings desire to create valuable assets, preserve value in assets they own, and exchange valuable assets in markets at low cost.<sup>20</sup> Scholars have applied these principles (introduced by Adam Smith in *The Wealth of Nations*) to markets for both physical and non-physical assets.<sup>21</sup> To varying degrees, all markets are intermediated.<sup>22</sup> At the human level, “middlemen” such as brokers and agents intermediate transactions.<sup>23</sup> But intermediation can also be geographic (i.e., the Silk Road),<sup>24</sup> interpersonal (i.e., poor rapport with a counterparty),<sup>25</sup> or institutional (i.e., government regulation).<sup>26</sup> History is replete with societies that flout or restructure intermediation to reorder “human affairs for the better.”<sup>27</sup>

Blockchains are an attempt to reorder human affairs online.<sup>28</sup>

---

20. EAMONN BUTLER, *THE CONDENSED WEALTH OF NATIONS AND THE INCREDIBLY CONDENSED THEORY OF MORAL SENTIMENTS* 5–6 (2011), <https://www.adamsmith.org/s/condensed-WoN.pdf> [<https://perma.cc/VD6M-HVAY>].

21. For example, the “marketplace model” for free speech relies on competitive market theory. See JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS* 988–99, (8th ed. 2012).

22. See generally Daniel F. Spulber, *Market Microstructure and Intermediation*, 10 J. ECON. PERSPS. 135, 136 (1996) (summarizing the function of intermediaries within markets).

23. *Middleman*, CORP. FIN. INST. (2021), <https://corporatefinanceinstitute.com/resources/knowledge/deals/middleman> [<https://perma.cc/V84Q-P4CV>].

24. Geography has prevented societies from trading and interacting since the dawn of civilization. The Silk Road is an early example of treacherous geography (the Himalayas) being overcome by securing trade routes. Michael A. Peters, *The Ancient Road and the Birth of Merchant Capitalism*, 53 EDUC. PHIL. & THEORY 955, 955–57 (2021).

25. John Wade, *Negotiating with Difficult People*, 2 FAULKNER L. REV. 221, 221–22 (2011).

26. BUTLER, *supra* note 20, at 64–66.

27. TAPSCOTT & TAPSCOTT, *supra* note 1, at 1. Whether it is the Silk Road, landing in the so-called New World, or creating the Internet, the arc of history has generally been defined by increased trade and connectivity between individuals and civilizations.

28. *Id.* at xxiv.

Generally, blockchain platforms enable users to record transactions in a common ledger.<sup>29</sup> The appeal of using a blockchain is that the technology permits users to transact peer to peer—without traditional middlemen.<sup>30</sup> Blockchain applications accomplish this by distributing cryptographed transactions into blocks that are recorded on a publicly visible ledger run by a network of computers around the globe.<sup>31</sup> Every block of transactions is cryptographically linked to the previous block.<sup>32</sup> And each transaction recorded on the ledger is verifiable, immutable, and permanent.<sup>33</sup>

As enthusiasts would say, blockchains allow individuals to digitally “manage, store, and transfer any asset . . . in a secure and *private* way.”<sup>34</sup> To be sure, the merit of these claims continues to be debated.<sup>35</sup> But pushing the debate aside, it is useful for the purposes of this Comment to understand the ethos underlying the movement. Highlighting shortcomings of the current Internet is a good place to start in appreciating the blockchain ethos.

### 1. Fixing the Legacy Internet

Web3 advocates often remark that banks, governments, and universities—even the Internet—are all becoming “legacy.”<sup>36</sup> In this context, legacy is nomenclature for outdated.<sup>37</sup> Pia Mancini, founder of the blockchain governance foundation Democracy Earth, had this to say about legacy institutions: “We are twenty-first century citizens . . . with nineteenth century institutions, which in turn are based on information technology of the fifteenth century.”<sup>38</sup> The common critique of legacy institutions is their centralization.<sup>39</sup> That is, excessive centralization

---

29. TAPSCOTT & TAPSCOTT, *supra* note 1, at 6.

30. *Id.*

31. PALMER, *supra* note 4, at 11–12.

32. TAPSCOTT & TAPSCOTT, *supra* note 1, at 6.

33. *Id.*

34. *Id.* at xxiv (emphasis added).

35. Compare *Id.* (supporting the claims), and Arjun Kharpal, *Blockchain is ‘One of the Most Overhyped Technologies Ever,’ Nouriel Roubini Says*, CNBC (March 6, 2018), <https://www.cnbc.com/2018/03/06/blockchain-nouriel-roubini-one-of-the-most-overhyped-technologies-ever.html> [<https://perma.cc/M9BH-PUXW>] (not supporting the claims).

36. Jeffrey Amico, *The Power of Open Networks: Public Blockchain Adoption in Capital Markets*, FLUIDITY (May 2, 2019), <https://medium.com/fluidity/the-power-of-open-networks-public-blockchain-adoption-in-capital-markets-ae66bf1b002d> [<https://perma.cc/8J69-S92G>].

37. *What is a legacy system? Definition and meaning*, MKT. BUS. NEWS (2021), <https://marketbusinessnews.com/financial-glossary/legacy-system-definition-meaning> [<https://perma.cc/UB5X-6RZM>].

38. Pia Mancini, *A Seat at the Table*, in SYSTEM OVERRIDE: HOW BITCOIN, BLOCKCHAIN, FREE SPEECH & FREE TECH CAN CHANGE EVERYTHING 23, 23–24 (2020).

39. Hannah Wolfman-Jones, *Network Intelligence*, in SYSTEM OVERRIDE: HOW BITCOIN, BLOCKCHAIN, FREE SPEECH & FREE TECH CAN CHANGE EVERYTHING 11, 11 (2020).

allows our institutions to enjoy immense power over many transactions: individuals cannot “reliably establish one another’s identities or trust one another to transact . . . without validation from a [central] third party like a bank or a government.”<sup>40</sup>

The Internet was designed to undercut intermediaries by “vastly improv[ing] the flow of data within and among firms and people . . . .”<sup>41</sup> The version of the Internet that existed in the mid-90s was exemplified by “static HTML pages viewable in a browser over a TCP/IP connection.”<sup>42</sup> Then in the mid-2000s came Web2, the “web as you know it today.”<sup>43</sup> Web2 introduced “dynamic websites and applications as well as audio and video streaming.”<sup>44</sup> The pioneers of the early Web hoped that information flow over the Internet “would help undermine traditional hierarchies . . . .”<sup>45</sup>

Progress certainly occurred.<sup>46</sup> However, because Web2 transactions remain largely controlled by centralized legacy actors, blockchain developers believe progress has stalled or even reversed.<sup>47</sup> They suggest that institutions “in business and government have bent the original democratic structure of the Internet to their will.”<sup>48</sup> And, as a result, the original value of precious assets like online personal information is going unrealized at the expense of profit and control.<sup>49</sup>

The Great Financial Crisis of 2008 has been pointed to as an event that exposed the fragility of our legacy institutions.<sup>50</sup> The legacy financial model consists of a global web of central banks, investment banks, commercial banks, rating agencies, brokerages, and regulators.<sup>51</sup> In the early 2000s, this web of financial institutions began packaging, selling, investing in, and hedging against mortgage-backed securities (“MBS”)

40. TAPSCOTT & TAPSCOTT, *supra* note 1, at 1.

41. *Id.* at xxiv. For a well written account of the Internet’s flattening function, see THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9–11 (2007 ed.).

42. PALMER, *supra* note 4, at 45.

43. *Id.*

44. *Id.*

45. See TAPSCOTT & TAPSCOTT, *supra* note 1, at 12.

46. *Id.* The Internet continues to reduce the costs of transacting and communicating over long distances, making it more difficult for nation-states to contain the flow of information within their borders. The Arab Spring, for example, has been widely regarded as a phenomenon illustrating the democratizing nature of Web2, in that case the platform Twitter. See also Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped By Social Media*, MIC (July 3, 2012), <https://www.mic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media> [<https://perma.cc/4LDH-LCGE>].

47. Mancini, *supra* note 38, at 11–12.

48. TAPSCOTT & TAPSCOTT, *supra* note 1, at 12.

49. *Id.* at 12–13.

50. *Id.* at 5.

51. Dylan Yaga et al., *Blockchain Technology Overview*, 8202 NAT’L INST. STANDARDS & TECH. INTERNAL REPS. 7 (2021).

that were poorly collateralized and inaccurately rated.<sup>52</sup> By 2008, flaws in the MBS market metastasized and triggered a financial collapse.<sup>53</sup> Trust in the financial system was so badly broken that calls were made to reexamine “the technology of money” itself.<sup>54</sup>

Those calls were answered in 2009 when Satoshi Nakamoto, an alias, published *Bitcoin: A Peer-to-Peer Electronic Cash System*.<sup>55</sup> Satoshi’s paper presented Bitcoin, an “electronic payment system based on cryptographic proof instead of trust,” as an alternative to reliance on the legacy financial system that provoked the 2008 financial crisis.<sup>56</sup> The technology described in Nakamoto’s paper that gave Bitcoin its value was blockchain.<sup>57</sup> The use of blockchain in Satoshi’s white paper brought the technology “to the forefront” of conversations about the future of money.<sup>58</sup> And ever since, Bitcoin has inspired a movement to create a blockchain-based Web3, where assets beyond currency could be exchanged in a disintermediated fashion.<sup>59</sup>

## 2. Ethereum and Beyond

After Bitcoin, Ethereum was introduced.<sup>60</sup> Ethereum has been the primary catalyst for expanding blockchain technology beyond currency.<sup>61</sup> Ethereum bills itself as a platform for distributed applications that, in exchange for the cryptocurrency Ether, allows users to leverage code for the “exchange [of] money, property, . . . or anything of value. . . .”<sup>62</sup>

Because Ethereum allows users to transfer content—not just currencies—it will be critical to the success of the Web3, which, if constructed as promised, will allow many asset transactions over the Internet to be peer-to-peer.<sup>63</sup> In pursuit of realizing Web3, a plethora of

---

52. RAY DALIO, *PRINCIPLES FOR NAVIGATING BIG DEBT CRISES 170–78* (1st ed. 2018).

53. *Id.* at 184–86.

54. See Trevor I. Kiviat, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 *DUKE L.J.* 569, 577–80 (2015) (explaining the phrase “technology of money”).

55. SATOSHI NAKAMOTO, *BITCOIN: A PEER TO PEER ELECTRONIC CASH SYSTEM 1* (2009).

56. *Id.*

57. TAPSCOTT & TAPSCOTT, *supra* note 1, at 5.

58. Ali Dhanani & Ryan Dowell, *Introduction to Blockchain Technologies and Smart Contracts*, 57 *HOUS. LAW.* 18, 18 (2019).

59. See generally PALMER, *supra* note 4, at 44–46 (on the movement to build a new Web3).

60. Kevin Werbach & Nicolas Cornell, *Contracts Ex Machina*, 67 *DUKE L.J.* 313, 335–36 (2017).

61. AJ BROOKS, *Ethereum’s Blockchain and Making an NFT*, in *YOU, THEM, AND NFTS: A COMPLETE GUIDE TO NON-FUNGIBLE TOKENS* (2020).

62. Justin Henning, *The Howey Test: Are Crypto-Assets Investment Contracts?*, 27 *U. MIAMI BUS. L. REV.* 51, 58 (2018) (emphasis added) (quoting *Smart Contracts: The Blockchain Technology That Will Replace Lawyers*, BLOCKGEEKS, <https://blockgeeks.com/guides/smart-contracts>) [<https://perma.cc/G7M C-2RTE>].

63. Faten Adel Alabdulwahhab, *Web3: The Decentralized Web Blockchain Networks and Protocol*

applications have emerged on Ethereum.<sup>64</sup> Though the number continues to grow, “[b]y some estimates, 70 percent of all distributed applications now run on the Ethereum blockchain . . . .”<sup>65</sup> The widespread adoption of Ethereum has earned it “powerful network effects that will be hard to dislodge.”<sup>66</sup>

Ethereum’s scope has placed it at the forefront of NFT markets.<sup>67</sup> NFT markets are particularly exciting for enthusiasts because of the opportunities they create for content producers.<sup>68</sup> Indeed, with NFTs, the budding Web3 community may have an asset class that helps artists realize the value in controlling the presentation of their original works.

### *B. Applying Economic Principles to Value NFTs*

NFT proponents assert that NFTs liberate individuals from legacy intermediation.<sup>69</sup> To examine this assertion, this Part explores the value proposition of NFTs by applying general principles of asset valuation to NFTs.

#### 1. The Definition of an Asset

The term “asset” refers to a resource, physical or abstract, that provides future benefit and is capable of being transferred across space and time.<sup>70</sup> NFTs are digital assets.<sup>71</sup> The value of any asset is decided by an amalgam of factors,<sup>72</sup> including *inter alia* preservation, supply, demand, transferability, liquidity, income producing capability, and risk.<sup>73</sup> Because NFTs are assets, each of these factors can be applied to value NFTs.

---

*Innovation*, Presentation Before the 1st International Conference on Computer Applications & Information Security (Apr. 4-6, 2018), in *IEEE XPLORE*, Aug. 2018, at 1, 4.

64. See, e.g., BROOKS, *supra* note 61, *The Top NFT Trading Platforms*.

65. TAPSCOTT & TAPSCOTT, *supra* note 1, at xxxiii.

66. *Id.*

67. PALMER, *supra* note 4, at 33.

68. See generally BROOKS, *supra* note 61, *Visible Autonomy* (summarizing excitement surrounding NFTs, their future, and their importance for blockchain and Web3).

69. TAPSCOTT & TAPSCOTT, *supra* note 1, at 6.

70. Cryptocurrency for Beginners: with Crypto Casey, *NFTs: New Asset Class (Non-Fungible Tokens) – Beginners’ Guide*, at 2:30 (Sep. 12, 2021), <https://cryptocasey.com/podcasts/nfts-new-asset-class-non-fungible-tokens-beginners-guide> [<https://perma.cc/5YVL-BYV9>] [hereinafter Cryptocurrency for Beginners].

71. Usman W. Chohan, *Non-Fungible Tokens: Blockchains, Scarcity, and Value 2* (Mar. 24, 2021) (Critical Blockchain Rsch. Initiative Working Paper, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3822743](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3822743) [<https://perma.cc/CR44-BV56>].

72. Cryptocurrency for Beginners, *supra* note 70, at 2:30.

73. *Id.*

## 2. Fungible Versus Non-Fungible Assets

Assets are either fungible or non-fungible.<sup>74</sup> Fungible asset classes simplify transactions because they are easily interchangeable and can be broken into component parts.<sup>75</sup> For example, money is a classic fungible asset—it is interchangeable and is capable of being fractionalized, i.e., (dollars can break down into cents).<sup>76</sup> The fungible nature of money allows one to “substitute a five-dollar bill with five one-dollar bills . . . .”<sup>77</sup> In contrast, many assets are non-fungible, meaning they are impossible to break down, replicate, or copy without destroying their value.<sup>78</sup> Think about baseball cards. Trading baseball cards is difficult because each card has exclusive attributes of value—something unique is imbued onto every original card.<sup>79</sup> In addition, one cannot fractionalize a card into component parts without ruining its value.<sup>80</sup> The same is true for NFTs.

## 3. The Role of Money in Pricing Non-Fungible Assets

Money is a powerful fungible asset because it preserves value well, is naturally controlled in supply, enjoys unlimited demand, and is universally accepted.<sup>81</sup> When a money is sound and universally accepted, it can be used to estimate the value of goods (e.g., non-fungible assets) via pricing.<sup>82</sup> In short, sound money makes valuing baseball cards easier. In the United States, the supply of money—the pricing instrument for non-fungible assets—is set by the Federal Reserve, a legacy financial intermediary.<sup>83</sup> The Federal Reserve prints money by buying government securities from banks.<sup>84</sup> This process, called quantitative easing, gives banks a greater capital cushion from which loans can be generated.<sup>85</sup> Loans are the true generator of money.<sup>86</sup> Once money is acquired, legacy intermediaries are relied upon to facilitate transactions for non-fungible

---

74. Chohan, *supra* note 71, at 2.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. SAIFEDEAN AMMOUS, *THE BITCOIN STANDARD: THE DECENTRALIZED ALTERNATIVE TO CENTRAL BANKING* 9 (2018).

82. *Id.*

83. *Id.* at 51.

84. *See e.g.*, JOHN KENNETH GALBRAITH, *MONEY: WHENCE IT CAME, WHERE IT WENT* 46–49 (2017).

85. *Id.*

86. *Id.*

assets.<sup>87</sup> For example, in real property, money is used to purchase homes, which is verified by instruments of record (e.g., government recorded deeds) that reflect ownership.<sup>88</sup> Real property transfer is just one example of a transaction where legacies intermediate the exchange of a non-fungible asset from start to finish.

#### 4. The Importance of Web2 in Changing Asset Transactions

The growth of Web2 moved many non-fungible transactions online.<sup>89</sup> At the same time, a host of new, digital non-fungible asset classes arose. Unfortunately, as those new assets—like personal data—have become more valuable online, Web2 has failed to preserve their original value.<sup>90</sup> Indeed, blockchain proponents argue that Web2 actively devalues precious non-fungibles like original speech and digital identity through its reliance on copying.<sup>91</sup> Email chains are useful for demonstrating the argument: Every time an email contains an attachment, the attachment is just a copy of an original.<sup>92</sup> And so the argument goes; whether it be .jpegs, audio files, consumer habits, or search history, it has never been easier to exploit the value of non-fungible assets online.<sup>93</sup>

#### 5. The Value Proposition of NFTs

Those who wish to preserve the originality over certain files or digital assets can, to an extent, do so with NFTs.<sup>94</sup> They can do this by minting an NFT of a collectible that attaches certain rights. To mint an NFT, “a unique, standardized token and associated smart contract are recorded on a blockchain.”<sup>95</sup> The code minted on the token is unique, thereby ensuring the holder is receiving access to the original asset.<sup>96</sup> In addition to access rights, purchasers of NFTs can receive profits on resales for

---

87. TAPSCOTT & TAPSCOTT, *supra* note 1, at xxiv.

88. Stephanie Emrick, *Transfer on Death Deeds: It Is Time to Establish the Rules of the Game*, 70 FLA. L. REV. 469, 469–70 (2018).

89. PALMER, *supra* note 4, at 75. *See also* Wolfman-Jones, *supra* note 39, at 37–39 (negative perspective on current infrastructure for transacting value online).

90. PALMER, *supra* note 4, at 75.

91. TAPSCOTT & TAPSCOTT, *supra* note 1, at 41–43.

92. *Id.* at xxiv.

93. *Id.* at 14–15.

94. *See generally* BROOKS, *supra* note 61, *Visible Autonomy* (explaining briefly how NFTs present novel value propositions).

95. *See* PALMER, *supra* note 4, at 33 (“A smart contract is a self-executing digital agreement that enables two or more parties to exchange.”); *see also* Andrew Zapotochnyi, *What Are Smart Contracts?*, BLOCKGEEKS (April 11, 2022), <https://blockgeeks.com/guides/smart-contracts/> [<https://perma.cc/G7MC-2RTE>].

96. Bennett & Koblinsky, *supra* note 9.

tokens that appreciate.<sup>97</sup> Put together, NFTs allow content creators to provide stakeholders with certain rights to assets held off-chain, as well as the opportunity to exchange their tokens for profit on open markets free of intermediation.<sup>98</sup>

NFTs are being experimented with to disrupt digital art.<sup>99</sup> One trading platform, Foundation, allows professional artists to host live auctions for their uniquely minted tokens.<sup>100</sup> Rarible, another trading platform, is more inclusive: it has “the first community-owned NFT marketplace where *anyone* can mint NFTs . . . .”<sup>101</sup> As discussed, the purpose of NFTs is to facilitate non-fungible asset transactions while simultaneously ensuring that original value in the transfer is preserved.<sup>102</sup> NFTs are immutable, versatile, non-perishable, capable of producing income, and, in certain circles, in high demand.<sup>103</sup>

Based on these properties, enthusiasts and speculators hiked NFT prices to high levels in 2021.<sup>104</sup> These prices normalized during 2022 as speculators left the market.<sup>105</sup> As speculation continues to wane, value of NFTs will become defined by the level of regulatory scrutiny they receive, as well as their actual value to consumers.<sup>106</sup>

### C. The Growing “Governance Gap”

Uncertainty over the status of digital assets is nothing new. Ten years of intense debate transpired before the Securities and Exchange Commission (“SEC”) exempted Bitcoin from federal securities regulations.<sup>107</sup> The recurrent lag between digital asset growth and regulatory response has been coined the “governance gap.”<sup>108</sup> And, as

97. Diana Qiao, *This Is Not A Game: Blockchain Regulation and Its Application to Video Games*, 40 N. ILL. U. L. REV. 176, 187 (2020).

98. Thomas N. Doty, *Blockchain Will Reshape Representation of Creative Talent*, 88 UMKC L. REV. 351, 356-57 (2019).

99. Diego Geroni, *NFTs And Their Use Cases: A Complete Guide*, 101 BLOCKCHAINS (Mar. 24, 2021), <https://101blockchains.com/nft-use-cases> [<https://perma.cc/ZXK7-YC9U>].

100. BROOKS, *supra* note 61, *The Top NFT Trading Platforms*.

101. *Id.* (emphasis added).

102. Bennett & Koblinsky, *supra* note 9.

103. *Id.*

104. *Id.*

105. Leeor Shimron, *NFTs Are In Their First Crypto Winter — Here’s What Investors Can Expect Next*, FORBES (Jul. 8, 2022), <https://www.forbes.com/sites/leeorshimron/2022/07/08/nfts-are-in-their-first-crypto-winterheres-what-investors-can-expect-next/?sh=3162bbf660d8> [<https://perma.cc/D4VN-VERS>].

106. *Id.*

107. Rakesh Sharma, *SEC Chair Says Bitcoin Is Not A Security*, INVESTOPEDIA, <https://www.investopedia.com/news/sec-chair-says-bitcoin-not-security> [<https://perma.cc/3Y4H-EBA7>] (last updated June 25, 2019).

108. TAPSCOTT & TAPSCOTT, *supra* note 1, at xxxvi.

was the case for Bitcoin, securities regulators have acted as first movers on NFTs, rushing to fill the governance gap and classify NFTs as securities.<sup>109</sup> SEC actions in this space has led to considerable regulatory uncertainty.<sup>110</sup>

In an attempt to provide clarity, United States Representative Don Beyer presented the *Digital Asset Market Structure and Investor Protection Act of 2021*,<sup>111</sup> the SEC published a digital assets framework on its website,<sup>112</sup> and private individuals brought lawsuits in federal court seeking the enforcement of securities laws against NFT marketplaces.<sup>113</sup>

Securities law is not the only discipline implicated by NFTs. Commodities law, copyright law, criminal law, and cybersecurity laws may also undergo changes as NFTs continue to proliferate.<sup>114</sup> And that is just in the United States. More repressive countries have banned cryptocurrency transactions altogether.<sup>115</sup> China, for example, has prohibited “all crypto transactions and vowed to root out [the] mining of digital assets . . . .”<sup>116</sup> As new NFTs continue to be minted, jurisdictions around the world will need to determine whether, and the extent to which, they will protect the expressive component of NFTs.

#### *D. Speech Markets, Public Forums, and Expressive NFTs*

The First Amendment of the United States Constitution prohibits Congress from “abridging the freedom of speech, or of the press. . . .”<sup>117</sup> The breadth of First Amendment jurisprudence reveals the Supreme

109. Qiao, *supra* note 97, at 219.

110. The SEC has issued guidance on when digital assets are captured under the Howey Test, which governs when a scheme is considered an investment contract under securities laws. Heeding this guidance, NFT minters must determine whether their token is imbued with the properties of an investment contract. See *Crypto and the Courts: A Look Ahead*, 24 No. 3 FINTECH L. REP. NL 2 (2021).

111. Digital Asset Market Structure and Investor Protection Act, H.R. 4741, 117th Cong. (2021).

112. *Framework for “Investment Contract” Analysis of Digital Assets*, U.S. SEC, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> (last updated Apr. 3, 2019) [<https://perma.cc/CH5P-B6JG>].

113. For example, plaintiffs in one case sued the NBA in federal court for violating securities laws in the administration of the NFT market NBA Top Shot. See Jeremy S. Goldman, *Are NBA Top Shot Moments Securities? Legal Arguments Take Shape In Class Action Against Dapper Labs That Could Rock The World Of NFTs*, MONDAQ (February 23, 2022), <https://www.mondaq.com/unitedstates/fin-tech/1165218/are-nba-top-shot-moments-securities-legal-arguments-take-shape-in-class-action-against-dapper-labs-that-could-rock-the-world-of-nfts> [<https://perma.cc/E3GG-JXEH>].

114. See, e.g., Doan et al., *supra* note 6.

115. Chloe Orji, *Bitcoin ban: These are the countries where crypto is restricted or illegal*, EURONEWS (Nov. 24, 2021), <https://www.euronews.com/next/2021/09/24/bitcoin-ban-these-are-the-countries-where-crypto-is-restricted-or-illegal2> [<https://perma.cc/2SSB-X4LZ>].

116. *China Widens Ban on Crypto Transactions; Bitcoin Tumbles*, BLOOMBERG, Sept. 24, 2021, (alteration in original) <https://www.bloomberg.com/news/articles/2021-09-24/china-deems-all-crypto-related-transactions-illegal-in-crackdown> [<https://perma.cc/25B6-M5PV>].

117. U.S. CONST. amend. I.

Court has paid more than lip service to giving “a voice to those a majority would silence.”<sup>118</sup> For example, “[w]ith . . . limited exceptions, the Court has held unconstitutional all laws deemed content-based . . . .”<sup>119</sup> Indeed, only in exceedingly rare circumstances—such as obscenity—has a content based restriction been upheld.<sup>120</sup> In addition to tightly policing content restrictions, judges and scholars have developed doctrines to facilitate the exchange of ideas in public spaces. Those doctrines include “the marketplace model”<sup>121</sup> and the public forum doctrine.<sup>122</sup>

### 1. The Marketplace Model

Supreme Court Justice Oliver Wendell Holmes believed that an open market for exchanging ideas is a prerequisite to discovering truth.<sup>123</sup> In *Abrams v. United States*, he wrote in dissent: “The best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>124</sup> Like Justice Holmes, adherents of the marketplace model presume that when ideas are freely exchanged, the truth is revealed as the best idea, and by virtue of being the best idea, the truth wins the most followers.<sup>125</sup> These presumptions have deep roots in British political thought.<sup>126</sup> Take the words of philosopher John Stuart Mill:

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race . . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>127</sup>

For the marketplace model to make sense, discovering the truth and confirming when an efficient speech market exists must be possible—a contention that scholars dispute.<sup>128</sup> One leading critic, Herbert Marcuse, argued that a marketplace of ideas is unrealistic “[u]nder the rule of monopolistic media.”<sup>129</sup> In response to such criticism, marketplace

---

118. *Barr v. Am. Ass'n Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2364 (2020) (Gorsuch, J., concurring in part and dissenting in part); *See generally* Robert A. Sedler, *The “Law of the First Amendment” Revisited*, 58 WAYNE L. REV. 1003 (2013) (comprehensive review of First Amendment jurisprudence).

119. Sedler, *supra* note 118, at 1036.

120. *Id.* at 1014.

121. BARRON ET AL., *supra* note 21, at 988–99.

122. Sedler, *supra* note 118 at 1059.

123. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

124. *Id.*

125. Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2627–29 (2019).

126. BARRON ET AL., *supra* note 21, at 989.

127. *Id.* (quoting JOHN S. MILL, ON LIBERTY (1859)).

128. Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 617 (1982).

129. Herbert A. Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE, 81, 96

advocates retort that when speech markets are awry, Holmes’s metaphor still provides “a justification for various governmental interventions to redistribute communicative opportunity.”<sup>130</sup> In the United States, one way courts intervene to promote open forums for speech is the public forum doctrine.<sup>131</sup>

## 2. Public Forums

The public forum doctrine places “an affirmative duty” upon “the government to facilitate speech” in spaces reserved for the public.<sup>132</sup> One effect of the doctrine is to preserve neutrality in open spaces.<sup>133</sup> To apply the doctrine, courts conduct a spatial inquiry to determine if a space is reserved for the public.<sup>134</sup> If it is, the law restricting speech may only survive if it is a “neutral time, place, and manner regulation.”<sup>135</sup>

Generally, when undertaking the spatial inquiry, courts assess whether the forum is “historically a medium of expression, whether the forum is open to the public, and whether it is highly trafficked.”<sup>136</sup> This analysis has roots to the Industrial Era, when protestors and picketers would corral on city streets.<sup>137</sup> In 1939, the Supreme Court wrote the following when recognizing sidewalks as public forums: “[T]hey have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>138</sup>

During the latter half of the 20<sup>th</sup> century, the Court extended the doctrine beyond sidewalks to include privately owned municipalities,<sup>139</sup> shopping centers,<sup>140</sup> and airport terminals.<sup>141</sup> Importantly, with the inclusion of each new space, a reference to parks and streets as “the quintessential forum for the exercise of” free speech has remained.<sup>142</sup>

Importantly, title to property is not dispositive in determining whether

---

(Beacon Press, 1965).

130. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 7–8 (2004).

131. Sedler, *supra* note 118, at 1059.

132. Joseph C. Best, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine in the Era of New Media*, 53 TEX. TECH L. REV. 273, 286–88 (2021).

133. Sedler, *supra* note 118, at 1033–35.

134. *Id.* at 1059–1061.

135. *Id.* at 1034.

136. Best, *supra* note 132, at 296.

137. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

138. *Id.*

139. *See Marsh v. Alabama*, 326 U.S. 501 (1946).

140. *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

141. *See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

142. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

a space is a public forum.<sup>143</sup> This principle was established in *Marsh v. Alabama*, where the Court was asked whether Chickasaw, Alabama, could evade the public forum doctrine solely by being a privately owned town.<sup>144</sup> The Court held against Chickasaw, ruling that a leaflet ban in its shopping district was an unconstitutional infringement on the speech of Chickasaw citizens in a public space.<sup>145</sup> Critical to this conclusion was the Court's recognition that the only difference between Chickasaw and public forums within public municipalities was the *total* private control: "[T]he town and its shopping district are *accessible to and freely used by the public in general* and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."<sup>146</sup>

*Marsh* demonstrates that under certain circumstances, private property can function as public fora.<sup>147</sup> But the inverse can also be true: publicly owned spaces are not always public fora.<sup>148</sup> Decades following *Marsh*, in *International Society for Krishna Consciousness, Inc. v. Lee*, the Court faced a challenge of an ordinance that banned leaflet distribution in airport terminals.<sup>149</sup> The Court ruled that the airport terminals at issue in the case, though publicly owned, were not public for First Amendment purposes.<sup>150</sup> First, the Court noted that "the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity."<sup>151</sup> Second, the Court found no evidence that terminals "have been intentionally opened by their operators" for speech.<sup>152</sup> Third and finally, the Court deemed the activity at issue in the case, the distribution of leaflets, to be impermissibly disruptive to the true purpose of terminals: "the facilitation of passenger air travel."<sup>153</sup>

*Marsh* was an important departure from the traditional rule that the public forum doctrine is inapplicable to private property.<sup>154</sup> *Lee*, on the other hand, was an important denial of protection to what was at the time, an emerging public space—public airport terminals.<sup>155</sup> Together, these two cases illustrate that the determination of whether a space is public or

---

143. See *Marsh*, 326 U.S. at 503.

144. *Id.*

145. *Id.*

146. *Id.* (emphasis added).

147. *Id.*

148. See *Lee*, 505 U.S. at 674.

149. *Id.*

150. *Id.*

151. *Id.* at 680.

152. *Id.*

153. *Id.* at 682.

154. Best, *supra* note 132, at 286.

155. Sedler, *supra* note 118, at 1065.

private for First Amendment purposes does not depend entirely on whether the space is publicly or privately owned.<sup>156</sup>

Following *Marsh* and *Lee*, the growth of Web2 shifted the dominant forum for public discourse online.<sup>157</sup> This shift was apparent as early as 1998: “[A]n increasing proportion of public debate occurs electronically between conversants who are separated geographically by great distances.”<sup>158</sup> By 2003, calls to modernize the public forum doctrine for Internet communication channels had emerged, resting on the assertion that “either now or in the foreseeable future, [the Internet] comprises the . . . most important [] public forum for speech.”<sup>159</sup>

Yet, it was not until 2017, in *Packingham v. North Carolina*, that the Supreme Court weighed, albeit in dicta, whether social media has become the “21st century equivalent” of a physical public forum.<sup>160</sup> Writing for the majority, Justice Kennedy first noted how ubiquitous online forums have become: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the Internet.”<sup>161</sup> Justice Kennedy continued that the Internet has “potential to alter how we think, express ourselves, and define who we want to be.”<sup>162</sup> The opinion concluded with a note of caution for courts: “[C]ourts must be conscious that what they say today might be obsolete tomorrow.”<sup>163</sup>

Ultimately, as forward thinking as the dicta in *Packingham* was, its discussion was limited to private social media companies—creations of Web2.<sup>164</sup> And because the language was mere cautious dicta, no significant opinion has followed *Packingham* that updates the public forum doctrine to Internet spaces.<sup>165</sup> As a result, social media companies, exempt from the public forum doctrine, have enjoyed an “oligopoly over online speech,” thereby exploiting public discourse for profit.<sup>166</sup> To remedy this situation, scholars advocate for relaxing the public/private formalities on online forums in favor of a purpose-based approach,

156. *Id.* at 1065–67.

157. Best, *supra* note 132, at 126–28.

158. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1536, 1634 (1998).

159. Mark P. Smith, *The Distortion of the Internet as a Public Forum*, 2003 UCLA J. L. & TECH. 29 (2003).

160. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1743 (2017) (Alito, J., concurring).

161. *Id.* at 1735.

162. *Id.* at 1736.

163. *Id.*

164. *Id.*

165. *See generally*, Best, *supra* note 134.

166. *Id.* at 274.

whereby courts “extend the public forum doctrine to include the most highly trafficked online forums whose *purposes* are to encourage the sharing of ideas and speech . . . .”<sup>167</sup> Private Web2 platforms such as YouTube, Facebook, and Twitter would be captured under a purpose-based approach.<sup>168</sup>

### *E. Using NFTs for Expression*

Creative individuals use NFTs for expression. For example, Benjamin Wareing, a prominent British political photographer, has begun auctioning his political photography as NFTs on OpenSea.<sup>169</sup> He regards NFTs as “the next evolution in technology and art as a whole (whether that’s painting, digital art, photography, video, performance, or any other variable of art).”<sup>170</sup> Wareing goes as far to claim his pieces are the “first official political photography NFTs in history.”<sup>171</sup>

Individual artists are not the only ones who can leverage blockchains for expression. In Hong Kong, anti-CCP protestors have created a “yellow circle economy” through blockchains.<sup>172</sup> This underground economy is “a network of pro-democracy businesses supported by protestors” calling for the adoption of “cryptocurrency for the sake of anonymity.”<sup>173</sup> The yellow circle economy is based on a blockchain called ROOT.<sup>174</sup> ROOT protestors could possibly promote their cause by compensating NFT minters that support the Hong Kong movement.

NFTs have also been used to voice populist sentiments in the United States.<sup>175</sup> DADA Art Collective, an avant-garde art blockchain formed to “create spontaneous visual conversations,”<sup>176</sup> has collaborated with Black Lives Matter, NFT marketplace Mintbase, and a “file-storage blockchain Arweave” to create immutable records of officer involved killings.<sup>177</sup>

---

167. *Id.*

168. *Id.*

169. Benjamin Wareing, *Why I’m Creating The First Official Political Photography NFTs in History*, MEDIUM (Jan. 18, 2021), <https://benjaminwareing.medium.com/why-im-creating-the-first-official-political-photography-nfts-in-history-d08493a2255c> [<https://perma.cc/BDK9-QWSA>].

170. *Id.*

171. *Id.*

172. Kristie Chan, *How cryptocurrency fuels protests and anti-government movements*, FORKAST (Aug. 25, 2021), <https://forkast.news/blockchain-cryptocurrency-anti-government-protests-hong-kong-blm> [<https://perma.cc/B8UH-6CTP>].

173. *Id.*

174. *Id.*

175. Leigh Cuen, *How an Art Collective Is Using Blockchain to Protest Police Brutality*, COINDESK (Jun. 12, 2020), <https://www.coindesk.com/markets/2020/06/12/how-an-art-collective-is-using-blockchain-to-protest-police-brutality> [<https://perma.cc/6YEU-5FLD>].

176. *Id.*

177. *Id.*

The project is called *No Justice No Peace*.<sup>178</sup> Another example is UnitedNonComNFT (“United”), a collection of NFTs marketed and “designed to raise awareness, build a freedom fund and bring local and global communities together.”<sup>179</sup> United’s burgeoning group of creators pride themselves on being the first activists “able to use non-fungible tokens . . . as a form of expression in a tangible way.”<sup>180</sup>

Around the world, individuals and groups are entering NFT markets to express themselves through original works.<sup>181</sup> They are drawn to NFT markets because of their lack of reliance on legacy institutions to control or exploit an exchange.<sup>182</sup> If NFT markets present a new horizon for speech, the question must follow: how can the expressive potential of NFT markets be protected under the First Amendment? Developments in 2022 have made this question even more prescient.

#### *F. The 2022 Downturn & The Responsible Financial Innovation Act*

Macroeconomic forces stirred a global recessionary environment in 2022.<sup>183</sup> Perhaps more than any industry, crypto has suffered as a result.<sup>184</sup> For months, bad news in crypto has dominated the headlines of major publications.<sup>185</sup> For example, Coinbase, the largest cryptocurrency exchange, had to lay off a large portion of its workforce.<sup>186</sup> OpenSea suffered an email data breach that threatened many of its users.<sup>187</sup> Such headlines have spurred intense skepticism over the future of crypto and laid bare the need for legal attention to digital assets.<sup>188</sup>

United States Senators Kirsten Gillibrand and Cynthia Lummis have responded to the legal uncertainty over digital assets with the Responsible

178. *Id.*

179. *UnitedNonComNFT: Join us Fighting Global Tyranny With One NFT at a Time*, UNITEDNONCOMNFT (2021), <https://unitednoncomnft.co> [<https://perma.cc/2KJX-6SXX>].

180. *Id.*

181. BROOKS, *supra* note 61, *Visible Autonomy*.

182. *Id.*

183. *See* Driebusch & Vigna, *supra* note 15.

184. *Id.*

185. *See* Shimron, *supra* note 105.

186. Nathan Becker et al., *Coinbase to Lay Off 18% of Staff Amid Crypto Meltdown*, WALL ST. J. (June 14, 2022), <https://www.wsj.com/articles/crypto-exchange-coinbase-to-lay-off-18-of-staff-11655211069> [<https://perma.cc/HG4U-5C7W>].

187. Sam Reynolds, *OpenSea Reports Email Data Breach*, YAHOO FIN. (June 30, 2022), [https://finance.yahoo.com/news/opensea-reports-email-data-breach-044154923.html?fr=sycsrp\\_catchall](https://finance.yahoo.com/news/opensea-reports-email-data-breach-044154923.html?fr=sycsrp_catchall) [<https://perma.cc/XBV2-3TKR>].

188. Paul Kiernan, *Senators Propose Industry-Friendly Cryptocurrency Bill*, WALL ST. J. (June 7, 2022), <https://www.wsj.com/articles/senators-to-propose-industry-friendly-cryptocurrency-bill-11654592401> [<https://perma.cc/MYC7-TBQ5>].

Financial Innovation Act (“RFIA”).<sup>189</sup> The bill is generally crypto-friendly and would resolve many legal ambiguities persistent in crypto.<sup>190</sup> Most notably, the bill would create an entirely new asset class in federal securities laws: “[a]ncillary assets.”<sup>191</sup> Ancillary assets would be defined as any “intangible, *fungible* asset that is offered, sold, or otherwise provided to a person in connection with the . . . sale of a security through a[] . . . scheme that constitutes an investment contract.”<sup>192</sup>

Notably, the RFIA exempts NFTs from its reach.<sup>193</sup> In fact, the bill explicitly that SEC jurisdiction would not extend to “digital collectibles and other unique digital assets.”<sup>194</sup> Therefore, even if the RFIA were to pass, work towards a legal framework for NFTs would still be required. Absent statutory clarity, the need to adopt a judicial framework for expressive NFTs is made more pressing.

### III. DISCUSSION

NFT literature and crypto legislation (such as the RFIA) produced in the United States has failed to adequately address whether the First Amendment should apply to expressive NFTs marketed and traded on public blockchains. This is a gap that needs to be filled. A First Amendment perspective would provide two benefits. First, it would counterbalance an excessive focus on NFT economics. And second, it would promote the protection of new speech on NFT exchanges and Web3 more generally.

Extending the First Amendment to NFT blockchains would not require a legal overhaul. All that is needed is a refresh to the marketplace model and public forum doctrine. The following discussion provides a start towards such a framework. First, Section A applies the marketplace model and public forum doctrine to NFT transactions. Section B follows with brief a call to action in response to the events of 2022.

#### *A. Refreshing the First Amendment for NFTs*

Recall that because myriad NFTs exist, a case-by-case approach to regulating them has developed.<sup>195</sup> This approach is appealing because it allows observers to place tokens within their proper functional niche and

---

189. *Id.*

190. *Id.*

191. Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. § 301 (2022).

192. *Id.* (emphasis added).

193. *Id.*

194. *Id.* § 403.

195. Zhu & Lehot, *supra* note 16.

regulate them accordingly. But crucial to a viable case-by-case approach is ensuring NFTs are subjected to a methodology that characterizes them accurately. At the time of this writing, regulatory literature on NFTs focuses primarily on the underlying economics of each token, not on the character or nature of the underlying asset the NFT links to.<sup>196</sup> An appreciation for NFTs as novel speech assets is needed.

### 1. NFTs are Marketable Speech Assets

NFT blockchains offer an alternative speech market to social media's dominion over Web2 speech. Blockchains are by nature economic; they “rely on the basis of distributed trust: trusting everyone in the aggregate as economic agents participating in a network on the basis of rational self-interest and competition.”<sup>197</sup> NFT markets extend the economic substructure of blockchain to the exchange of expression so that creators can auction their speech free of intermediation and receive digital currency in exchange. Framed in this way, NFT markets offer an attractive new speech market for content creators seeking to be compensated for the value of their work.

When examining the microeconomics of an NFT transaction, the speech market comes into focus. Each token protects the most precious of all non-fungible assets: the presentation and custody over original ideas and/or original expression. Therefore, when minters sell their NFTs, they auction access to original speech—be it a video, essay, audio file, or piece of art. An NFT minter offering a token for sale is functionally no different than a political protestor soliciting t-shirts in a public park—it is just that NFTs can reach a larger audience on a blockchain. Thus, from start to finish, NFT transactions promote speech activity by allowing creators to solicit and sell access to their original ideas in an immutable, verifiable, peer-to-peer, and, if desired, anonymous fashion. To be sure, minters can attach attractive economic incentives to their tokens to induce sales (such as discounts or free items).<sup>198</sup> But the economics of these tokens should not change a determination that they are works of original expression.

If the expressive value of NFTs is ignored, speech on blockchains could be censored or chilled in the name of regulatory compliance. For example, if securities disclosure requirements were applied to *all* expressive NFTs, the costs of compliance could chill speakers. Such “[a] registration requirement” would treat NFT minters “that wish to speak”

---

196. *Id.*

197. Sune Sandbeck et al., *The block is hot: A commons-based approach to the development and deployment of blockchains*, in *BLOCKCHAIN AND WEB3: SOCIAL, ECONOMIC, AND TECHNICAL CHALLENGES* 15, 18 (Massimo Ragnedda & Giuseppe Destefanis eds., Routledge 2020).

198. Doan et al., *supra* note 6.

on a blockchain “differently than those wishing to speak elsewhere . . . .”<sup>199</sup> That means photographers like Benjamin Wareing may one day deem minting NFTs of political photography as too risky. Other avant-garde artists may likewise begin to feel the rewards for minting NFTs do not outweigh the hassle of compliance. Though NFTs are novel and (in some cases) profitable, the complex “technical requirements of the platform”<sup>200</sup> should not obfuscate what expressive NFTs marketed on blockchains promote: the appreciation of original and open expression.

## 2. NFT Markets are Nascent Public Forums

Recall that early public forum cases centered on spaces where individuals gathered to picket or distribute literature.<sup>201</sup> Further, recall that since that period, “the shift of discussion to online platforms has been . . . monumental,” yet the reference to parks and streets as the quintessential public forum remains unaffected.<sup>202</sup> It was this “unwillingness to designate and regulate online forums properly” that resulted in a governance gap, which has been used as a profit opportunity by social media companies.<sup>203</sup> The symptoms of the governance gap are everywhere. Consider the rise of censorship and monopolistic media.<sup>204</sup> There is also the ascent of “fake news,” the antithesis of truth.<sup>205</sup> If alive today, Holmes and Marcuse might agree that our marketplace of ideas, if there is one, needs correction.

Put simply, absent an application of the public forum doctrine to Internet spaces, individuals and companies are left without a digital forum where they can freely exchange ideas without fear of exploitation or censorship. Therefore, the public forum doctrine can and should be modernized to encompass expressive NFT markets. Doing so would allow expressive NFT markets to receive robust protection under strict scrutiny and “reasonable time, place, and manner” requirements.<sup>206</sup> Absent such protection for NFT minters, the potential of speech to be protected within NFT markets is blunted—a bad prospect if the promise of Web3 is to be realized. Below, an application of the public forum doctrine to NFT markets is offered.

---

199. Wales & Ovelman, *supra* note 18, at 274. “Registration requirement” refers to the rule that unless they can point to an exemption, issuers of securities must register their offerings with the Securities and Exchange Commission (SEC).

200. *Id.*

201. Best, *supra* note 132, at 274.

202. *Id.*

203. *Id.* at 292.

204. *Id.* at 276.

205. See e.g., Manzi, *supra* note 125, at 2632.

206. Sedler, *supra* note 118, at 1059–60.

*i. Extending the Purpose Based Approach*

An extension of the purpose-based approach to public forums works well with blockchain. Though every blockchain is different, most employ an infrastructure purposed for public use.<sup>207</sup> Applying the language in *Marsh*: permissionless blockchains are programmed to be “accessible to and freely used by the public in general.”<sup>208</sup> Indeed, permissionless blockchains like Ethereum are operated on a public network.<sup>209</sup> The fact that blockchains rely on Internet service providers to exist should not render them private in a jurisprudential sense. The maintenance of public forums can be aided by private actors without the forum becoming private (think about private landscaping services hired for contract in a public park). Only where a private entity *owns* the forum—such as social media companies—have courts hesitated to apply the public forum label. And even if one were to take the position that blockchains are wholly private—which most are not—the purposivism language in *Marsh* cited above can still provide a basis to recognize blockchains as public fora.<sup>210</sup>

*ii. The Character of the Space*

Recall that the *Lee* Court concluded that the original purpose airport terminals were created for, facilitating passenger travel, was impermissibly disrupted by leafletting.<sup>211</sup> In other words, the *Lee* Court viewed the historical use of terminals as confirmation they are primarily used to facilitate travel—not speech.<sup>212</sup>

The Court’s reasoning in *Lee* does not apply to public NFT blockchains. Public NFT blockchains have no rival purpose—like facilitation of air travel—that challenges the primacy of facilitating expression. This is exemplified by the current “[k]ing of the NFT [m]arket,” OpenSea, which was expressly created to provide an open market for anyone to express original works on the blockchain.<sup>213</sup> In addition, users of blockchains like OpenSea confirm this expressive purpose. With no entry cost, anyone can peruse OpenSea and purchase

---

207. TAPSCOTT & TAPSCOTT, *supra* note 1, at 6.

208. *Marsh v. Alabama*, 326 U.S. 501, 503 (1946).

209. TAPSCOTT & TAPSCOTT, *supra* note 1, at 6.

210. *Marsh*, 326 U.S. at 503.

211. *Lee*, 505 U.S. at 684–85.

212. *Id.*

213. Jeff Kauflin, *What Every Crypto Buyer Should Know About OpenSea, The King Of The NFT Market*, FORBES (Nov. 23, 2021), <https://www.forbes.com/sites/jeffkauflin/2021/11/23/what-every-crypto-buyer-should-know-about-opensea-the-king-of-the-nft-market/?sh=dd6c4ea2f892>

[<https://perma.cc/YX2J-46JD>]. Kauflin provides additional insight into OpenSea, highlighting its use as an exchange for expression.

NFTs of original digital expressions using Ether.<sup>214</sup> From the beginning, the success story of markets like OpenSea is the “anyone-can-can-be-an-artist ethos” the platform cultivates to inspire “more and more ordinary folks . . . to become creators [and] collectors.”<sup>215</sup>

Therefore, one cannot argue—as the Court did with airport terminals in *Lee*—that NFT markets like OpenSea are not created to, or are not primarily used to, facilitate expression.<sup>216</sup> Under both inquiries in *Lee*—original purpose and historical use—permissionless NFT markets for expressive assets can be justified as digital public forums.<sup>217</sup>

### 3. Policing the Boundaries of Public Fora

Accepting that markets like OpenSea are public forums, a key question to resolve is how to police the boundaries of what content can be exchanged. Though an extended discussion on this issue is beyond the scope of this Comment, an analogue to what is permitted in physical spaces provides a useful starting point. Obscenity, child pornography, violence, and unlawful verbal acts are all examples of expressions that have no protection in physical public fora under the First Amendment.<sup>218</sup> Such expression should likewise have no place on a public NFT market.

Similarly, if someone fraudulently solicits a security in a public park that is not registered with the SEC, that person is violating securities law.<sup>219</sup> The same could be said for a blockchain public forum: an individual selling an NFT that is more security than expression should be subjected to securities laws. A whole host of assets can be exchanged in a public forum space, and it is crucial that those primarily used for speech and expression—even if generating profits—are properly recognized and protected as such.

Beyond policing, the key question generated by treating markets like OpenSea as public forums is determining when an NFT should be characterized as primarily expressive. Though exploring that question is also outside the scope of this Comment, a logical place to start when tailoring a definition are real-world analogues. If an NFT provides holders with the location for an original piece of writing, for example, it is the token’s ability to give users access to original speech that should be protected (without the NFT, the holder cannot view the *original* work).

---

214. *Id.*

215. *Id.*

216. *Lee*, 505 U.S. at 683.

217. *Id.*

218. Sedler, *supra* note 118, at 1010.

219. See generally Rebecca Gross et al., *Securities Fraud*, 49 AM. CRIM. L. REV. 1213 (2012) (comprehensive review of securities law requirements).

### *B. A Call to Action*

Market volatility (and skepticism over asset valuations) should not influence the protection of speech where it exists. Even if all NFT projects eventually fail, those who crusade into those speech markets should be empowered to do so, not discouraged. Even if valuations continue to plummet, and even if the popularity of NFTs radically changes in the future, NFT markets are impacting the lives of artists and creators today. New mediums of communication continue to develop over time, from print, to radio, to television, to the Internet, to now, the blockchain. Just because a medium for speech is new, uncommon, or speculative does not mean it is unworthy of First Amendment protection.

When fundamental speech rights are exercised through any technology, that exercise should be recognized and protected accordingly. In the case of NFTs, if it is not, the opportunity to carve out new democratic spaces for digital speech—spaces that are desperately needed—will go squandered. All it takes to blunt the expressive potential of Web3 platforms is jurisprudential delay or an overbroad statute. The time to act is now; the current absence of NFT guidance via statute gives courts a window to begin extending the First Amendment into blockchain.

## IV. CONCLUSION

The infrastructure of web communication is at a crossroads. The failure to update First Amendment doctrines developed during the Industrial Age led to a governance gap during the Web2 era. Social media companies, masquerading as public forums, filled that gap and have rendered online speech markets badly damaged. Today, the blockchain has opened a new governance gap—a gap widened by the legal ambiguity over NFTs. Although statutes like the RFIA would help bridge the gaps in securities and commodities law, the need for clarity on NFTs will remain. Without statutory guidance, courts must play a vital role in driving the legal status of NFTs and their markets moving forward.

Courts must respond to the blockchain governance gap by doing what they did not during Web2: refresh the First Amendment to protect online speech. Specifically, they should look to the marketplace model and public forum doctrine to protect expressive NFTs and the public blockchains they are traded on. The stakes are high: The key to building the “nascent creator economy,”<sup>220</sup> the future of public forums, is protecting the expressive freedom of Web3 creators. With stakes so high, perhaps it is unsurprising that one of the most lucrative NFT auctions to

---

220. PALMER, *supra* note 4, at 72.

2022]

SPEECH MARKETS & WEB3

229

date depicts exiled NSA whistleblower Edward Snowden emblazoned with the words, “Stay Free.”<sup>221</sup>

---

221. BROOKS, *supra* note 61, *The Top NFT Trading Platforms*.