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Militant Democracy Comes to the Metaverse?

Aziz Z. Huq*

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Abstract

Social media platforms such as Facebook, Twitter, Instagram, and Parlor are an increasingly central part of the democratic public sphere in the United States. But the prevailing view of this platform-based public sphere has of late become increasingly dour and pessimistic. What were once seen as technologies of liberation have come to be viewed with skepticism as channels and amplifiers of “antisystemic” forces, damaging the quality and feasibility of democracies. If correct, this skepticism yields an interesting tension: How can the state protect its democratic character against unravelling pressure from actors who are necessary components of democratic practice in the first place? What happens, that is, when the private infrastructure of democracy is turned against the project of collective self-rule?

Of course, this is not the first time that a private actor understood to be a necessary component of the democratic system has turned out to be a threat to the quality of democracy itself. The paradox of regulating private actors qua threats to democracy, indeed, has been both recognized and theorized in relation to parties of the extreme left and extreme right in postwar Europe. The principal theoretical lens through which those earlier challenges were analyzed traveled under the label of “militant democracy,” a term coined by the émigré German political scientist Karl Loewenstein. The midcentury militant democracy debate, I suggest in this essay, offers an alternative way of evaluating the problem of digital platforms—now Facebook, tomorrow the Metaverse—and democracy. Because this debate unfolded outside the scope of the First Amendment, it starts from different premises and provides an opportunity for considering digital platforms’ role in a democracy from a novel perspective. Of course, it’s not possible to generate in some mechanical way a laundry list of effectual interventions today from yesterday’s experience with anti-systemic parties. But I suggest that the midcentury debate on militant democracy can illuminate by suggesting questions and issues that are marginal or ignored within First Amendment discourse. I conclude the essay with five ‘lessons’ from that earlier debate.

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Militant Democracy Comes to the Metaverse?

Introduction

Social media platforms such as Facebook, Twitter, Instagram, and Parlor are an increasingly central plank of what the Supreme Court calls “the modern public square.”¹ A recent Pew Research Center poll found thirty-one percent of Americans sourcing at least some of their news from Facebook, and a further twenty-two percent finding it on YouTube.² In some ways, this has been a positive development. Digital platforms (as I shall call them in this essay) offer broad, albeit still structured, access to a more diverse range of voices, at least in comparison to the news sources, such as national newspapers and broadcast news programming, that dominated the middle and late twentieth century.³ Private individuals can reach a wide, national audiences without navigating the strait-gate of corporate gate-keeping that characterized older media.⁴ The open internet architecture of connectivity between networks⁵ also allows users, at least outside authoritarian regimes such as China and North Korea, to seek out, if they choose, a far more ideologically diverse spectrum of perspectives than previously available. Scientific research, historical archives, and public records that once would have required physical travel to access can now be examined online. And for those who are home-bound or geographically isolated—as many of us were during the Covid-19 pandemic’s early days—digital platforms are plainly a boon.

Yet one widely held view of this digital-platform-based public sphere has had a much more pessimistic cast. What was once seen as a “technology of liberation” has come to be seen as a channel and amplifier of “antisystem forces in democracies.”⁶ The digital town square, to be sure, is blamed for a wide array of sins, both venial and venal. These include the facilitation of intimate-partner abuse and harassment; cyber-bullying and stalking; terrorism recruitment and propaganda; hate speech and racist violence; and medical misinformation.⁷ But of particularly sharp concern is their effect upon the high-quality public discourse perceived as being necessary to the sound operation of a democracy. Social media is in particular castigated for its “pollution of the democratic environment through fake news, junk science, computational propaganda and aggressive micro-targeting and political advertising”; for “creating political filter bubbles,” and for being implicated in the rise of populism ... the end of democracy and ultimately, the death of democracy.”⁸ Social media has “critical implications

¹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

² *News Consumption Across Social Media in 2021*, PEW RSCH. CTR. (Sept. 21, 2021), <https://perma.cc/Y3LY-7NT3>.

³ Cf. SOPHIA ROSENFELD, *DEMOCRACY AND TRUTH: A SHORT HISTORY* 154 (2019).

⁴ Which is not to say that access is wholly unregulated—as I will develop at length below.

⁵ On the internet as a network of networks, see MILTON MUELLER, *WILL THE INTERNET FRAGMENT?* 22-24 (2017).

⁶ Joshua A. Tucker et al., *From liberation to turmoil: Social media and democracy*, 28 J. DEM. 46, 47 (2017).

⁷ An early and prescient work on these harms is DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014). On medical misinformation, see Gordon Pennycook, et al., *Fighting COVID-19 misinformation on social media: Experimental evidence for a scalable accuracy-nudge intervention*, 31 PSYCH. SCI. 770, 771 (2020) (describing the problem). On hate speech, see Alexandra A. Siegel, *Online Hate Speech*, in *SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD, PROSPECTS FOR REFORM* 56, 57 (Nathaniel Persily & Joshua Tucker eds. 2020).

⁸ Helen Margetts, *Rethinking democracy with social media*, 90 POL. Q. S1, S1 (2018); see also Nathaniel Persily and Joshua A. Tucker, *Introduction*, in *SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM* (Nathaniel Persily and Joshua A. Tucker, eds. 2020) (offering a similar list that includes “disinformation, polarization, echo chambers, hate speech, bots, political advertising, and new media”); Ronald J. Deibert, *The road to digital unfreedom: Three painful truths about social media*, 30 J. DEM. 25, 31 (2019) (asserting that social media “is one of the main reasons why authoritarian practices are now spreading worldwide”).

for political polarization” because most people use it as a “mirror that helps us understand our place in society” without realizing it is “more like prisms .. distorting our sense of ourselves, and the each other.”⁹ As companies such as Meta push to drive an increasing share of human activity into the digital sphere—or ‘metaverse’—the salience of such concerns is likely to increase.¹⁰ A concern about digital platforms’ malign effects on democracy, moreover, might be plausibly prioritized over other worries for the simple reason that a breakdown of democracy ipso facto precludes the use of democratic institutions to address such other concerns.

A well-functioning democracy might be able to respond to democracy-related threats from digital platforms via either regulation or legislation. But this is not a straightforward task for a couple of reasons. First, government regulation of the public sphere inevitably raises a concern about the use of state power to entrench incumbents and thereby to curtail democratic competition. governments might regulate social-media purporting to level the playing field, but in fact with the explicit or implicit aim of advancing the interests of one side in a partisan political contest. The threat to democracy that arises out of social media’s emergence, therefore, is necessarily two-sided (or bilateral): It comes both from private actors that have made themselves indispensable to the practical operation of democracy, and also from the state itself when it purports to regulate for democracy’s own good. Second, even if government is presumed to be well-intentioned, a policy for addressing the anti-democratic effects of digital platforms must solve a difficult empirical problem: How are the private actors who present a real threat to democratic ordering to be distinguished from those who present no such threat?

My aim in this essay is to explore the possibility of a new analytic lens for thinking about these issues. My aim in so doing is not to offer here prescriptions for addressing the democratic costs of social media. More modestly, I hope to offer some fresh ways of thinking about that problem, perspectives that to date are not familiar to a U.S. legal audience. In that body of legal scholarship, the role of digital platforms is largely viewed through the prism of the Constitution’s First Amendment. (This is in contrast to larger public debate, which tends to focus on questions of fact, rather than trying to theorize the problem of regulating platforms.¹¹)

One reason for this lens is that legal scholarship tends to be catalyzed by judicial disputes. For instance, Florida¹² and Texas¹³ have enacted laws regulating social media

⁹ CHRIS BAIL, *BREAKING THE SOCIAL MEDIA PRISM: HOW TO MAKE OUR PLATFORMS LESS POLARIZING* 52-53 (2021); accord TIM WU, *THE ATTENTION MERCHANTS: THE EPIC STRUGGLE TO GET INSIDE OUT HEADS* 317 (2016) (complaining that the “once highly ordered attention economy had seemingly devolved into a chaotic mutual admiration society, full of enterprising Narcissi”); see also JENNY ODELL, *HOW TO DO NOTHING: RESISTING THE ATTENTION ECONOMY* ix (2019) (same).

¹⁰ For a brief introduction to the concept of the Metaverse, see Brian X. Chen, *What’s all the hype about the Metaverse?*, N.Y. TIMES (Jan 18, 2022),

<https://www.nytimes.com/2022/01/18/technology/personaltech/metaverse-gaming-definition.html>; see also

MATTHEW BALL, *THE METAVERSE: AND HOW IT WILL REVOLUTIONIZE EVERYTHING* (2022). Alas, I have nothing more to say about the ‘metaverse’ in this essay, despite my title: I am concerned here with existing and future digital platforms, and the term ‘metaverse’ in the title stands in, euphonically but inaccurately, for both.

¹¹ There is a whole field of interesting and sophisticated theoretical work known as “platform studies” that considers how platforms work, how creator communities are shaped by or work with their specific architectures, interfaces and affordances, and how these creator communities in turn influence, negotiate and resist platform cultures. Jean Burgess, *Platform studies*, in *CREATOR CULTURE: AN INTRODUCTION TO GLOBAL SOCIAL MEDIA ENTERTAINMENT* 21 (S. Cunningham and D. Graig, eds., 2021). By and large, platform studies touches on legal academic work only rarely. It would be an interesting project to close that gap—but that’s not the project that this paper pursues.

¹² S.B. 7072, 123rd Leg., Reg. Sess. (Fl. 2021).

¹³ H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021).

platforms citing fears of “leftist media.”¹⁴ Florida’s (at the time of this writing) has been preliminary enjoined on First Amendment grounds, while Texas’s has been allowed to go into effect with the benediction of the Fifth Circuit Court of Appeal.¹⁵ This constitutional framing, though, has the ambiguous merit of making certain questions central. Foremost amongst these is the question whether “online intermediaries are state actors or perform a public function and, thus, are subject to providing free speech guarantees.”¹⁶ On the pro-regulation side of this debate, particularly on the political left, arguments about the scope of state action are underpinned by relatively thin and undertheorized assumptions about “non-transparent, unelected, and profit-motivated corporate actors,” in contrast to relatively benign public actors.¹⁷ There is a risk that this debate can collapse into a contest over whether one distrusts government or corporate power more—a question that tends to be answered not with empirics, but rather with a sort of raw and untutored political intuition.

Yet I am not convinced that—important as it is—the First Amendment’s state action inquiry, and the various complexities of content-neutrality and interest balancing that follow in its wake, are the only ways of thinking about the problem of digital platform’s democratic costs. I think there may well be other ways of making some progress on the “theoretical”¹⁸ side of this institutional design problem. In doing so, I take as a given that digital platforms’ challenge to democratic good-health is framed by first, the two-sided nature of democratic threats from both private and state actors, and second, that it is often hard to figure out which private actors pose a threat to democratic life. What I want to show here is that theorizing about these structural challenges to democracy is not new, and that there are surprising and analytically fruitful alternatives for compassing this problem.

My premise (which, in due course, I’ll try to substantiate) is that the challenge posed by digital platforms has a parallel in startling (if incomplete and controversial) ways to the challenge that European democracies in the early and middle of the twentieth century faced in

¹⁴ Florida Governor, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, Florida Governor (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/>.

¹⁵ *NetChoice, LLC v. Paxton*, No. 21-51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022) (upholding Texas law against First Amendment challenge); *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022) (invalidating several provisions of Florida’s law).

¹⁶ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1610 (2018); see also Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 95 WASH. U.L. REV. 1353, 1372 (2018) (“Given the state action doctrine, an enormous amount of important expression lacks constitutional protection against the actions of powerful private entities, such as platforms, employers, and property owners.... Expressive freedom needs protection against private power.”); Jonathan Peters, *The “Sovereigns of Cyberspace” and State Action: The First Amendment’s Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 1025 (2017); (using “*Marsh* as a foundation” for “a state action theory suitable for the digital world”); Daniel Rudofsky, Note, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741, 777 (2017) (“Facebook is the town in *Marsh v. Alabama*. Only it appears to be a virtual town, and Facebook has essentially created a government over that virtual town. A strong case could be made that Facebook should be considered a state actor”).

¹⁷ Genevieve Lakier and Nelson Tebbe, *After the “Great Deplatforming”: Reconsidering the Shape of the First Amendment*, LPE PROJECT (March 1, 2021), <https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/>. Lakier and Tebbe say they “prefer a public battle that includes the courts and legislatures and corporations over the meaning and scope of democratic speech on the platforms than to put our faith solely in non-transparent, unelected, and profit-motivated corporate actors.” *Id.* For a more cautious perspective, see Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1992 (2018).

¹⁸ *Cf.* Tucker et al., *supra* note 6, at 47 (“Is there a theoretical framework linking social media and politics that can shed light on these turnabouts and contradictions?”). I have little to say about the specifics of legal reform or technical changes.

relation to another set of private actors who were both necessary to and also potential fatal to democracy. The threat in that earlier era came from antidemocratic political formations, such as the successors of the Nazi party and groups aligned with the Stalinist regime of the Soviet Union. Both of these political forces entered the democratic process across postwar Europe. Both were hence participants in electoral democracy claiming nontrivial levels of popular support, and yet both were also perceived (rightly, as it happens) as threats to the persistence of democracy. The two-sided nature of democratic threat was clear in that historical context because state action against such parties would both mitigate a challenge to democracy, but also could have been misused to undermine democracy. And it was also unclear then whether (or when) an anti-system party rose to the level of being a real threat. So the same epistemic problem we see today was also present then.

The principal theoretical lens through which those challenges were analyzed in postwar Europe traveled under the label of “militant democracy.” This term was coined by the émigré German political scientist Karl Loewenstein, writing from his then-refuge at Columbia University after a flight from Nazi Germany.¹⁹ Loewenstein’s label was quickly taken up by public intellectuals in the United States and Germany.²⁰ While the term and its implications never seized hold of the American legal imagination, it deeply informed the design of West Germany’s post-war Basic Law. According to the German Constitutional Court, or *Bundesverfassungsgericht*, the Basic Law “expresses the conviction of the [drafters], based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties,” and as a result “created a ‘militant democracy.’”²¹ The ensuing idea of militant democracy, as we shall see, has never been uncontested.²² Certainly, its core ambition to directly regulate and even prohibit “core political speech” is a way that flies in the face of the First Amendment.²³

If the social digital platform/democracy problem is *structurally similar* to the challenge of antisystem parties that Loewenstein’s militant democracy theory was crafted to meet, then the latter might provide a useful lens for thinking about the challenge of digital platforms to democracy. This is so for a number of reasons. To begin with, militant democracy theory is not bounded by the familiar intellectual orthodoxies of the First Amendment. Freed of the latter’s channeling effects, moreover, it invites us to think about a different cluster of theoretical problems, and a wider range of regulatory alternatives. For example, we are not bound by the potentially misleading metaphor of the democratic “marketplace of ideas,” which holds

¹⁹ See Karl Loewenstein, *Militant Democracy and Fundamental Rights - Part I*, 31 AM. POL. SCI. REV. 417 (1937) [hereinafter “Loewenstein, *Militant Democracy P*”]; Karl Loewenstein, *Militant Democracy and Fundamental Rights - Part II*, 31 AM. POL. SCI. REV. 638 (1937) [hereinafter “Loewenstein, *Militant Democracy II*”].

²⁰ See, e.g., MAX LERNER, *IT IS LATER THAN YOU THINK: THE NEED FOR A MILITANT DEMOCRACY* (Transaction Publishers, 1989) (1943); Karl Mannheim, *The Third Way: A Militant Democracy*, in III COLLECTED WORKS OF KARL MANNHEIM - DIAGNOSIS OF OUR TIME 4 (1943).

²¹ Judgment of Aug. 17, 1956, Federal Constitutional Court (First Sen.), 5 BVerfGE 85, 141-42.

²² For example, I have written that militant democracy is a “very risky strategy.” TOM GINSBURG AND AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 171 (2018). As this essay shows, I continue to appreciate the risks of militant democracy, but think that I made too little then of the potential for a sharpened, sector specific version of the doctrine.

²³ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (“The Free Speech Clause exists principally to protect discourse on public matters”). For the use of the term “core political speech,” see McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 347 (1995); accord *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). It is useful to overstate, however, the clarity of this “core.” See Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012) (explaining how core political speech can be targeted for suppression under certain lines of doctrine).

considerable sway in American thinking.²⁴ Further, Loewenstein’s work has seeded a rich harvest of use cases—a field of experimentation untethered from the minatory gaze of the First Amendment—in addition to a generous harvest of theoretical work arguing both in favor and opposing his idea.

If indeed the challenge to democracy from social media is structurally akin to that posed by extremist parties of the early twentieth century—as I have suggested and shall argue at length in what follows—then these use cases and theoretical work linked to militant democracy ought to provide a novel ground for reflection and analysis on how best to think about and address contemporary challenges from digital platforms to democracy.

This insight leads, secondly, to an opportunity to explore the practical and theoretical space for insights into democracy’s contemporary challenge from social media. To be clear, I make no claim that it is possible to read off in some mechanical way effectual interventions today from yesterday’s experience with anti-democratic parties. Rather, I will suggest that the debate on militant democracy has broad-brush lessons for contemporary debates. They point to the importance of time, and the availability of robust bureaucratic capacity. While those lessons do not take the form of specific reform tactics, they do suggest in general terms the sort of legal and reform strategies that are more likely to be successful, and those that are likely to fail.

The argument that follow makes two threshold assumptions. Both of them are controversial, but I don’t want to expend too much ink arguing them out. Suffice here to say that if you disagree with either one, you will be considerably more skeptical about the premise of structural parallel between midcentury anti-democratic actors and digital platforms. The first is the assumption that, in fact, digital platforms are responsible for anti-democratic effects—and in particular the epistemic distortion effects described in Part I. Concededly, the empirical evidence on this point does not always find strong and immediate effects, but several of the leading studies do identify reasons for concern.²⁵ A recent, well-sourced and well-argued popular account (somewhat breathlessly) characterizes the digital platforms effect as “brain hackling millions of Americans ... at a moment when polarization and disinformation threatened to tear apart the fabric of society,” and urges their complete shutdown so “fewer democracies [are] torn asunder by polarization, lies, and violence.”²⁶ It is certainly possible that more evidence will undermine the conclusion that digital platforms have a damaging effect on democracies, independent of other political and economic forces (although consider whether confirmatory evidence, if it arrives, could well be too late). If this were so, the evidence of

²⁴ For a bracing challenge to that metaphor, however, see Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1163 (2015) (identifying “a considerable amount of existing empirical research can cast light on the question and tends, as we also explain in Part II, to justify skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones”).

²⁵ Empirical findings here suggest subtly, but not grossly, negative effects. A recent study found little direct polarizing effect from social media, but postulated a long-term erosion of trust in mainstream media. Andrew M. Guess, et al., *The consequences of online partisan media*, 118 PROC. NAT’L ACAD. SCI. (2021); see also Ro’ee Levy, *Social Media, News Consumption, and Polarization: Evidence from a Field Experiment*, 111 AM. ECON. REV. 831 (2021) (finding that social media algorithms may limit exposure to counter-attitudinal news and thus increase polarization”). Another study found that expressions of “out group animosity” drove sharing behavior. Steve Rathje, Jay J. Van Bavel, and Sander Van Der Linden, *Out-group animosity drives engagement on social media*, 118 PROC. NAT’L ACAD. SCI. e2024292118 (2021). Exposure to divergent views has no ameliorative effect. Christopher A. Bail et al., *Exposure to opposing views on social media can increase political polarization*, 115 PROC. NAT’L ACAD. SCI. 9216 (2018).

²⁶ MAX FISHER, *THE CHAOS MACHINE: THE INSIDE STORY OF HOW SOCIAL MEDIA REWIRED OUR MINDS AND OUR WORLDS* 130, 319 (2022).

epistemic distortion presented in Part I would be of merely academic interest. But the premise that digital platforms are indeed a distinctive threat to democratic health is useful here as a starting point for inquiry.

The second assumption is that this independent effect cannot be addressed instead by targeting the political candidates and formations responsible for attacks on democracy. I am skeptical, however, that there is any simple way of dealing directly with anti-system parties and candidates. Even where an official at the apex of elected political power commits a prima facie violation of the criminal law, American law offers no well-functioning mechanism for addressing such malfeasance.²⁷ Our mechanics of political hygiene, in other words, are profoundly flawed. Even if they weren't, the prospect of indicting and locking up political candidates raises even greater challenges and paradoxes in a democracy than regulating digital platforms.²⁸ At worst, it makes ample sense to examine both options, and not to foreclose either line of inquiry too soon.

My larger argument proceeds as follows. Part I summarizes in more detail the challenge posed by digital platforms to contemporary democracy. Part II defines “militant democracy” first as a theory and then as a regulatory practice. Drawing from recent debates on that theory and practice in Part III, which have arisen out of our current moment of anti-system activism, I extract five lessons in relation to how best to think about the challenge of pro-democratic regulation of digital platforms, with particular attention to the problem of misinformation.

I. The Democratic Case Against Digital Platforms

This Part summarizes the evidence for thinking that the operation of digital platforms can pose a challenge to democracy's durability. The scholarly responses to this concerning development, while typically animated by a strong skepticism of both the ‘big tech’ firms that dominate and digital economy, are nevertheless profoundly divided as to the prospect of increased state intervention.

A. How Digital Platforms Undermine Democracy

The practice of democracy does not require that everyone tell the truth; it does not demand the extirpation of lies. Far more modestly, democracy needs to provide its participants with reliable mechanisms that—as best as possible, given available technologies and social practices--“capture ... reality and distinguish reliable knowledge about it from falsehoods, errors, bullshit, or even just unproven belief.”²⁹ In practice, this means a set of institutions oriented toward what Bernard Williams called “truthfulness.”³⁰ Such institutions, on Williams's account, are *oriented toward* the production of “dependable knowledge, or truths by which to craft a life in common.”³¹ They are to be distinguished from institutions that are oriented away from the testing of knowledge claims, that engage in the suppression or distortion of conflicting

²⁷ See Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506 (2018).

²⁸ For an application, see Aziz Huq, *An Ominous Debate about ‘Trump Judges,’* POLITICO (September 9, 2022), <https://www.politico.com/news/magazine/2022/09/09/the-ominous-debate-over-trump-judges-00055808>.

²⁹ ROSENFELD, *supra* note 3, at 19-20. This is less demanding than a demand by “truth” per se offered by JOHAN FARKAS AND JANNICK SCHOU, *POST-TRUTH, FAKE NEWS AND DEMOCRACY* (2020).

³⁰ BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY* 2-3 (2002) (noting that the “demand for truthfulness” can run alongside the “suspicion of truth”).

³¹ ROSENFELD, *supra* note 3, at 27.

information, or that practice a selective suppression of truth-claims based on extrinsic (say, partisan-political) compulsions.

Digital platforms may undermine this epistemic predicate of pluralist democracy because they are not orientated toward truthfulness as Williams used that term. We can usefully focus on two pertinent risks—the shadow cast by concentrated power to control the flow of true information, and the accelerating dissemination of misinformation—to truthfulness to illustrate this.³² There are also worries that the digital-platform economy has an indirect effect on the quality of democracy insofar as it generates concentrations of wealth that distort the political process.³³ The growing political power of firms owning digital platforms is relevant to the argument here because the more clout those firms have, the harder it is to regulate them. But I am skeptical that firms act as anti-system forces in the lobbying context.³⁴ Or, perhaps more accurately, given the extensive influence over political outcomes long influenced by industry of various stripes, it is not clear that tech firms' actions are distinctive in any interesting sense. For now, therefore, I will focus on the direct risks of digital platforms to truthfulness in political discourse, and leave to one side questions of wealth concentration and regulatory influence.³⁵

The first point to make here concerns the degree to which digital media markets are concentrated rather than diverse and pluralist.³⁶ A small number of “dominant” digital platforms “control an enormous amount of the nation’s political communication” in the United States.³⁷ Moreover, “the five largest platforms own more than 98% of the market share, with Facebook alone accounting for nearly 70%.”³⁸ They operate in a “far less competitive environment” than older media companies because of the network effects implicit in platform design and operation.³⁹ Even if there are other news sources available online, digital platforms therefore exercise a distinct form of epistemic power because of their unique ability to command and direct users' attention. Platforms' ability to command and control the flow of information is arguably more consequential than a raw capacity to control who speaks. Under

³² I leave aside the effects of digital technologies on wealth concentration.

³³ The tech sector's growth is correlated with growing wealth inequality, but the causal relation is not clear. Henri Njangan, et al. *Do ICTs drive wealth inequality? Evidence from a dynamic panel analysis*, 46 TELECOMMUNICATIONS POL. 102246 (2022). On the political influence of tech firms, see, e.g., Kiran Stacey, *Tech Companies Spent Record Sum on US Lobbying in 2018*, FIN. TIMES, Jan. 23, 2019, <https://www.ft.com/content/7147935c-1f34-11e9-b126-46fc3ad87c65>. There is also debate on the labor effects of automation. For an excellent and skeptical view of automation's effect on labor's income share, see AARON BENANAV, *AUTOMATION AND THE FUTURE OF WORK* (2020).

³⁴ Mariano-Florentino Cuéllar & Aziz Z. Huq, *Economies of Surveillance*, 133 HARV. L. REV. 1280, 1328 (2020) (discussing the scale and effects of big tech lobbying).

³⁵ This focus on the epistemic predicate of democracy is vulnerable to a further critique from the left: This would mock the idea that formal procedures, such as elections, can ever be sufficient to qualify as democracy in the absence of deconcentration of ownership over the means of production. The compatibility of democracy with concentrated ownership over resources and assets is an important and difficult question, but not one I plan to address here.

³⁶ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 976 (2019) (“A handful of digital platforms exert increasing control over key arteries of American commerce and communications.”).

³⁷ Francis Fukuyama et al., Stanford Cyber Pol'y Ctr., *Middleware for Dominant Digital Platforms: A Technological Solution to a Threat to Democracy* 3 (2021), https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-middleware_ff_v2.pdf; on the use of social media for terrorism, see Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 654-655, 707 (2017). There are several collected volumes that canvass concerns about the social effects of social media. See, e.g., LEE BOLLINGER & GEOFF STONE, *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF DEMOCRACY* (2022); D. POZEN, ED., *THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY* (2020); S. BRISON & K. GELBER, *FREE SPEECH IN THE DIGITAL AGE* (2019).

³⁸ Jane Bambauer et al., *Platforms: The First Amendment Misfits*, 97 IND. L.J. 1047, 1052 (2022).

³⁹ Fukuyama et al., *supra* note 37, at 4.

conditions in which speech is plentiful, that is, but people’s capacity to imbibe information is more limited, “every minute of listener attention [is] highly contested.”⁴⁰

One obvious consequence of platform concentration sustained by network effects is a greater power on the part of tech firms to determine *which* voices are heard or not—thereby replicating, at least in part, the kind of ‘bottleneck’ that existed in older forms of media (e.g., broadcast news, national newspapers). The corporate managers of digital platforms are “governing online speakers, communities, and populations, rather than ... merely facilitating or hindering digital communication” so as to be in effect “the governors of social spaces.”⁴¹ Perhaps the most extensively discussed exercise of such power is Facebook’s decision to attach warning labels to tweets by former President Trump, and then to bar him from the platform exemplify this power.⁴² Efforts by both Florida and Texas to regulate social media platforms have been justified by claims that such corporate power is being misused.⁴³ Of course, whether those claims should be taken as face value is hardly obvious.

The concentration of political speech on digital platforms not only empowers their owners and managers. It also increases the reach and leverage of political actors who have accrued large followings on the platform. Amplification of their voices means that their harmful speech, as well as their needful interventions in democratic life, have greater heft. At the same time, platforms also enable powerful users to regulate the flow of counter-speech by blocking critical voices. Hence, President Trump’s use of Twitter’s blocking feature incited a constitutional challenge, and a circuit-court opinion (subsequently vacated) characterizing Twitter as a public forum for First Amendment purposes.⁴⁴ Powerful actors can also harness the numerosity of their online followers by goading the latter “to humiliate, harass, discourage, and even destroy targeted speakers using personal threats, embarrassment, and ruining of their reputations.”⁴⁵ These dynamics suggest the concentration of speech and attention in digital platforms raises not only a question of corporate power, but also distills a correlative power in certain dominant speakers to leverage platforms’ affordance to the detriment of robust public debate through speech-mediated externalities.

A second strand of concern focuses on the quality of information disseminated through digital platforms—or rather “the spread of lies and falsehoods” on social media.⁴⁶ This bites hard in the election context. During the 2016 election cycle, one study estimated, Americans

⁴⁰ Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 556 (2018). For a pithy statement of the problem, see Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2235 (2018) (“In a world where there is too much speech, the old notion that a free speech regime creates an unfettered marketplace of ideas breaks down. Anyone can use Twitter, but that very fact means that Twitter produces an undifferentiated and useless swamp of information and opinion.”).

⁴¹ Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2021-25 (2018).

⁴² Fukuyama et al., *supra* note 37, at 3; Mike Isaac & Kate Conger, *Facebook Bars Trump Through End of His Term*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/07/technology/facebook-trump-ban.html>.

⁴³ See *supra* text accompanying notes 12 to **Error! Bookmark not defined.** Note that if speakers on one side of the political spectrum violate viewpoint neutral rules (e.g., concerning truthfulness or civility), then the nonpartisan application of those rules will have asymmetrical effects. Both Florida’s and Texas’s law ignore the (well known) fact that former President Trump’s rate of lying on social media far outstripped the record of his erstwhile opponents—and hence betray their partisan orientation.

⁴⁴ Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *vacated and dismissed as moot sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021). On the idea of “counter-speech” facilitated by platforms, see Dawn Carla Nunziato, *The Varieties of Counterspeech and Censorship on Social Media*, 54 U.C. DAVIS L. REV. 2491, 2503 (2021) (“[P]latforms facilitate counterspeech by creating and hosting forums for platforms where people can respond directly or indirectly to one another’s speech.”).

⁴⁵ Wu, *supra* note 40, at 560.

⁴⁶ CASS SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 48 (2021).

shared items of online misinformation some 38 million times, saw on average one or more such items during the election season, and believed such items roughly half of the time.⁴⁷ One vivid example is a 2019 rumor to the effect that Senator Elizabeth Warren had displayed a doll in blackface in her kitchen; this false rumor began on 4chan and then diffused to mainstream platforms, such as Facebook and Twitter.⁴⁸ In a handful of extreme cases, a consequence of misinformation may be physical violence.⁴⁹ In mid-November 2020, for example, some two percent of *all* views on Facebook were of posts claiming that the American election had been stolen.⁵⁰

The rate of misinformation on a given digital platform seems to fluctuate over time, at least in part in response to self-regulatory efforts by the platforms themselves.⁵¹ But the lower cost of access to platforms enables such misinformation to be mass produced for dissemination at scale.⁵² And it is reasonable to postulate a hydraulic effect—whereby regulation in one platform simply leads those producing misinformation to turn to other venues. Many platforms indeed allow the use of social bots, which “can magnify the spread of false news by orders of magnitude.”⁵³ In tandem with the concentration of digital communications driven by network effects, therefore, the potentially industrial scale at which false news can be produced creates a possibility of an epistemic market for lemons:⁵⁴ Sources that do not abide by norms of truthfulness, in effect, are able to drown out sources that do respect those norms.

Digital platforms have commercial incentives that are often incompatible with truthfulness, or at least are indifferent to that quality. Most do not charge access fees. Instead, their profits derive from the extraction and analysis of data created, advertently or otherwise, by users.⁵⁵ This data, in turn, is used to target “behavioral advertising,” which purports to allow for precisely targeted communications to small slices of the population in accordance with their

⁴⁷ Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 211–12 (2017); see also R. Kelly Garrett, *Social Media’s Contribution to Political Misperceptions in U.S. Presidential Elections*, 43 PLOS ONE 1, 1–2 (Mar. 27, 2019).

⁴⁸ Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), <https://nyti.ms/2fdzLBD>. For another example, see Drew Harwell, *Faked Pelosi Videos, Slowed to Make Her Appear Drunk, Spread Across Social Media*, WASH. POST (May 24, 2019), <https://www.washingtonpost.com/technology/2019/05/23/faked-pelosi-videos-slowed-make-her-appear-drunk-spread-across-social-media/>; see also Aziz Z. Huq, *International Institutions and Platform-Mediated Misinformation*, 23 CHI. J. INT’L L. 116, 119 (2022) (summarizing evidence on digital disinformation).

⁴⁹ For such an argument, see Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J. FORUM 475, 480 (2021) (“The January 6, 2021 siege on the Capitol building demonstrated that social-media companies can even mobilize seething reactionary mobs.”); see also Kirsten Martin, *Recommending an Insurrection: Facebook and Recommendation Algorithms*, in ETHICS OF DATA AND ANALYTICS 225–239 (2022) (discussing the role of social media in organizing around that insurrectionary violence). On the importance of rhetoric in the January 6 insurrection, see Aziz Z. Huq, *On the Origins of Republican Violence*, BRENNAN CENTER FOR JUSTICE (June 29, 2021), https://www.brennancenter.org/sites/default/files/2021-06/Huq_final.pdf

⁵⁰ FISHER, *supra* note 26, at 318.

⁵¹ Hunt Allcott, Matthew Gentzkow & Chuan Yu, *Trends in the Diffusion of Misinformation on Social Media*, 6 RES. & POL. 1, 2 (2019) (charting decrease in misinformation on Facebook after 2016, but not Twitter).

⁵² See, e.g., Darren L. Linvill & Patrick L. Warren, *Troll Factories: Manufacturing Specialized Disinformation on Twitter*, 37 POL. COMM’N 447 (2020).

⁵³ David M. J. Lazer et al., *The Science of Fake News*, 359 SCIENCE 1094, 1095 (2018).

⁵⁴ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (discussing how the market for “lemons” problem intersects with quality differences and uncertainty).

⁵⁵ See SHOSHANNA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 101–02 (2019); see also Timothy Erik Ström, *Capital and Cybernetics*, 135 NEW L. REV. 23, 33–34 (2022) (analyzing Google’s business model).

propensity to make purchases.⁵⁶ This economic model places a premium on maximizing engagement with platforms, rather than maximizing the dissemination of truthful information.⁵⁷ This would not be a problem if people tended to consume and share true information rather than false information. But there is some evidence that people are more likely to engage with, and hence share, false rather than truthful information, and that false rumors consequently spread faster than truthful news.⁵⁸ Platforms such as Facebook, perhaps in light of this confluence of technology and user psychology, have resisted efforts by academic researchers to map out the precise extent and effects of misinformation on their sites.⁵⁹ They have also pushed back on technical reforms that would mitigate the negative effects of their network at the cost of constraining opportunities for data collection. For example, in 2020, Facebook briefly experimented with a machine-learning algorithm designed to predict posts “bad for the world”—but discontinued the experiment, despite a successful result, because it lowered user engagement.⁶⁰ Even before the January 2021 insurrection at the U.S. Capitol, the company had begun reversing changes to its platform designed to limit the dissemination of false information.⁶¹

Further, digital platforms emerged in the United States at a deregulatory moment in which media was becoming more overtly partisan thanks to the abolition of the fairness doctrine.⁶² Applied by the Federal Communications Commission until its 1987 repeal, this compelled broadcasters to devote a reasonable percentage of time to the coverage of public issues and to cover these issues so as to present contrasting points of view.⁶³ Exacerbating trends already visible in talk radio and cable television, digital platforms’ architecture often conduce to a tailored information “bubble” for each user so as to exacerbate this partisan effect.⁶⁴ A combination of misinformation’s industrial production and a larger media ecosystem characterized by partisan filtering has been “a mess of one-sided information.”⁶⁵

⁵⁶ Olivier Sylvain, *The Market for User Data*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087, 1089 (2019); see also Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. 1073, 1086 (2020) (“Online behavioral advertising generates profits by ‘turning users into products, their activity into assets,’ and ‘platforms into weapons of mass manipulation.’” (citation omitted)); see also Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAGAZINE (Feb. 16, 2012), <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>.

⁵⁷ Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV. (Mar. 11, 2021), <https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation>.

⁵⁸ Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146 (2018).

⁵⁹ See, e.g., Jeff Horwitz, *Facebook Seeks Shutdown of NYU Research Project Into Political Ad Targeting*, WALL ST. J. (Oct. 23, 2020, 8:59 PM), <https://www.wsj.com/articles/facebook-seeks-shutdown-of-nyu-research-project-into-political-ad-targeting-11603488533> (reporting that Facebook “has sent legal demands and sometimes filed suits against entities it accuses of seeking data access for nefarious purposes,” including academic researchers).

⁶⁰ Kevin Roose, *Facebook Reverses Postelection Algorithm Changes that Boosted News from Authoritative Sources*, N.Y. TIMES (Dec. 16, 2020, 8:17 PM), <https://www.nytimes.com/2020/12/16/technology/facebook-reverses-postelection-algorithm-changes-that-boosted-news-from-authoritative-sources.html>; Kevin Roose, Mike Isaac & Sheera Frenkel, *Facebook Struggles to Balance Civility and Growth*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/11/24/technology/facebook-election-misinformation.html>.

⁶¹ FISHER, *supra* note 26, at 330.

⁶² See Jonas Heese & Vishal P. Baloria, *Research: The Rise of Partisan Media Changed How Companies Make Decisions*, HARV. BUS. REV. (Oct. 30, 2017), <https://hbr.org/2017/10/research-the-rise-of-partisan-media-changed-how-companies-make-decisions>.

⁶³ See *The Handling of Pub. Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Commc’ns Act*, 48 F.C.C.2d 1, 7 (1974).

⁶⁴ MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 19 (2021). The idea of a “filter bubble” derives from ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011).

⁶⁵ Note, *The Awareness Doctrine*, 135 HARV. L. REV. 1907, 1928 (2022).

Simultaneously, these platforms have refined this business model and platform structure when automated content moderation, which is performed by ‘artificial intelligence’ tools, remains incapable of identifying and effectively screening digital media flows.⁶⁶ For example, the video-stream showing the mass murders at the Al Noor Mosque in Christchurch, New Zealand, in March 2019, the video from his GoPro camera live streaming the killings were uploaded some 1.5 million times on Facebook, eluding the company’s manual and automated efforts at suppression.⁶⁷ In short, the network’s power to disseminate outpaces its power to regulate speech.

In sum, the very characteristics that make digital platforms so enabling of democratic speech—their potential for network effects and their dispensing with access fees in favor of behavioral advertising—create a speech environment that is *oriented against truthfulness*.⁶⁸ It is this structural quality—and not just the absolute rate of falsehoods circulating online—presents a challenge to democracy. At the same time, the growing concentration of capital in the tech sector translates into leverage in Congress and other legislative bodies—making legal reform increasingly difficult.⁶⁹ The result is not just a challenge to democracy—but one that over time disables democratic institutions from effectual responses.

B. Responding to Misinformation: Academic Responses

How should legislatures, and in particular Congress, respond to this emergent threat to the epistemic foundations of democracy? I will focus here, as well as for the balance of this essay, on the epistemic distortion problems of truth suppression and misinformation. The dynamic of media concentration, however, should be assumed to be present in the background—operating as a cause and as an accelerant of the misinformation problem. But I don’t address them further here.

The challenge of misinformation on digital platforms has sharply divided scholarly commentary. On the one hand, some scholars have urged greater regulation of digital platforms with the aim to stanching some of these harms. Calls for regulation tend to focus on amendment to Section 230 of the Communications Decency Act, which limits the civil liability of certain digital firms for their role in channeling and disseminating information created by third parties.⁷⁰ Leading proposals counsel for tailoring immunity more narrowly to “speech” and “exclude[ing] bad actors from [Section 230’s] legal shield”⁷¹; installing independent-review

⁶⁶ M. Mitchell Waldrop, *The genuine problem of fake news*, 114 PROC. NAT’L ACADS. SCI. 12631, 12362-63 (2017); Mike Masnick, *Content Moderation at Scale Is Impossible: Recent Examples of Misunderstanding Context*, TECHDIRT (Feb 26, 2021), <https://www.techdirt.com/articles/20210225/10365146316/content-moderation-scale-is-impossible-recent-examples-misunderstanding-context.shtml>. For a more sweeping denunciation of automated content moderation, see Tarleton Gillespie, *Content Moderation, AI, and the Question of Scale*, 7 BIG DATA & SOC’Y 1 (2020).

⁶⁷ Robert Gorwa, Reuben Binns, & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 BIG DATA & SOC. 1, 1–2 (2020).

⁶⁸ That it does so through interactions with broadly shared physiological processes does not mitigate its causal effect. FISHER, *supra* note 26, at 25-26 (describing the way that social apps “hijack compulsions” intrinsic to human psychology). But this does distinguish social digital platforms from, say, cable television or talk radio—media that have also played a role in the decay of the epistemic norms necessary to democracy.

⁶⁹ Ström also explains that the largest equity holders in Alphabet and other “tech titans” are institutional asset-management firms such as Vanguard and Blackrock. Ström, *supra* note 55, at 35-36. This entanglement with dominant financial capital likely increases the political costs of regulating the tech sector.

⁷⁰ 47 U.S.C. § 230.

⁷¹ Danielle Keats Citron & Mary Anne Franks, *The Internet As A Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 69-70 (2020)

boards⁷²; prohibiting the use of engagement-maximizing or allowing users to choose their content-moderation environment⁷³; and stricter disclosure rules.⁷⁴

Yet the drive for reform is tempered on the other hand by constitutional and pragmatic concerns. Even advocates of legislative reform fear that that the First Amendment as currently interpreted would dramatically limit regulatory options.”⁷⁵ Other scholars warn that an expansion of civil liability via reform of Section 230 would encourage companies to “over-enforce and suppress lawful speech.”⁷⁶ A cautious and precise advocate of Section 230 reform, Danielle Citron, has expressed strongly worded alarm about European rules on violent speech as a form of “government coercion occurring outside the rule of law” that risks “worldwide censorship creep” and “global” speech suppression.⁷⁷ Encouraging the development of automated content-moderation tools through legal penalties, she concludes, may “aggravate existing tendencies toward censorship and surveillance, encode bias and harmful stereotypes, and aggrandize corporate power.”⁷⁸ In sharp contrast to these concerns, the scholarly reactions to Facebook’s creation of an oversight board have been generally (if cautiously) positive.⁷⁹

The scholarship on digital-platform reform, in sum, remains is large focused on specific and retail proposals, and is curtailed by a presumptive concern about the First Amendment. Where the latter does not apply, such as in Europe, scholars tend to be concerned with free speech values that lead them toward more libertarian outcomes. Absent from this literature to date is an effort to situate the project of making the project of making digital platforms safe for democracy in a longer historical context.

II. Militant Democracy 1.0

Almost a century ago, democracies faced a challenge from private actors putatively central to the operation of democratic choice who threatened to destabilize the democratic

⁷² See, e.g., Ben Wagner, Krisztina Rozgonyi, Marie-Therese Sekwenz, Jennifer Cobbe & Jatinder Singh, *Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act*, in ASS’N FOR COMPUTING MACH., FAT* 20: PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 261 (2020)

⁷³ For a suggestion along these lines, see Lauren Jackson & Desiree Ibekwe, *Jack Dorsey on Twitter’s Mistakes*, N.Y. Times (Aug. 19, 2020), <https://www.nytimes.com/2020/08/07/podcasts/the-daily/Jack-dorsey-twitter-trump.html> [<https://perma.cc/3H7X-LLJN>] (“We need to open up and be transparent around how our algorithms work and how they’re used, and maybe even enable people to choose their own algorithms to rank the content or to create their own algorithms, to rank it.”).

⁷⁴ See, e.g., Md. Code Ann., Elec. Law § 13-405 (West 2021), *invalidated by* Wash. Post v. McManus, Jr., 944 F.3d 506 (4th Cir. 2019).

⁷⁵ Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 65 (2021) (“[A]ny Internet regulations would need to be closely drawn to achieve epistemic competition in democratic discourse.”); Evelyn Douek, *Governing Online Speech: From “Posts-As-Trumps” to Proportionality and Probability*, 121 COLUM. L. REV. 759, 828 (2021) (concluding that “there will always be categories of content moderation rules that private platforms can and should make that will be beyond the reach of the law to substantively regulate”).

⁷⁶ Daphne Keller, *Amplification and Its Discontents*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. 9-17 (June 8, 2021), <https://knightcolumbia.org/content/amplification-and-its-discontents>.

⁷⁷ Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1070 (2018).

⁷⁸ Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT’L L.J. 41, 47 (2020).

⁷⁹ Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2499 (2020) (concluding that Facebook’s Board is “a promising new tool for ensuring free speech around the world”); see also Block-Wehba, *supra* note --, at 90-92 (similarly positive assessment). For a more nuanced judgment, see Evelyn Douek, *Facebook’s “Oversight Board:” Move Fast with Stable Infrastructure and Humility*, 21 N.C.J. L. & TECH. 1, 53 (2019) (“The FOB can still bring significant benefits to Facebook’s content moderation despite [certain] limits”).

project: political parties that participated in the democratic process, but that explicitly, or implicitly, aimed to use whatever political power they obtained to unravel the basic institutional premises of democracy. The archetype of such a political force, of course, was and is the Nazi party.⁸⁰ But the postwar period in Europe saw a range of violent and anti-democratic movements.⁸¹ Out of this confluence of fears for democracy, the idea of militant democracy bubbled up as diagnosis and remedy.

This Part presents the theory and practice of militant democracy as it was first developed in the 1930s by Karl Loewenstein, and then as it has been refined and recast in the last decade.⁸² The reason for doing so is that Loewenstein and his successors addressed a problem with many analogies to the democratic challenge presented by digital platforms. Parallel to the contemporary moment, that is, private entities (political parties) that ordinarily are thought to be central to democratic practice presented an acute threat to democracy.⁸³ Moreover, it was obvious from the beginning that the exercise of state power to prohibit or curtail the activities of such actors was at minimum in tension with democratic practice, and at worst a potential threat to the sound operation of democracy itself because of the self of self-dealing by incumbents.⁸⁴ Finally, just as the decay of the democratic public sphere makes the political project of reform more difficult today, so too militant democracy is bedeviled by a time inconsistency problem.

Of course, it would be premature at best to think that the specific proposals associated with militant democracy could be transposed mechanically to the digital context. Rather, in this Part, I aim more modestly to map out the debate sparked by Loewenstein's ideas in order to show how thinking about threats to democracy has become refined and more nuanced over time. Plausible, if incomplete, answers to some of the ethical and practical challenges to that enterprise have, in my view, emerged. A more fine-grained account of how to manage the pro-democratic use of anti-democratic tools has been, slowly, worked out. Understanding these lessons—which is the ambition of Part III—demands a historical foundation first in the ideas of Loewenstein and his successors.

A. Militant democracy as a response to fascism

In 1937, the German emigre Karl Loewenstein published a pair of papers in the *American Political Science Review* that set forth a new concept of “militant democracy.”⁸⁵ He wrote explicitly against the tide of a “fascist International of the multi-colored shirts.”⁸⁶ Fascism itself, he argued, was “only a technique for gaining and holding power, for the sake of power alone.”⁸⁷ It operated by “a supersession of constitutional government by emotional government.”⁸⁸ In

⁸⁰ ADAM PRZEWORSKI, *CRISES OF DEMOCRACY* 41-42 (2019).

⁸¹ *Id.* at 69-71 (discussing violent movements against the French Fourth Republic).

⁸² The period between 1960 and 2010 (roughly) was one in which scholars did not spend much time on the concept of militant democracy. The emergence of populist political parties, and the decay of established party systems in the past decade, see GINSBURG AND HUQ, *supra* note 22, have rekindled interest in the topic.

⁸³ ALEXANDER S. KIRSHNER, *A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATING POLITICAL EXTREMISM* 74 (2014).

⁸⁴ This risk had already been illustrated by the use of emergency powers by the von Papen administration in Germany in the year before Hitler's ascent to power. *See* `S (discussing the use of emergency powers in Weimar, and the resulting theoretical debate).

⁸⁵ *See* Loewenstein, *Militant Democracy I*, *supra* note 19; Loewenstein, *Militant Democracy II*, *supra* note 19.

⁸⁶ Loewenstein, *Militant Democracy I*, *supra* note 19, at 418.

⁸⁷ *Id.* at 422.

⁸⁸ *Id.* at 418.

words that might, mutatis mutanda, be invoked today, he warned that “[f]ascism is the true child of technical wonders and of the emotional masses.”⁸⁹

Against this threat, however, Loewenstein urged a battery of measures: prohibit “specifically named parties”; ban paramilitary organizations and “party uniforms”; allow the exclusion of extremist candidates from parliament; criminalize the incitement of “agitation” against groups defined by “race, political attitude, or religious creed”; and restrict “the public propaganda of subversive movements.”⁹⁰

Not all of these ideas, of course, appealed to legislators and policy-makers, even in Loewenstein’s fraught day. But his ideas had considerable influence in the drafting of German’s 1949 Basic Law, or *Grundgesetz*.⁹¹ This constitutional document picked up on his idea of a party-ban mechanism—a legal instrument that has subsequently come to represent the core version of militant democracy. In particular, Article 21 of the *Grundgesetz* established a right to form a political party, but also directed that “[p]arties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.”⁹² Further, all parties’ “internal organization must conform to democratic principles”; their use of funds must also be transparent.⁹³ The German Constitutional Court (the *Bundesverfassungsgericht*) has power to enforce Article 21 at the request of the executive branch.⁹⁴

In 1952, the Court signed off on a ban of the Socialist Reich Party, in a decision that focused on that party’s reliance on former Nazi ideas and imagery.⁹⁵ Then in 1956, the *Bundesverfassungsgericht* allowed a ban of the Communist Party to come into force.⁹⁶ After these decisions, Article 21’s party-ban mechanism has fallen into disuse.⁹⁷ Article 18 of the *Grundgesetz* also permits individualized forfeitures of the rights to free expression, to assembly, and to privacy in respect to the mails and the telephones.⁹⁸ This power has been invoked on four occasions. But on each of those occasions, the *Bundesverfassungsgericht* has rejected the application on the ground that the risk to democracy did not warrant a prohibitory action.⁹⁹

⁸⁹ *Id.* at 423.

⁹⁰ Loewenstein, *Militant Democracy II*, *supra* note 19, at 646, 648, & 650-53.

⁹¹ Jan-Werner Müller, *Militant Democracy*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1253 (Michel Rosenfeld & Andras Sajó, eds., 2012).

⁹² *Grundgesetz* [GG] [Basic Law] art. 21(2), translation at <http://www.gesetze-im-internet.de/>.

⁹³ *Id.*

⁹⁴ *Id.* art 21(2); Müller, *supra* note --.

⁹⁵ BVerfGE, 1 BvB 1/51, Oct. 23, 1952,

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/1952/bvg52-059.html>.

⁹⁶ 5 BVerfGE 85, Aug. 17, 1956.

⁹⁷ There was a failed effort to ban the National Democratic Party (NDP) in 2003. Thilo Rensmann, *Procedural Fairness in a Militant Democracy: The “Uprising of the Decent” Fails Before the Federal Constitutional Court*, 4 *GERMAN L.J.* 1117 (2003). The petition was denied fourteen years later. BVerfG, 2 BvB 1/13, Jan. 17, 2017,

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/01/bs20170117_2bvb000113.html.

⁹⁸ *Grundgesetz* [GG] [Basic Law] art. 18, translation at <http://www.gesetze-im-internet.de/>.

⁹⁹ Jan-Werner Müller, *Individual Militant Democracy*, in *MILITANT DEMOCRACY AND ITS CRITICS: POPULISM, PARTIES, EXTREMISM* 19-20 (Anthoula Malkopoulou and Alexander S. Kirshner, eds., 2019) [hereinafter “Müller, *Individual Militant Democracy*”].

Today, the party ban has become the exemplary instrument of militant democracy.¹⁰⁰ The idea of a ban, indeed, has proved popular elsewhere in the world. Today, “some form of party prohibition procedure is common to most democratic systems.”¹⁰¹ More than a quarter of national constitutional courts have the ability to adjudicate the legality or constitutionality of political parties.¹⁰² Party bans have been imposed recently across regions and contexts, from Spain and Turkey to Israel and South Korea.¹⁰³ In Europe, party bans have been used against political formations of the extreme-right and left, substate nationalist parties purportedly pursuing secession by violent means, or religious fundamentalist parties.¹⁰⁴ Militant democracy, at least in this form, has become the global norm rather than the exception.

B. Criticizing militant democracy in practice and in theory

Neither the idea nor the practice of militant democracy has been universally embraced or celebrated. Instead, Loewenstein’s proposals, and the ensuing legal practices, have come under considerable criticism. Out of that criticism, however, has emerged a more refined and calibrated account of defending democratic orders. I start here with the main criticisms of militant democracy. Two of them, in my view, are particularly powerful, while a third is less persuasive. I then turn to some of the arguments offered in efforts to rehabilitate the concept of militant democracy. My aim here is to show that militant democracy has engendered a sophisticated theoretical debate that does not simply track the debate observed in First Amendment scholarship and jurisprudence.

To begin with, critics of militant democracy point out that the practice places governments in the painfully hypocritical position of squelching democratic rights in the name of democracy. The German legal philosopher Hans Kelsen hence condemned the “dangerous contradiction of using the means of dictatorship to defend democracy.”¹⁰⁵ Kelsen’s argument for consistency is hardly decisive on its own. At a minimum, it invites the objection that Kelsen unreasonably assumes that democrats should treat unlike things (fair-minded and evil-intending political actors) the same. His argument also rests on the assumption that ethical goals can be pursued without making difficult choices between competing ethical commitments—a notion that seems at odds with common experience of the world.¹⁰⁶

¹⁰⁰ Zachary Elkins, *Militant democracy and the pre-emptive constitution: from party bans to hardened term limits*, 29 DEMOCRATIZATION 174, 183 (2022). Elkins also considers presidential term limits a form of militant democracy; this seems a relatively unusual definition of the term.

¹⁰¹ Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 38 (1995).

¹⁰² See Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1443 tbl.1 (2008).

¹⁰³ Tom Ginsburg, Aziz Z. Huq, and David Landau, *Democracy’s Other Boundary Problem: The Law of Disqualification*, -- CAL. L. REV. -- (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938600&dgcid=ejournal_html_email_university:of:chicago:coasesandor:institute:for:law:economics:research:paper:series_abstractlink.

¹⁰⁴ Angela K. Bourne and Fernando Casal Bértoa, *Mapping ‘militant democracy’: Variation in party ban practices in European democracies (1945-2015)*, 13 EUR. CONST’L L. REV. 221, 244 (2017).

¹⁰⁵ Quoted in Carlo Invernizzi Accetti and Ian Zuckerman, *What’s wrong with militant democracy?*, 65 POL. STUD. 182, 182 (2017). I have written

¹⁰⁶ The classic statement of this problem in respect to political action is Michael Walzer *Political action: The problem of dirty hands*, 2 PHIL. & PUB. AFF. 160 (1973). It is also worth pointing out that Kelsen elevates ethical consistency as a goal that is important in and off itself. But it is not obvious why we should strike for such consistency as individuals, let alone at the level of the policy. For an argument to this effect, see RAYMOND GEUSS, WHO NEEDS A WORLD VIEW? 1-39 (2020).

Still, Kelsen's concern can be bolstered by the observation that even "unreasonable" citizen-participants have indefeasible rights to engage in the democratic process. Arguing from Rawlsian premises, political theorist Jonathan Quong has thus crafted a powerful argument to the effect that in a regime of liberal tolerance, unreasonable people should not lose the "general benefits of citizenship" by virtue of holding unreasonable views.¹⁰⁷ Liberal rights to speech and association, that is, are not grounded in the prediction that they will be used wisely or correctly. Rather, they are rooted in the premise of a "more general interest [that] I [a citizen] have in being able to choose."¹⁰⁸ If the practice of liberal democracy is justified by reference of individuals' general interest in being to choose how to use liberal freedoms (even if I use them badly), it defeats its own premise by imposing penalties on a person when they make what others conclude is the 'wrong' choice.

This theoretical tension has a practical concomitant. Even if a polity begins with a trustworthy, pro-democratic government in place, there is a risk that in future periods it will come under the control of a less scrupulous coalition.¹⁰⁹ The concern here is not just that the militant democratic measures will be misused once a party averse to democracy seizes power: Presumably, such a party will find other means to entrench itself absent militant democratic tools. Rather, the problem is that militant democratic tools will be misused even by democratically oriented parties and office-holders. To illustrate this concern, critics of militant democracy can point to the European Court of Human Rights' judgment in *Sahin v. Turkey*, which upheld a prohibition on the use of headscarves by women in public universities as "necessary in a democratic society."¹¹⁰ *Sahin*, note these critics, made it "possible to be treated as an 'enemy' of democracy" even without any "intention of forming a political organization and competing for political power."¹¹¹ Arguably, religious and racial minorities experience the greatest risk that militant democratic tools will be misused based on an exaggerated (or biased) judgment about the threat posed by a symbol or organization.¹¹²

This argument against militant democracy from the risk of abuse draws its force from a profound *conceptual* difficulty at the heart of Loewenstein's theory: That is, it is far from clear how to draw the distinction between an acceptable and an unacceptable party or movement in a democratic context.¹¹³ Loewenstein's argument gains much of its emotional punch from the simple fact that it targets the problem of Nazism. But outside that core case, how are we to distinguish anti-system parties? In his original articles, Loewenstein also drew a line between "emotional" and rational parties.¹¹⁴ That demarcation hardly seems adequate to the task at hand. Yet it is also quite unclear whether there is a better distinction available.

¹⁰⁷ Jonathan Quong, *The Rights of Unreasonable Citizens*, 12 J. POL. PHIL. 314, 322 (2004).

¹⁰⁸ *Id.* at 330; see also KIRSHNER, *supra* note 83, at 5 (positing indefeasible rights of participation).

¹⁰⁹ Accetti and Zuckerman, *supra* note 105, at 188 (arguing that the "primary danger" of militant democratic tools is that "they can be exercised by whoever happens to hold power")

¹¹⁰ *Leyla Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. ¶ 28 (2004), <http://www.echr.coe.int/echr> (search by application number).

¹¹¹ Accetti and Zuckerman, *supra* note 105, at 193.

¹¹² GINSBURG AND HUQ, *supra* note 19, at 170-71.

¹¹³ Carlo Invernizzi Accetti and Ian Zuckerman, *Militant democracy as decisionist liberalism*, in THE DECISIONIST IMAGINATION: SOVEREIGNTY, SOCIAL SCIENCE AND DEMOCRACY IN THE 20TH CENTURY, 64, 65 (Daniel Bessner and Nicholas Guillhot, eds., 2019) (arguing that the theory of militant democracy is "incapable of providing a juridically operational criterion to distinguish between presumptive friends and enemies of democracy").

¹¹⁴ Loewenstein, *Militant Democracy I*, *supra* note 19, at 418. It is inadequate for the embarrassingly simple reason that all parties (like all people) are sometimes "emotional" and sometimes rational. For an effort to rehabilitate this element of Loewenstein's theory, see András Sajó, *Militant democracy and emotional politics*, 19 CONSTELLATIONS 562, 562 (2012) (focusing on "extreme emotionalism").

This line-drawing problem is difficult not least because there is a “range of legal and political techniques through which parties, politicians, and policies are insulated against contestation and change.”¹¹⁵ As a result, efforts to entrench are plausibly described as pervasive.¹¹⁶ At the same time, there is a spectrum of such efforts with clearly distinct polls. Hence, it is one thing to enact policies that are so popular they ensure reelection, and another thing to draw legislative districts such that there is no set of facts under which the opposition can prevail. It is one thing to resort to judicial challenges to secure the consistent application of voting rules; it is another thing to use physical violence to threaten election administrators to apply voting rules so that your candidate wins. The absence of a distinction that can be formulated in clear and distinct words is not the same as the absence of a distinction *tout court*. Perhaps, like love or pornography, you just know it when you see it. Perhaps at some point, a political party can by their actions, their intentions, or some mix of the two, rise to the level of an intolerable problem for a democracy. It may simply be hard, *ex ante*, to say in words where that line lies.

Further, the identification difficulty illustrated by *Sahin* is related to (or is a version of) an intertemporal challenge that bedevils militant democracy more generally. The problem is this: The polity most in need of militant democratic measures will be least likely, and also the least able, to adopt them.¹¹⁷ That is, in a relatively well-functioning democracy, which is able to agree on a militant democratic scheme, such measures will not be immediately needed. The political demand for them will be weak. And the suspicion of self-dealing may well be disabling. When such a need arises, it will likely be too late to form a working coalition for its enactment.

Even assuming a militant democratic framework is in place, moreover, there remains a temporal problem: On the one hand, the application of prohibitions on antidemocratic parties or individuals who lack political support can seem disproportionate. On the other hand, when a movement has accrued enough support to pose a credible threat to democracy, the costs to democratic legitimacy of moving against it may well become prohibitive. In Germany, for example, the Bundesverfassungsgericht has recently rejected applications against individual far-right actors. But on the other hand, it seems unlikely that the political will could be mustered to move against the Alliance for Germany party, which may well have antidemocratic tendencies, because it has gained too much public support.

Finally, critics have observed that militant democracy in practice treats symptoms while ignoring the underlying ailment. An anti-system movement does not have a credible shot at gaining political power, the argument goes, without an underlying “social” pattern of discontent.¹¹⁸ Without a solution to that long-range problem, it can be argued, militant democracy is doomed to fail.

This criticism, however, makes the questionable assumption that the emergence of an anti-democratic faction is connected to some underlying social problem in such a way that addressing the latter mitigates the former. But this is not necessarily so. Say a faction emerges in the absence of serious social problems, perhaps because of the failure of established parties’

¹¹⁵ Daryl Levinson and Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 406 (2015).

¹¹⁶ *Id.* at 405-06.

¹¹⁷ Müller, *Individual Militant Democracy*, *supra* note 99, at 18 (making this point in respect to the propensity of political leaders to agree upon a militant democratic model).

¹¹⁸ Anthoula Malkopoulou and Ludvig Norman, *Three models of democratic self-defence: Militant democracy and its alternatives*, 66 POL. SCI. 442, 443 (2018); *id.* at 447 (criticizing militant democracy for its “deep-seated exclusionary *elitism* and suspicion towards popular participation”).

failure to offer sufficiently distinct alternatives in respect to economic policy.¹¹⁹ If the economic problem is cured, the anti-system party may still find other causes to sustain it. Or imagine a threat to democracy that crystallizes because of an unfounded, even invidious, belief in a social threat. European far-right populism, for instance has fed off racialized fears concerning immigration and terrorism.¹²⁰ In this case, it is simply wrong to say that the ‘problem’ (the presence of diverse communities) is one that should be solved, as opposed to understood as a virtue. Finally, when the ‘root causes’ of an anti-democratic movement are fairly described as “social disintegration,”¹²¹ it is also not at all clear that it should be ignored in favor of its causes. The underlying social problem may not be amenable to being resolved quickly, and ignoring the anti-system faction may well make it worse. It is all very well saying that a threat to democracy has ‘root causes.’ But if the latter take enough time to resolve, it may well be too late for democracy as an ongoing concern.

C. **Rehabilitating militant democracy**

Advocates of militant democracy have attended to rehabilitate the concept in the face of these theoretical criticisms. They have argued for its compatibility with democracy and the suggested that the practical difficulties of its implementation can be overcome.

On the former point, theorists have tried to move the terrain of argument from argumentation from ideal theory to more ‘realist’ grounds. One move is to propose a “principle of limited intervention,” which eschews an “ideal” democracy and aims at “an imperfect representative regime[]” without “rights violations” in which “both antidemocrats and democrats [are] able to pursue their political ends safely.”¹²² The intuition here is that constraints on democratic participation need not be an all-or-nothing matter. Rather than completely excluding individuals or groups from politics through “criminal restrictions or legal gag rules,” militant democratic measures can be tailored both in scope and in direction.¹²³ For instance, the German Bundestag has added new sections to Article 21 of the Grundgesetz to allow the state to deny government funding to parties that have an anti-democratic platform.¹²⁴ Israeli law creates a distinction between the dissolution of a party and a prohibition on its running for political office, requiring parties to meet a higher standard for the latter.¹²⁵ In effect, this creates a tiered system of penalties for anti-systemic action. As a result, a political system may allow space for some parties organized around even “reprehensible” ideas to exist and recruit, while still denying them the right to seek elected office.¹²⁶

What of the risk of mission creep and the problem of time-inconsistency, both of which are exemplified in some measure by the *Sahin* judgment? One possible response is to make

¹¹⁹ For a powerful argument blaming leftist parties for the recent rise of European populism, see Sheri Berman and Hans Kundnani, *The cost of convergence*, 321 J. DEM. 22 (2021); see also STEPHANIE L. MUDGE, *LEFTISM REINVENTED: WESTERN PARTIES FROM SOCIALISM TO NEOLIBERALISM* (2018) (offering powerful support for this thesis).

¹²⁰ For studies of these dynamics, see Albana Shehaj, Adrian J. Shin, and Ronald Inglehart, *Immigration and right-wing populism: An origin story*, 27 PARTY POL. 282 (2021); Aziz Z. Huq, *Terrorism and democratic recession*, 85 U. CHI. L. REV. 457 (2018).

¹²¹ Malkopoulou and Norman, *supra* note 118, at 443.

¹²² KIRSHNER, *supra* note 83, at 47-48.

¹²³ *Id.* at 63-64.

¹²⁴ See Gelijs Molier & Bastiaan Rijpkema, *Germany’s New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court’s ‘Potentiality’ Criterion for Party Bans*, 14 EUR. CONST. L. REV. 394, 406-08 (2018).

¹²⁵ See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1449-50 (2007).

¹²⁶ See *id.*

militant democratic measures “subject to review by an independent body, such as a court.”¹²⁷ This strategy, of course, assumes the availability of independent bureaucratic capacity that is relatively immune from factional capture.

South Korea’s Constitution, for example, contains a procedure for prohibiting “anti-constitutional” parties that gives the final word to the Constitutional Court.¹²⁸ Under section 7A of *Basic Law: the Knesset*, the legislature can prevent candidates from running for office if they engage in speech denying the Jewish and democratic nature of the state, inciting racism, or supporting the armed struggle of a state or terrorist organization against Israel.¹²⁹ Supplementing this channel, Israeli courts have adopted an aggressive program of removing officials and blocking appointments based on a judge-made concept of “good character.”¹³⁰ Israeli law on the books disallows officials from serving in office upon conviction, but the Supreme Court has gone further to deem officials ineligible from remaining in or holding office if currently under indictment.¹³¹ Such comparative experience suggests that a militant democracy that contains an independent institutional check (such as judicial review) need not be weak as a result. To the contrary, the Israeli experience suggests that courts can at times be more aggressive than elected-branch actors in defending democratic values.

Finally, many of these examples hinge on the use of constitutional law as the berth for militant democracy measures. The relevant constitutional text, such as Germany’s Grundgesetz, is often enacted long before the actual threat to democracy arises (although perhaps also in the shadow of an earlier threat). That text further installs the institutional apparatus (e.g., independent courts) necessary to prevent the abuse of militant-democratic powers. Such examples suggest that the intertemporal problem of militant democracy can be resolved. Foresight in democratic institutional design may be difficult, but it is not impossible.

III. Militant Democracy 2.0: Learning from History and Theory

These practical and theoretical debates can inform our thinking today about how to address digital platforms’ threat to democracy because there are structural parallels between that problem and the challenge of ant-system political parties. In both cases, a non-state formation playing a necessary function in democratic governance operates in such a way as to corrode the viability of ongoing democratic government. In both cases, the normal ethical commitments of a democracy counsel for a laissez faire approach—while the prospect of aggressive regulation raises a specter of incumbency protection or abuse.

Given these structural parallels between the problems Loewenstein identified and the challenges of contemporary moment, it is worth asking if it is possible to draw lessons from the past of militant democracy to the future of digital-platform regulation. Clearly, differences between the two domains bar any precise inference about the choice of optimal intervention. Parties and platforms play quite different roles in the democratic ecosystem, and it would make no sense to try to mechanically translate party-related measures to the digital platform context.

¹²⁷ KIRSHNER, *supra* note 83, at 83. Capoccia, in a positive rather than a normative analysis, points to the role of “border parties,” who are marginal members of the political coalitions necessary to implement militant democratic measures, as having a moderating role. Capoccia, *supra* note 135, at 216-17. These parties, however, have very different incentives from a court.

¹²⁸ Const. S. Korea, art. 65, 111.

¹²⁹ § 7(A), Basic Law: the Knesset (1958) (amend. 1985).

¹³⁰ See Yoav Dotan, *Impeachment by Judicial Review: Israel’s Odd System of Checks and Balances*, 19 THEORETICAL INQUIRIES 705 (2018).

¹³¹ *Id.* at 727.

Rather, the lessons from the history of militant democracy will necessarily be more modest, and more abstract.

Five main lessons can be drawn from the experience of militant democracies in respect to the democratic externalities of digital platforms.

First, regulation in defense of democracy involves challenging ethical conflicts. It makes no sense, pace Kelsen, to appeal to one single principle (say, the freedom of democratic speech), without recognizing the potential for ethical conflict.¹³² First Amendment absolutism is an incoherent, self-defeating, north star when it comes to digital platforms. And it is far from clear that the doctrinal tools of tiered scrutiny and narrow tailoring have much traction when it comes to recognizing this problem.¹³³ Indeed, a strong aversion on the distinctive evils of content or viewpoint sensitivity—which is characteristic of First Amendment law—precludes any serious effort to solve the problem of discernment that lies at the heart of any anti-systemic challenge to democracy: Identifying which actors, parties or platforms, in fact pose a threat.¹³⁴ In this sense, First Amendment doctrine fails to grasp one distinctive problem of speech regulation in the service of democracy. Militant democracy doctrine at least perceives the problem.

Second, the profound identification problem that regulators face in respect to digital platforms is in important part an intertemporal problem. At an early point in time, a party will be too small to impose real harms to the democratic system. Regulation is then politically feasible (and without large democratic side-effects), but likely to be seen as unnecessary, or perhaps as overkill. As time goes on, and the party gets bigger, regulation becomes politically more difficult; the necessary legislative coalition is harder to assemble. And the democratic costs of intervention rise. The longer a European jurisdiction waited to address an emergent and then growing anti-democratic formation, the more difficult it tended to become politically to address the latter, and the greater the collateral democratic cost in terms of the negation of actually existing popular preferences.¹³⁵ As times goes on, moreover, it is plausible to think that the risk that regulation would be misused—perhaps by the anti-democratic faction itself once it gained elected office—would also have increased. Paradoxically, the polities in greatest need of intervention are the ones in which regulation is most expensive and hence least likely to occur.

Similarly, the contemporary challenge of social media to democracy's quality has a temporal dimension: The optimal moment for regulation may well be early in the life-cycle of a platform, before it has come to depended upon by many people, and before it has imposed

¹³² See *supra* text accompanying notes 105 to 106.

¹³³ For a comprehensive analysis, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1271 (2006) (noting that “the Supreme Court has never given analytical clarity to the strict scrutiny formula's central concepts of compelling governmental interests and narrow tailoring”).

¹³⁴ For a canonical argument about “the uniquely powerful distorting effect of [] content-based restrictions” on public discourse,” see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 200 (1983). For an application of the content neutrality framework to platform regulation, see Lily A. Coad, Note, *Compelling Code: A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457, 492 (2021). My point here is that analytic framework is profoundly unhelpful in the context of militant democracy contexts where the whole point is ... content sensitivity.

¹³⁵ Giovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, 9 ANN. REV. L. & SOC. SCI. 207, 213 (2013) (noting that “outlawing a political party both excludes a set of political ideas from the deliberative policy-making process and, at the same time, reduces the range of choices available to voters”).

significant negative externalities on a democracy.¹³⁶ Further, a result of social media's rise, and any consequent malfunctioning public sphere, may be that over time, it becomes increasingly difficult, or even perhaps impossible, for the public bodies in a polity to mitigate the democratic harms of digital platforms through law. All else being equal, a lower-quality legislature or bureaucracy is likely to have a harder time creating and enforcing good relation. And the more dysfunctional democracy becomes, the more likely it is that any regulation will be badly designed or used for anti-democratic, entrenchment purposes. By early regulation will often look unnecessary, lack political support, and even arrive with a suspicious odor of self-dealing. The poignant malignancy of social media is hence that it defeats over time the necessary conditions for its own democratic reform—a bit like a virus that infects a body and slowly turns the latter's defense mechanisms against themselves. As a result, in a jurisdiction that actually, already faces a challenge to its democracy from social media, it may be too late to generate and apply effectual, responsive, and non-abusive regulation.

With this intertemporal problem in mind, advocates of more aggressive regulation of social media should be cognizant of the risk that governments will only be incentivized to move against democratic threats when it is too late to do so.¹³⁷ The United States has already experienced a measure of democratic backsliding in the past five years.¹³⁸ There is no particular reason to expect that this trend has come to an end. Measures implemented to stanch the flow of misinformation online, or to mitigate the concentration of power in a handful of platforms, risk being immediately misused for partisan ends. Both the Texas and the Florida statutes targeting political bias on social media, for example, were proposed and defended in explicitly partisan terms.¹³⁹ It is fair to worry that both are intended to advance the partisan interests of the legislators and governors who supported them—especially since both states have simultaneously pursued potentially disenfranchising new restrictions on voting.¹⁴⁰ President Trump's June 2020 Executive Order on Preventing Online Censorship,¹⁴¹ similarly raised concerns about the partisan-inflected use of regulatory powers to entrenching and distorting effect.¹⁴²

On one particularly skeptical view of American politics, therefore, the political window in which effectual responses to digital flows of misinformation may have come and gone. Even if Congress were to overcome its predictable gridlock, the resulting enactments would either have limited effect or would delegate discretion to the executive branch. The quality of enforcement would hence vary as the administration changed partisan hands. The state laws

¹³⁶ Hence, Facebook could thwart regulation in Australia by simply withdrawing its news content. FISHER, *supra* note 26, at 332-33. In effect, its epistemic monopoly made its epistemic harms impossible to combat.

¹³⁷ Müller, *Individual Militant Democracy*, *supra* note 99, at 18; *see also* text accompanying note --.

¹³⁸ *See* INT'L IDEA, GLOBAL STATE OF DEMOCRACY REPORT 2021 (2021), <https://perma.cc/C25R-UPE4> (finding that “the United States, the bastion of global democracy, fell victim to authoritarian tendencies itself, and was knocked down a significant number of steps on the democratic scale”); *see also* Sarah Repucci and Amy Slipowitz, *Democracy in a Year of Crisis*, 32 J. DEM. 45 (2021) (situating decline of quality of American democracy in a comparative context).

¹³⁹ *See supra* text accompanying notes – to --.

¹⁴⁰ Jane C. Timm, *Appeals court reinstates Florida's restrictive voting law*, NBC NEWS (May 6, 2022), <https://www.nbcnews.com/politics/elections/appeals-court-reinstates-floridas-restrictive-voting-law-rca27703>; Juana Summers and Barbara Sprunt, *Texas election workers provide practical and emotional support to confused voters*, NPR NEWS (Feb. 27, 2022), <https://www.npr.org/2022/02/27/1082821390/texas-election-workers-provide-practical-and-emotional-support-to-confused-voter>

¹⁴¹ Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020);

¹⁴² *See, e.g.*, Tim Wu, *Trump's Response to Twitter Is Unconstitutional Harassment*, N.Y. TIMES (June 2, 2020), <https://nyti.ms/3eG1UAH> (“By retaliating against Twitter for what it said in its warning labels, Mr. Trump violated the First Amendment.”) (citations omitted)

enacted by Florida and Texas offer no reason for optimism that states will do better when it comes to regulation. Perhaps there was a moment at which it was politically feasible to craft and enact a precise and nonpartisan regulatory framework to mitigate misinformation; if there was, it has likely come and gone. It may instead now simply be too late to install militant democracy for the metaverse by law because of the progressive and ongoing decay in the quality of American democracy more generally.

It should be noted that First Amendment jurisprudence does not recognize or address this intertemporal challenge. That is, militant democracy theory brings to the fore a theoretical problem elided in that body of law and scholarship.

Third, the debate in militant democracy about targeting symptoms or root causes suggests that the design of pro-democracy interventions must be sensitive to the way that regulated activities interact with long-term economic and social trends. The problem of misinformation in American democracy did not begin with digital platforms. During the 2016 election, for example, political elites and more traditional forms of media (e.g. cable news and talk radio) played a significant role in disseminating fallacies.¹⁴³ Efforts to regulate social media should be crafted in light of the risk that misinformation efforts will move to other channels. Just as party bans cannot address underlying “social disintegration,”¹⁴⁴ so militant regulation of digital platforms cannot address all the underlying drivers of misinformation. One question is thus whether targeting platforms will lead to a migration of epistemic problems into other venues.

Fourth, an ethical lesson of the literature on militant democracy is that pro-democracy interventions can and should be designed in a way that accounts for the legitimate participatory interests of “unreasonable” citizens.¹⁴⁵ Indeed, as the practice of militant democracy has evolved over time, states have adopted more fine-grained tools. They have become carefully tailored rather than excessively sweeping; individual rather than categorical, and temporary rather than permanent. Israel’s calibrated regime for anti-system parties offers a useful instance of ‘good practice’ on this score.¹⁴⁶

This lesson bears on the appropriate choice of instruments to address misinformation, and has implications for whether misinformation should be addressed by state action or by private actors. All else being equal, it is a point in favor of allowing platforms to impose limits on their users, rather than for states to regulate platforms. (To be clear, there may well be other arguments weighing decisively in the other direction—and I want here to delineate just one of many potential concerns).

Hence, one advantage to self-regulation is the fact that the censorial power of even dominant platforms is limited. The decision of a company to exclude a person from (say) Facebook or Twitter obviously burdens their ability to reach a wide audience substantially. A legal restriction on the circulation of certain information, whether backed by criminal or civil penalties, would likely have more far-reaching effects. Especially for public figures who already command political influence, exclusion from a social media site is unlikely to preclude them from some effective communication with the public. The marginal effect of a platform-specific

¹⁴³ YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 232-32, 381-87 (2018).

¹⁴⁴ Malkopoulou and Norman, *supra* note 118, at 443

¹⁴⁵ Quong, *supra* note 107, at 322.

¹⁴⁶ See *supra* text accompanying notes 125 to 129.

prohibition on more politically and socially marginal figures would certainly be greater. But in both cases, private action is likely to be less categorical, and more tailored, than an analogous state intervention. In addition, efforts at self-regulation by digital platforms are unlikely to have the wide-repercussions that legal interventions against those platforms would have. There is, to begin with, a risk that regulation would have perverse, counterproductive effects. For example, regulation, to date, has focused solely on large platforms.¹⁴⁷ Such regulation, however, might drive misinformation into other venues. Other online forums might be more difficult to regulate, and perhaps even worse in terms of the quality of the speech they support. In this way, state regulation may lead to a more fragmented speech environment, one that is less conducive to democracy rather than vice versa.

Fifth, a central axis of debate over the regulation of misinformation on digital platforms should concern the identity of the regulator: Should it be the task of the state, or is private regulation to advance democratic values preferable? And if a state actor is to do the regulator, what qualities should it possess? Indeed, it is not too much to assert that the empirical question of regulator quality is the hidden hinge of debates on militant democracy and social media regulation. Experience with militant democracy suggests that problems of incentive and timing are best addressed through the prophylactic creation of independent institutions capable of crafting and applying pro-democracy norms entailing restrictions on democratic participation long before an actual problem arises.

In the context of digital platforms, the ‘regulator choice’ question will appear to many as an unsavory one, pitting one evil against another. On the one hand, digital platforms have demonstrated that they operate under the sway of powerful incentives to gather as much behavioral data as possible, whether or not this depends on engagement with misinformation or worse on their sites.¹⁴⁸ Commentators note that platforms such as Twitter and Facebook also have extraordinary, quasi-regulatory power by dint of market concentration.¹⁴⁹ They expresses great skepticism of the motives of private firms such as Meta and Alphabet.¹⁵⁰ Recent examples of self-regulation suggest that the absence of legal penalties leads to self-regulatory regime that are too weak to be effective. The Aoteroa New Zealand Code of Practice promulgated in July 2022, for example, has “several essential operational weaknesses.”¹⁵¹ And studies suggest that large platforms do not always follow their own rules.¹⁵² This suggests that even if self-regulation can be more targeted, it may never be compatible with the profit-making strategies of large firms.¹⁵³

On the other hand, that the probability of pro-democracy legislation of digital platforms emerging from either Congress or the several states is quite low.¹⁵⁴ (We have probably left it

¹⁴⁷ For example, both the Florida and the Texas laws target only large social media networks. S.B. 7072, 123rd Leg., Reg. Sess. (Fl. 2021); H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021).

¹⁴⁸ See sources cited in *supra* note 55.

¹⁴⁹ See, e.g., Lakier and Tebbe, *supra* note 17.

¹⁵⁰ *Id.* For a more general critical look at the incentives of big tech, see generally RANA FOROOHAR, DON'T BE EVIL: THE CASE AGAINST BIG TECH (2021).

¹⁵¹ Curtis Barnes et al. Platforms Are Testing Self-Regulation in New Zealand. It Needs a Lot of Work, Lawfare (Sept. 2, 2022), <https://www.lawfareblog.com/platforms-are-testing-self-regulation-new-zealand-it-needs-lot-work>. For a more positive, but less persuasive, account, see Sam Essor, NZ's Social Media "Code of Practice" Launched, HGMLEGAL (2022), <https://www.hgmlegal.com/insights/nzs-social-media-code-of-practice-launched>.

¹⁵² For evidence that platforms do not follow their own policies, for example on hate speech, see Caitlin Ring Carlson & Hayley Rousselle, *Report and Repeat: Investigating Facebook's Hate Speech Removal Process*, FIRST MONDAY (Jan. 27, 2020), <https://perma.cc/3LXZ-W8SJ>.

¹⁵³ See FISHER, *supra* note 26, at 330-31 (expressing doubts along these lines).

¹⁵⁴ See *supra* text accompanying notes 142 to 145.

too late). If the process of democratic backsliding continues in the United States, it seems likely that legislative efforts will become even more sluggish, and have increasingly partisan and pernicious effects. Moreover, neither legislatures nor agencies have the extensive understanding of the platform design space that firm insiders possess. After all, the platforms themselves are directly responsible for the day-to-day operation of their sites. They of necessity have better access to information about possible design tweaks. In effect, they already offer “a form of private governance that reaches across geographic borders.”¹⁵⁵ Most platforms, moreover, are subject to an ongoing process of updating, which creates potential opportunities for change tweaks to be made simply as part of the process of continuing refinement of the site. They can use their content-moderation policies as an “editorial guide sheet”¹⁵⁶ with supple, speech-spacing effects, rather than as a blunt “system of prior restraints”¹⁵⁷ And there is some evidence that their tweaks can materially change (if not abate entirely) the flow of misinformation.¹⁵⁸ The reason self-regulation is unlikely to work is not an absence of tools; it is an absence of motivation.

The regulatory choice in respect to digital platforms, in short, is a choice between two evils. It admits of no easy answer. Perhaps the ideal scenario is for self-regulation under the shadow of a credible regulatory threat—a combination that leverages politicians’ (perhaps transient) desire to protect the democratic system and also takes advantage of tech firms’ insider knowledge.

Conclusion

The rise of digital platforms as central elements of the public square at a moment of democratic backsliding in the United States tees up a set of unappetizing choices. As theorists of militant democracy could have predicted, the need for interventions in respect to the quality of the digital public sphere now may be inversely correlated to the likelihood that well-designed interventions could be enacted into law.

Earlier debates on militant democracy, to be clear, do not provide specific guidance in respect to current debates on digital platforms. But the parallel between antidemocratic parties and antidemocratic speech effects on platforms is sufficiently compelling that we stand today to learn from earlier debates. I have suggested three broad lessons: pay attention to the social and economic context; refine and tailor regulatory interventions to minimize the burden on even “unreasonable citizens”; and seek out the *least* distorted regulator. In the present context, this points toward a greater potential for self-regulation, notwithstanding the perverse incentives created by platforms’ hunger for behavioral data. This highly imperfect approach, though, may well be better than anything now available in light of the failure to act earlier, and install more effectual regulation when it was politically, and perhaps constitutionally, possible.

¹⁵⁵ Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 31 (2019). For further exploration of this idea, see Kristen E. Eichensehr, *Digital Switzerland*, 167 U. PA. L. REV. 665, 668 (2019).

¹⁵⁶ Olivia Solon, *To Censor or Sanction Extreme Content? Either Way, Facebook Can’t Win*, GUARDIAN (May 23, 2017), <https://perma.cc/R2R6-DQVM>.

¹⁵⁷ Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1359–60 (2018).

¹⁵⁸ Allcott, Gentzkow, and Yu, *supra* note 51, at 2.

