DEMOCRATIC SELF-DEFENSE

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Four U.S. states recently took diametrically opposed approaches to address fundamental problems that their respective state legislatures identified in the online speech environment. While controversial legislation in Florida and Texas sought to limit the ability of platforms to remove users or content, New York and California passed laws ultimately aimed at curbing hate speech and other forms of abuse on platforms. In isolation, each of these legislative approaches raises significant First Amendment concerns, and all are likely insufficient to address the problems posed by online speech. But what if the impetus behind these laws were combined into a unified regulatory approach? Speech protection and speech limitation then might be better thought of as two sides of the same regulatory coin.

The role of speech on social media has gained increased attention in the wake of the January 6, 2021 attack on the Capitol. Two themes emerged in connection with these events that unsettle long-standing constitutional assumptions in the United States. First, the rigidity of the state action doctrine was gradually questioned in favor of users' speech protection on private social media platforms against perceived censorship. Second, the theme of "militant democracy" increasingly appeared as commentators asked whether democracy must offer its protections, including robust free speech, to those who actively seek to undermine it.

Both of these concepts, the horizontal effect of fundamental rights and militant democracy, are well established in other constitutional democracies, but in the past, they did not gain significant traction in the United States. In comparative constitutional theory, militant democracy and the horizontal

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effect of fundamental rights tend to be studied in isolation but viewing them in tandem opens new perspectives. This Article argues that one mechanism without the other is normatively undesirable, as is the absence of both. But viewed together, they can be understood and operationalized as "democratic self-defense," especially with respect to the vexing problems surrounding speech on social media platforms.

INTRODUCTION

Four U.S. states recently took diametrically opposed approaches to address fundamental problems that their respective state legislatures identified in the online speech environment. While legislation in Florida[1] and Texas[2] sought to limit the ability of social media platforms to remove users or content, New York[3] and California[4] passed laws aimed at curbing hate speech and other

1. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196 (11th Cir. 2022) (challenging S.B. 7072), *vacated and remanded*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

2. NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (challenging H.B. 20), *vacated and remanded*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

3. N.Y. Gen. Bus. Law § 394-cc (McKinney 2024); *see* Volokh v. James, 656 F. Supp. 3d 431, 436 (S.D.N.Y. 2023) (granting preliminary injunction).

4. CAL. BUS. & PROF. CODE § 22677 (West 2025); X Corp. v. Bonta, No. 23-CV-1939, 2023 WL 8948286 (E.D. Cal. Dec. 28, 2023) (denying preliminary injunction), *rev'd and remanded*, 116 F.4th 888 (9th Cir. 2024). *See also* Cat Zakrzewski, *New California Law Likely to Set Off Fight Over Social Media Moderation*, WASH. POST. (Sept. 14, 2022), https://www.washingtonpost.com/technology/2022/09/13/california-social-network-transparency/ [https://perma.cc/F9MV-6CRC] (reporting on AB 587 and noting that "unlike most of the state efforts to address tech platforms' content moderation policies, which generally have been championed by Republican-led legislatures, the California law is the most significant policy

forms of abusive content on such platforms. In isolation, these legislative approaches raise significant First Amendment concerns, and all are likely insufficient to address the problems posed by online speech effectively.[5] The Florida and Texas "laws limit the platforms' capacity to engage in content moderation."[6] Social media platforms would be treated as common carriers subject to antidiscrimination law.[7] This constitutes an attempt to align the protection of users' speech against interference by private actors with speech protection against government actors. As the U.S. Supreme Court noted in *Moody v. NetChoice, LLC*,[8] by claiming that its law prevents "viewpoint discrimination," Texas imposes a restriction meant to constrain only the

efforts to date from Democrats and civil rights groups reacting to criticism that tech companies aren't doing enough to prevent abuse on their platforms").

5. *See, e.g.*, Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 151–52 (2022) ("Justice Thomas's proposal to treat platforms as common carriers, and Florida's and Texas's steps in that direction, are not only unconstitutional but also terrible public policy."); Eric Goldman, *A Short Explainer of Why California's Mandatory Transparency Bill (AB 587) Is Terrible*, TECH. & MKTG. L. BLOG (Aug. 9, 2022), https://blog.ericgoldman.org/archives/2022/08/a-short-explainer-of-why-californias-mandatory-transparency-bill-ab-587-is-terrible.htm [https://perma.cc/X9EM-CMGH]. *But see, e.g.*, Dawn Carla Nunziato, *Protecting Free Speech and Due Process Values on Dominant Social Media Platforms*, 73 HASTINGS L.J. 1255, 1259 (2022) ("[A] favorable assessment of the desirability and constitutionality of certain aspects of proposed legislation . . . including provisions that would require platforms . . . to comport with certain principles of nondiscrimination and due process as recognized under the First Amendment, the Due Process Clause, and the International Covenant on Civil and Political Rights, and prohibits these platforms from engaging in certain types of viewpoint discrimination or speaker-based discrimination.").

6. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2393 (2024). In *Moody v. NetChoice*, 144 S. Ct. 2383 (2024), the U.S. Supreme Court vacated and remanded the appellate court decisions, see *supra* notes 1–2, "for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge." *Id.* at 2394.

7. *See, e.g.*, Nunziato, *supra* note 5, at 1285; Bhagwat, *supra* note 5, at 128–29 ("Facebook and Twitter are private companies that, almost all concede, are not bound by the First Amendment and so face no *constitutional* constraints against suppressing disfavored but constitutionally protected viewpoints (in particular, praise for political violence) on their platforms. Conservative critics therefore needed a theory to justify regulatory interference with the control that these companies exert over their own private property. To create such a theory, these critics embraced the concept of common carriage . . . ."). Similarly, Justice Thomas has argued for considering social media platforms common carriers in *Biden v. Knight First Amendment Institute at Columbia University*. 141 S. Ct. 1220 (2021) (Thomas, J., concurring). He reiterated that position in *NetChoice* but noted that "the same factual barriers that preclude the Court from assessing the trade associations' claims under our First Amendment precedents also prevent us from applying the common-carrier doctrine in this posture . . . . On remand, however, both lower courts should continue to consider the common-carrier doctrine." *NetChoice*, 144 S. Ct. at 2413 (Thomas, J., concurring). Stopping short of endorsing the common carrier doctrine for social media platforms, Justice Alito in *NetChoice* criticized the majority for "fail[ing] to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old 'public square'—should be viewed as common carriers. Whether or not the Court ultimately accepts that argument, it deserves serious treatment." *Id.* at 2438 (Alito, J., concurring) (citation omitted).

8. 144 S. Ct. 2383 (2024).

government on private actors as well.[9] Similar proposals elsewhere would allow users to claim First Amendment protection against private parties rather than government actors, potentially contravening the state action doctrine.[10] The New York and California laws, by contrast, limit private speech based on content and viewpoint, which is presumptively unconstitutional.[11]

But what if the impetus behind these laws—regulation of content moderation decisions, both to ensure maximum speech protection and to limit egregiously harmful speech on platforms—were combined into a unified regulatory approach? Speech protection and speech limitation then might be thought of as two sides of the same regulatory coin.

The attack on the U.S. Capitol on January 6, 2021, marked a turning point in domestic discussions of online speech regulation.[12] Two themes emerged in its aftermath that unsettle long-standing constitutional assumptions in the United States. First, the rigidity of the state action doctrine was gradually questioned as commentators and lawmakers started to explore whether First Amendment protections could extend to speech on social media platforms, binding private parties.[13] Former President Donald J. Trump, too, took this

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9. *Id.* at 2408 ("To describe that interest, the State borrows language from this Court's First Amendment cases, maintaining that it is preventing 'viewpoint discrimination.' But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. When Texas uses that language, it is to say what private actors cannot do: They cannot decide for themselves what views to convey.") (citation omitted).

10. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) ("[T]he Free Speech clause prohibits only *governmental* abridgement of speech. The Free Speech Clause does not prohibit *private* abridgement of speech." (emphasis in original)). See Nunziato, *supra* note 5, at 1276–84, for an overview of other federal and state legislative proposals that would require platforms to be treated as common carriers or state actors.

11. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).

12. *See* Claudia E. Haupt, *Regulating Speech Online: Free Speech Values in Constitutional Frames*, 99 WASH. U. L. REV. 751, 785 (2021). The U.S. election of November 5, 2024, marked yet another turning point in the story. This Article takes developments up until that date into account. Accordingly, this Article refers to "former President Trump." Developments surrounding President Trump's retaking office in January 2025, as this Article is going to press, suggest that platform policies around content moderation and their comparative implications may be undergoing significant changes. *See, e.g.*, Mike Isaac & Theodore Schleifer, *Meta Says It Will End Its Fact-Checking Program on Social Media Posts*, N.Y. TIMES (Jan. 7, 2025), https://www.nytimes.com/live/2025/01/07/business/meta-fact-checking [https://perma.cc/7QA6-52L8]; Christiano Lima-Strong, *Meta's Fact-Checking Overhaul Widens Global Rift on Disinformation*, WASH. POST (Jan. 8, 2025), https://www.washingtonpost.com/technology/2025/01/08/meta-facebook-fact-checking-europe-us/ [https://perma.cc/7EHX-KJ9H].

13. *See, e.g.*, Evelyn Douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. CHI. L. REV. ONLINE (June 6, 2022), https://lawreviewblog.uchicago.edu/2022/06/06/douek-lakier-first-amendment/ [https://perma.cc/PR2D-8YAR] ("In recent years, concern about anti-conservative bias on social media platforms, and liberal domination of the media more broadly, have pushed conservative lawyers and judges to develop new theories of how the First Amendment applies to (at least some) corporate speech intermediaries. These

position in his lawsuits against Twitter and Facebook and their CEOs challenging his post-January 6 deplatforming as a violation of his First Amendment rights.[14] Elsewhere, this constitutional mechanism is known as the "horizontal effect" of fundamental rights.[15] Second, the theme of "militant democracy" increasingly appeared as commentators asked whether a constitutional democracy must offer its protections, including robust free speech protection, to those who actively seek to undermine it.[16]

This Article descriptively suggests that, taken together, the opposing legislative approaches highlighted at the outset mirror the horizontal effect of fundamental rights and militant democracy. Normatively, this Article argues that one mechanism without the other is undesirable, as is the absence of both. But combined, they can be understood and operationalized as "democratic self-defense," especially with respect to the vexing problems surrounding speech on social media platforms.

Viewed in tandem as democratic self-defense, this Article explicates that militant democracy and horizontal effect reveal two sets of guardrails. First, militant democracy provides the limits of constitutionally permissible public discourse, containing a threat to exclude antidemocratic organizations and individuals. It thus orients the constitutional framework toward preserving and defending democracy. Then, these guardrails are imposed on private

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theories are now being tested by the *raft* of social media regulations that have been recently enacted in Republican states.").

14. Trump v. Twitter, Inc., 602 F. Supp. 3d 1213 (N.D. Cal. 2022) (rejecting the argument that Twitter is a state actor); Nunziato, *supra* note 5, at 1270–71 ("The complaint alleged that Facebook is a state actor for First Amendment purposes."); Clay Calvert, *Anti-censorship Rhetoric v. First Amendment Realities: The Fight Over Florida's Anti-deplatforming Statute and Some Thoughts About Speaker Autonomy, Compelled Expression and Access Mandates in Online Fora*, 20 FIRST AMEND. L. REV. 385, 393 (2022).

15. Haupt, *supra* note 12, at 773–74. Whether constitutional rights apply only between individuals and the state or reach into the private sphere to also bind private parties is a foundational question. In comparative constitutional law, this question is typically discussed as "vertical" versus "horizontal" effect: "These alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal)." Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003).

16. *See, e.g.*, David Golumbia, *Trump's Twitter Ban Is a Step Toward Ending the Hijacking of the First Amendment*, BOS. GLOBE (Jan. 9, 2021, 1:05 PM), https://www.bostonglobe.com/2021/01/10/opinion/stretching-first-amendment/?event=event25 [https://perma.cc/87QW-Z5LY]; Thomas B. Edsall, *Have Trump's Lies Wrecked Free Speech?*, N.Y. TIMES (Jan. 6, 2021), https://nyti.ms/2L9cUgP [https://perma.cc/E683-3JVE] ("In that context, Levinson raised the possibility that the United States might emulate post-WWII Germany, which 'adopted a strong doctrine of "militant democracy,"' banning the neo-Nazi and Communist parties . . . . 'Most Americans rejected "militant democracy" in part, I believe, because we were viewed as much too strong to need that kind of doctrine. But I suspect there is more interest in the concept inasmuch as it is clear that we're far less strong than we imagined.'" (quoting Sanford Levinson)); Kenneth Propp, *Speech Moderation and Militant Democracy: Should the United States Regulate Like Europe Does?*, ATL. COUNCIL (Feb. 1, 2021), https://www.atlanticcouncil.org/blogs/new-atlanticist/speech-moderation-and-militant-democracy-should-the-united-states-regulate-like-europe-does/ [https://perma.cc/HGL7-Z8E4].

interactions, including free speech protections against private actors. This results in a dual constitutional role, at once limiting and expanding.

Militant democracy and horizontal effect so conceptualized are best understood as complementary and mutually reinforcing constitutional mechanisms. The democratic state may defend itself against groups and individuals that seek to undermine it, while at the same time, individuals may be bound by fundamental rights in their interactions in order to prevent undermining democracy. Importantly, "the limits on speech must reflect the values underlying the historically motivated decision to impose certain limits on public discourse."[17] Seen together, militant democracy and the horizontal effect of fundamental rights thus form the core mechanism of democratic self-defense on social media and beyond.

In so contending, this Article synthesizes and critically engages with two newly emergent strands of domestic legal scholarship: incipient explorations of militant democracy applications to social media[18] and initial discussions of horizontal effect doctrine in the context of social media.[19] Both the horizontal effect of constitutional rights and militant democracy are well established in other constitutional democracies, but in the past, they did not gain significant traction in the United States.[20] Earlier comparative studies of militant democracy[21] and horizontal effect[22] did not consider the crucial role played by social media for a simple reason: most of these online speech venues did not exist. But at a time when, in the United States, "[t]he

17. Haupt, *supra* note 12, at 779.

18. *See, e.g.*, Aziz Z. Huq, *Militant Democracy Comes to the Metaverse?*, 72 EMORY L.J. 1105 (2023); Neil Netanel, *Applying Militant Democracy to Defend Against Social Media Harms*, 45 CARDOZO L. REV. 489 (2023).

19. *See, e.g.*, Jack M. Balkin, *Free Speech Versus the First Amendment*, 70 UCLA L. REV. 1206, 1224–25 (2023) (discussing horizontal effect doctrine); Haupt, *supra* note 12, at 774 (same). For a comparative perspective, see Claudia E. Haupt, *The Horizontal Effect of Fundamental Rights*, *in* OXFORD HANDBOOK OF DIGITAL CONSTITUTIONALISM (Giovanni De Gregorio, Oreste Pollicino & Peggy Valcke eds., 2024).

20. As Professor Mark Tushnet noted only fifteen years ago, "[t]he term 'militant democracy' is absent from constitutional discourse in the United States of America." Mark V. Tushnet, *United States of America*, *in* THE 'MILITANT DEMOCRACY' PRINCIPLE IN MODERN DEMOCRACIES 357 (Markus Thiel ed., 2009). On the earlier lack of academic interest in militant democracy in English-language scholarship, see Giovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, 9 ANN. REV. L. & SOC. SCI. 207, 210 (2003).

21. *See, e.g.*, Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 32–34 (1995); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007); Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 FLA. J. INT'L L. 169, 177–78 (2007) [hereinafter Haupt, *Democratic Public Discourse*]; Claudia E. Haupt, *Regulating Hate Speech—Damned If You Do and Damned If You Don't: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT'L L.J. 299, 314–15 (2005) [hereinafter Haupt, *Regulating Hate Speech*] (discussing militant democracy). *See generally* MILITANT DEMOCRACY (András Sájo ed., 2004).

22. *See, e.g.*, Gardbaum, *supra* note 15; Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003).

constitutional limits on platform regulation seem increasingly up for grabs,"[23] a new perspective can be particularly instructive.

This Article proceeds in four parts. Part I sets the stage by mapping developments in the United States that have made discussions of horizontal effect and militant democracy more salient than perhaps ever before. Current legislative activity in several states mirrors these existing constitutional mechanisms, but their explicit invocation in U.S. debates has thus far remained largely superficial.

Part II first briefly reviews militant democracy, its historical origins, and theoretical underpinnings. Simply put, it is "the idea of a democratic regime which is willing to adopt preemptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime."[24] This part then combines militant democracy and the horizontal effect of fundamental rights to examine democratic self-defense through the lens of modern German free speech jurisprudence, including, in particular, speech on social media. This case study provides an empirical-analytic component to the theoretical exploration of democratic self-defense on social media. In a pair of decisions in the summer of 2021 involving content moderation on Facebook, the German Federal Court of Justice (*Bundesgerichtshof, BGH*), Germany's highest court in civil and criminal matters, expounded on the horizontal effect of fundamental rights on social media, illustrating how horizontal effect works in the context of a constitutional framework featuring militant democracy. I suggest that both can be combined into a theory of democratic self-defense that is broad enough to capture antidemocratic speech on social media and beyond.

Part III first outlines theoretical insights that advance the understanding of militant democracy, horizontal effects, and their combination into democratic self-defense in the social media context and beyond. In comparative constitutional theory, militant democracy and the horizontal effect of fundamental rights tend to be studied in isolation but viewing them in tandem opens new perspectives. Whereas prior iterations of these constitutional mechanisms considered the relationship between individuals (or political groups such as parties) and the state, the role of speech on social media forces a refocusing of the debate around nonstate actors' involvement in defending democracy. This perspective allows for a more textured understanding of both. In addition to the emergent legal literature on militant democracy and social media, this discussion engages the rich debate in the political science literature and references discussions in legal scholarship preceding the advent of social media.

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23. Daphne Keller, *Lawful but Awful?: Control over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. ONLINE (June 28, 2022), https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/ [https://perma.cc/H52U-QMU4].

24. Jan-Werner Müller, *Militant Democracy*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1254 (Michel Rosenfeld & András Sajó eds., 2012).

Part IV interrogates lessons and limits for the domestic debate on social media regulation, putting the theoretical framework of democratic self-defense into conversation with the current legislative efforts in Florida, Texas, California, and New York. Whereas the restrictions on content-moderation decisions by platforms envisioned in the Florida and Texas laws is reminiscent of the idea of the horizontal effect of fundamental rights, the normative concerns behind the California and New York laws are akin to placing limits on public discourse similar to the values undergirding militant democracy. Seen as two sides of the same coin, these laws can thus be conceptualized as an attempt at democratic self-defense. Although each approach individually is undesirable, rendering the Florida, Texas, California, and New York laws inadequate, combining them would better achieve the desired normative goal of protecting democratic public discourse, as a prerequisite of democratic self-government, in an increasingly important speech venue. This part then considers alternative approaches, such as a deconstitutionalized private law framework,[25] and their normative desirability. So doing, it argues that the constitutionalized version better captures the underlying social relationships.[26] It concludes that although adoption of the constitutionalized version of democratic self-defense is unlikely as a matter of doctrine as currently interpreted in the Supreme Court, its mechanisms are nonetheless reflected in the actions of other constitutional actors, most notably state legislatures.[27]

The intellectual history of militant democracy starts with Professor Karl Loewenstein's development of the concept in two articles published in the *American Political Science Review* in 1937.[28] In the intervening eighty-eight years, significant technological change has rendered the comparative perspective even more salient. As Professors Tom Ginsburg and Aziz Z. Huq note, "many challenges do not distinguish among nations. . . . Since the invention of the electric telegram in 1846, political ideas, idioms, and tactics have spread almost instantaneously across borders."[29] Social media has dramatically accelerated this trend. Consequently, the question of how to

25. *See* Balkin, *supra* note 19, at 1210–14.

26. *See* Haupt, *supra* note 19, at 11.

27. *Cf.* Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LPE PROJECT (Mar. 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/ [https://perma.cc/P3AS-LLCP] (expressing preference for "a public battle that includes the courts *and* legislatures *and* corporations over the meaning and scope of democratic speech on the platforms").

28. *See generally* Karl Loewenstein, *Militant Democracy and Fundamental Rights I*, 31 AM. POL. SCI. REV. 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights II*, 31 AM. POL. SCI. REV. 638 (1937). *See, e.g.*, NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ, SUSANNE BAER & SUSANNA MANCINI, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1549–52, 1555 (4th ed. 2022); DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 51 (3d ed. 2012); Müller, *supra* note 24, at 1256–58; TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 168 (2019); ALEXANDER S. KIRSHNER, A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATTING POLITICAL EXTREMISM 2 (2014).

29. GINSBURG & HUQ, *supra* note 28, at 5.

preserve democratic values and constitutional democracy itself against attacks from within, and in the face of democratic backsliding and sharply rising political polarization, arguably has now reached an urgency not seen since Professor Loewenstein's times.[30]

I. THE NEED FOR DEMOCRATIC SELF-DEFENSE

In the early twenty-first century, constitutional, political, and cultural discussions surrounding free speech values, the role of social media, and their impact on democracy shifted.[31] Whereas prior generations held on to the classic liberal idea of negative rights as designed against the state, and political discourse as based on the speech of equals in the polity,[32] the rise of Facebook, X (formerly Twitter), Instagram, YouTube, and TikTok, to only name a few, has toppled previous assumptions. The question no longer is whether the First Amendment applies, but how platform governance mechanisms work.[33] At least that is the conventional domestic story. Recent events, however, may have upended this First Amendment narrative, both weakening the state action doctrine and giving rise to calls for imposing content- and viewpoint-based restrictions on speech on social media.[34] This part first briefly sketches the rise of private platforms and highlights concurrent free speech debates. It then traces the changing political landscape as the backdrop against which legal questions regarding online speech regulation play out.

Two perennial speech concerns take center stage: censorship and hate speech, though in this current permutation, both censors and speakers are private parties.[35] These speech concerns have considerable political valence

30. *Cf. id.* at 170 (noting that to answer the question of "how to harden new or established democracies against erosion . . . one must go back to the interwar period to find the closest precursor to the discussion").

31. *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) [hereinafter Balkin, *Digital Speech and Democratic Culture*]; Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149 (2018) [hereinafter Balkin, *Algorithmic Society*].

32. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

33. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2342 (2014); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1599 (2018); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 606–07 (2022).

34. Note, though, that platform governance was restrictive all along via terms of service and community standards. *See, e.g.*, Jennifer Daskal, *Speech Across Borders*, 105 VA. L. REV. 1605, 1611–12 (2019). However, although platforms moderate users' speech according to their terms of service and community standards, they are not enforceable against the platforms themselves. *See, e.g.*, Nunziato, *supra* note 5, at 1257.

35. *See, e.g.*, NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022) ("Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say."), *vacated and remanded*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024); *id.* at 452 ("Texas enacted HB 20 to address 'the Platforms' evolution into internet censors."); *see also* Sarah E. Needleman & Will Feuer, *Elon Musk Takes Surprise 9% Stake in Twitter, Sending Shares Higher*, WALL ST. J. (Apr. 4, 2022, 9:16 PM), https://www.wsj.com/

as conservatives generally tend to favor applying some form of First Amendment protection for speech social media for fear of anti-conservative content moderation bias, as illustrated by the Florida and Texas laws, whereas liberals generally tend to favor imposing restrictions on hate speech and other forms of abusive content, as reflected in the California and New York laws. In their legislative efforts, moreover, both positions mirror emergent popular understandings of free speech that contradict traditional U.S. free speech doctrine.[36]

A. Private Platforms and Free Speech

In the classic negative rights understanding of the U.S. Constitution, the First Amendment shields private speech from the government. Content and viewpoint restrictions on private speech are subject to strict scrutiny review where the state must demonstrate a compelling interest that is narrowly tailored.[37] The First Amendment, so understood, does not extend to interactions between private parties. This approach to free speech protection as solely directed against the state is not unusual.[38]

Although the state action requirement is a core feature of the contemporary First Amendment, the doctrinal path historically has been uneven, and its political valence has flipped. As Professor Genevieve Lakier explains, "the idea that private actors, not just government officials, might threaten the freedom of speech guaranteed by the First Amendment, as well as the other rights protected by the Constitution, was first suggested by big-government liberals, whom contemporary conservatives love to hate."[39] Legal scholars in the early twentieth century "argued against the notion that the Constitution protects rights including freedom of speech from only government action."[40]

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articles/elon-musk-takes-9-stake-in-twitter-sending-shares-higher-11649070636 [https://perma.cc/7Y6K-HFWA] ("In recent years, Twitter and Meta Platforms Inc.'s Facebook and Instagram have faced criticism over how they handle content on their platforms. Some people have accused the companies of censoring speech, while others say they don't do enough to moderate content on their platforms that can lead to harm."). As in previous work, this Article prefers the language of "speech regulation" over "censorship." *See* Haupt, *supra* note 12, at 753 n.5 ("Like Jack Balkin, I prefer the term 'speech regulation' over 'censorship.' . . . Balkin notes that 'people generally consider "censorship" as presumptively impermissible, but not all regulation of speech is unjustified.' This is particularly true where constitutional provisions for speech protection explicitly permit regulation, as is the case in most constitutional regimes outside of the United States." (quoting Balkin, *supra* note 33, at 2299) (citation omitted)).

36. KNIGHT FOUNDATION-IPSOS, KNIGHT FREE EXPRESSION RSCH. SERIES, FREE EXPRESSION IN AMERICA POST-2020: A LANDMARK SURVEY OF AMERICANS' VIEWS ON SPEECH RIGHTS 4 (2022), https://knightfoundation.org/reports/free-expression-in-america-post-2020/ [https://perma.cc/FA3T-B9RU] (finding, inter alia, that most Americans say private and public institutions should prohibit racist speech but allow political views that are offensive).

37. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

38. *See, e.g.*, DORSEN ET AL., *supra* note 28, at 1052 ("In many countries, the protection of speech applies only where it is imperiled by the state.").

39. Genevieve Lakier, *The Great-Free Speech Reversal*, ATLANTIC (Jan. 27, 2021, 9:33 AM), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ [https://perma.cc/YJT3-3N2W].

40. *Id.*

This thinking is famously reflected in *Marsh v. Alabama*,[41] the product of progressive justices' influence on the Supreme Court at the time. Similarly, Professor Lakier notes, "the great liberal lion, Justice Thurgood Marshall, wrote an opinion that held that a shopping mall's private owner could not exclude protesters from the mall's passageways without violating their First Amendment rights."[42] However, this doctrinal approach changed "after President Richard Nixon appointed four pro-business conservative justices."[43] The Supreme Court then "reject[ed] this view of the First Amendment, and insist[ed] that private corporations have no constitutional obligation to grant access to their property to speakers they dislike, no matter how powerful those corporations might be."[44]

By the beginning of the twenty-first century, the state action doctrine and the prohibition of content- and viewpoint-based discrimination were firmly anchored in First Amendment doctrine. What remained was "[t]he notoriously tricky question . . . how exactly to draw the line between state and private action, which polices the boundary between the application and nonapplication of the Constitution."[45] In the social media context, a version of this issue most recently played before the Supreme Court in *Murthy v. Missouri*,[46] questioning the extent of permissible government involvement in (or influence over) content moderation decisions.[47]

The rise of social media played out against this seemingly settled constitutional background, without being directly subject to it. Now, the biggest challenge arguably no longer is the state but other private actors. The First Amendment perhaps does a good job protecting against government overreach, but it is not very effective when private speakers and private platforms pose a threat. Nonetheless, free speech values were fundamentally shaped by U.S. constitutional understandings of the First Amendment. Thus, U.S. social media companies tended to emphasize their respect for First Amendment-style speech protection even though the First Amendment does not directly apply to them.[48] At the same time, the internal governing structures—embodied by the platforms' terms of service and community standards—permitted much greater content and viewpoint moderation than would have been permitted under the First Amendment.[49] In part, this was

41. 326 U.S. 501 (1946).
42. Lakier, *supra* note 39.
43. *Id.*
44. *Id.*
45. Gardbaum, *supra* note 15, at 412.
46. 144 S. Ct. 1972 (2024).
47. *Id.* (holding that two states and several platform users lacked Article III standing to sue the federal government for impermissible coercion of platforms' content moderation decisions in violation of the First Amendment); *see also* Claudia E. Haupt, *Free Speech Versus Public Health: The Role of Social Media (Part I)*, BILL OF HEALTH (July 31, 2024), https://blog.petrieflom.law.harvard.edu/2024/07/31/free-speech-versus-public-health-the-role-of-social-media-part-one/ [https://perma.cc/UF7R-5ZCP] (discussing the case).
48. *See, e.g.*, Klonick, *supra* note 33, at 1621; Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1522 (2019).
49. Balkin, *Algorithmic Society*, *supra* note 31, at 1195 ("Because platform owners are private actors, constitutional law permits them to engage in content-based regulation that

due to a version of the "Brussels effect"[50]: European regulators put pressure on the companies to follow a more European-style approach in order to operate in the European Union while avoiding direct regulation.[51] In addition, operating outside of the United States, direct regulation such as the General Data Protection Regulation (GDPR)[52] or the Digital Services Act (DSA)[53] (or, in the past, national legislation such as Germany's Netzwerkdurchsetzungsgesetz (NetzDG))[54] may apply.

Nonetheless, the important takeaway is that U.S. social media companies continue to operate outside of the First Amendment's formal doctrinal framework. Yet, as the Eleventh Circuit emphasized in *NetChoice*, "this would be too obvious to mention if it weren't so often lost or obscured in political rhetoric—platforms are private enterprises, not governmental (or even quasi-governmental) entities."[55]

B. The Changing Political Landscape

In contemporary efforts to address speech on social media, weakening the state action doctrine is portrayed as a conservative project—in an ideological flip, as Professor Lakier explains[56]—although prohibitions of hate speech are deemed to be aligned with liberal interests.[57] This forms the political

would be prohibited under the First Amendment if they were treated as state actors."); Haupt, *supra* note 12, at 768–69.

50. *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD, at xiv (2020).

51. *See, e.g.*, Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018); Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27 (2019); Haupt, *supra* note 12, at 769 ("U.S. platforms are already engaging in speech regulation more closely aligned with the European model."); Daskal, *supra* note 34, at 1638. *See* ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY 324–26 (2023).

52. Council Regulation 2016/679, 2016 O.J. (L 119); *see* Meg Leta Jones & Margot E. Kaminski, *An American's Guide to the GDPR*, 98 DENV. L. REV. 93 (2020).

53. Commission Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC, 2022 O.J. (L 277); *see* Ioanna Tourkochoriti, *The Digital Services Act and the EU as the Global Regulator of the Internet*, 24 CHI. J. INT'L L. 129 (2023); *see also* Netanel, *supra* note 18, at 560–74 (discussing militant democracy and the DSA).

54. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, BUNDESGESETZBLATT, Teil I [BGBL I] at 3352; *see* Haupt, *supra* note 12, at 762–67; *see also* Claudia E. Haupt, *Curbing Hate Speech Online: Lessons from the German Network Enforcement Act (NetzDG)*, *in* OXFORD HANDBOOK OF HATE SPEECH (Eric Heinze, Natalie Alkiviadou, Tom Herrenberg, Sejal Parmar & Ioanna Tourkochoriti eds., forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4806195 [https://perma.cc/A5DC-75PL].

55. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1204 (11th Cir. 2022), *vacated and remanded*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

56. *See supra* notes 39–44 and accompanying text.

57. *See, e.g.*, Zakrzewski, *supra* note 4 (reporting that Democrats and civil rights groups supported California's AB 587); *see also* Netanel, *supra* note 18, at 520 n.138 ("Democrats typically want to require platforms to take greater responsibility for policing online content that harms individuals or society as a whole, while Republicans want to transform platforms into common carriers, with minimal prerogative to block third-party content on their sites.").

backdrop for the legislative activities described at the outset. Whereas Florida and Texas are primarily concerned with perceived censorship of conservative opinions on social media, California and New York are primarily concerned with hate speech and other abusive content.[58]

Although the Supreme Court maintains that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate,'"[59] the recent past has toppled assumptions about the value of speech in the United States. Once confined to discussions of hate speech directed at racial and other minority groups, which had been keenly aware of the harm in hate speech all along,[60] fairly mainstream cultural assumptions changed rapidly with the rise of social media.[61] Speech is no longer considered unequivocally "good."[62] As one recent survey of Americans' views on speech rights noted, "Americans agree that hate speech on social media is a problem."[63] Moreover, the realization that speech can be particularly harmful at the hands of bad-faith government actors—a lesson learned the hard way in Europe and elsewhere a century ago—finally came to the United States where confidence in democracy has eroded significantly in the recent past.[64] But whereas Nazi parades were deemed a necessary evil of free speech protection in the United States,[65] the European postwar consensus had determined that there are limits to democratic public discourse that require a policing of its boundaries.[66]

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58. *See supra* notes 4–11.

59. Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

60. *See generally* JEREMY WALDRON, THE HARM IN HATE SPEECH (2012).

61. *See, e.g.*, Andrew Marantz, *Free Speech Is Killing Us*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [https://perma.cc/3G27-X6F3] ("Sticks and stones and assault rifles could hurt us, but the internet was surely only a force for progress. No one believes that anymore.").

62. *See, e.g.*, Tim Wu, Opinion, *How Twitter Killed the First Amendment*, N.Y. TIMES (Oct. 27, 2017), https://www.nytimes.com/2017/10/27/opinion/twitter-first-amendment.html [https://perma.cc/N3MC-XXL6] ("Some might argue, based on the sophomoric premise that 'more speech is always better,' that the current state of chaos is what the First Amendment intended. But no defensible free-speech tradition accepts harassment and threats as speech, treats foreign propaganda campaigns as legitimate debate or thinks that social-media bots ought to enjoy constitutional protection. A robust and unfiltered debate is one thing; corruption of debate itself is another. We have entered a far more dangerous place for the republic; its defense requires stronger protections for what we once called the public sphere.").

63. KNIGHT FOUNDATION-IPSOS, *supra* note 36, at 29.

64. *See generally*, CASS R. SUNSTEIN, CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (2018); MARK A. GRABER, SANFORD LEVINSON & MARK TUSHNET, CONSTITUTIONAL DEMOCRACY IN CRISIS? (2018); STEVEN LEVISTSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); GINSBURG & HUQ, *supra* note 28.

65. *See* Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978). *But see* RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 151–53 (1997).

66. *See, e.g.*, Haupt, *supra* note 12, at 779 ("Considering certain speech outside the bounds of public discourse in order to protect democracy, however, is explicitly part of the constitutional framework elsewhere."). For a recent example of such discussions, see, for example, Kate Brady, *Over 1 Million Rally in Germany Against Rising Power of Far-Right Party*, WASH. POST (Jan. 22, 2024), https://www.washingtonpost.com/world/2024/01/22/germany-rally-afd-berlin/ [https://perma.cc/272H-NVVZ] ("[German] Interior Minister

Substantively, a range of speech ills allegedly plague online discourse with negative effects on democracy:[67] hate speech, dis- and misinformation (including a worrisome permutation of health misinformation by public officials,[68] medical professionals,[69] and private individuals[70] during the COVID-19 pandemic), and outright propaganda led to "epistemic distortion problems of truth suppression and misinformation."[71] Problematically, the core of the business model for online platforms is user engagement.[72] It is not the production of knowledge or truth.[73] So the more controversial the content is, the better the platform will be able to capture and hold users' attention. Whether the proliferated content causes harm, however, is not of interest to the platforms themselves.[74]

At the same time, in the United States, "for the past several years, conservatives have alleged that the dominant social media platforms have wielded their unchecked power in such a way as to censor, deprioritize, discriminate against, and ultimately deplatform conservative/right-wing viewpoints, speakers and content."[75] Following the insurrection of January

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Nancy Faeser said last week, however, that she doesn't 'rule out' a procedure to ban the AfD, even if the hurdles for this 'constitutional last resort' are high. Such a step would be the 'sharpest sword' available, Faeser told regional broadcaster SWR.").

67. *See, e.g.*, Robert Post, *Democracy and the Internet*, BALKINIZATION (Jan. 28, 2023, 9:30 AM), https://balkin.blogspot.com/2023/01/democracy-and-internet.html [https://perma.cc/5MK7-FDGC] (identifying "at least six major unique threats to democracy" that exist online but not in traditional mass media); Haupt, *supra* note 12, at 778 ("Unregulated online speech challenges democratic self-government in novel ways.").

68. *See, e.g.*, Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809, 1814.

69. *See, e.g.*, Claudia E. Haupt, *Pseudoprofessional Advice*, 103 B.U. L. REV. 775, 779 (2023).

70. *Id.* at 793; Wendy E. Parmet & Jeremy Paul, *COVID-19: The First Posttruth Pandemic*, 110 AM. J. PUB. HEALTH 945, 945 (2020).

71. Huq, *supra* note 18, at 1122; *see also* Netanel, *supra* note 18, at 491 ("Online platforms thrive on propagating emotionally inflammatory content that maximizes user engagement. Too often that entails amplifying disinformation, hate speech, online extremism, and deep-seated partisan animosity.").

72. *See* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 276–326 (2016) (discussing history of social media as advertising platforms).

73. Claudia E. Haupt, *Platforms as Trustees: Information Fiduciaries and the Value of Analogy*, 134 HARV. L. REV. F. 34, 36 (2020) (noting that "speech on platforms is not connected to a body of knowledge"). For a set of studies in collaboration with Meta using Facebook and Instagram data, see Huo Jingnan & Shannon Bond, *New Study Shows Just How Facebook's Algorithm Shapes Conservative and Liberal Bubbles*, NPR (July 27, 2023, 2:01 PM), https://www.npr.org/2023/07/27/1190383104 [https://perma.cc/F7G2-HLGD] (reporting on studies published in *Science*'s special issue from July 2023 and similar studies in Ronald E. Robertson, Jon Green, Damian J. Ruck, Katherine Ognyanova, Christo Wilson & David Lazer, *Users Choose to Engage with More Partisan News Than They Are Exposed to on Google Search*, 618 NATURE 342, 342–48 (2023)).

74. *See* Haupt, *supra* note 69, at 800–01. *See The Facebook Files*, WALL ST. J. (2021), https://www.wsj.com/articles/the-facebook-files-11631713039 [https://perma.cc/J9A7-JRVY] ("Facebook Inc. knows, in acute detail, that its platforms are riddled with flaws that cause harm, often in ways only the company fully understands.").

75. Nunziato, *supra* note 5, at 1262–69 (discussing instances of alleged anti-conservative bias); Bhagwat, *supra* note 5, at 128 (noting "long-standing complaints from political conservatives that 'Big Tech' had a liberal bias and unduly censored conservative speech on

6, 2021, then-Twitter's permanent suspension of the then-former president's @realDonaldTrump account[76] (later reversed under new ownership[77]) became the lynchpin of debate. Although some commentators deemed the deplatforming long overdue,[78] former President Trump himself sued Twitter and Facebook and their CEOs, claiming the platform had violated his First Amendment rights by deplatforming him.[79] Although this direct challenge of the state action doctrine failed, states undertook several attempts to enforce free speech protection of users against private companies.

In response to former President Trump's deplatforming, Florida became the first state to pass a law aimed at limiting social media platforms' ability to deplatform candidates for public office.[80] According to Florida Governor Ron DeSantis, platforms have "the power of . . . censorship over individuals and organizations, including what I believe is clear viewpoint discrimination."[81] This, he asserted, manifests in anti-conservative bias.[82] As Professor Clay Calvert recounts, on the day Governor DeSantis signed the law, "[a] sign affixed to the lectern from which he spoke that day read 'STOP Big Tech Censorship.'"[83] Professor Calvert further explains:

> Big Tech engages, as DeSantis put it, in "viewpoint discrimination." The use of that last term likely was strategic because viewpoint discrimination, when deployed by the government against private speech, is especially egregious and faces rigorous judicial review. . . . DeSantis thus suggested, *sub silentio*, that if the government may not engage in viewpoint discrimination, then surely the owners of powerful platforms from Silicon Valley . . . should not be able to do so either.[84]

This reasoning largely obscures the distinction between state actors and private actors. Though different from former President Trump's direct First Amendment claim against Twitter, the result is similar. The same is true for

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their platforms—a claim which, while lacking any empirical support, appears to be widely shared among conservatives").

76. X, *Permanent Suspension of @realDonaldTrump*, X BLOG (Jan. 8, 2021), https://blog.x.com/en_us/topics/company/2020/suspension [https://perma.cc/9GGE-TLBD].

77. Ryan Mac & Kellen Browning, *Elon Musk Reinstates Trump's Twitter Account*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/technology/trump-twitter-musk.html [https://perma.cc/F7L7-WEGA].

78. *See, e.g.*, Frank Pasquale, *The Bounds of Political Discourse: Why the Trump Bans Make Sense*, BALKINIZATION (Jan. 10, 2021), https://balkin.blogspot.com/2021/01/the-bounds-of-political-discourse.html [https://perma.cc/5SVJ-TNFM].

79. Calvert, *supra* note 14, at 393.

80. *Id.* at 390, 396 ("DeSantis also raised the issue of the deplatforming of Trump and tied Florida's legislation to it as a countermeasure.").

81. *Id.* at 394.

82. *See* NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1203, 1205 (11th Cir. 2022) (explaining that Florida "has enacted a first-of-its-kind law to combat what some of its proponents perceive to be a concerted effort by 'the 'big tech' oligarchs in Silicon Valley' to 'silenc[e]' 'conservative' speech in favor of a 'radical leftist' agenda"), *vacated and remanded*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024); *see also id.* at 1205 (quoting Governor DeSantis's signing statement that the law intended to combat the "'biased silencing' of 'our freedom of speech as conservatives . . . by the 'big tech' oligarchs in Silicon Valley.'").

83. Calvert, *supra* note 14, at 395.

84. *Id.* at 396–97.

the Texas law, though it functions in a slightly different way. As the U.S. Court of Appeals for the Fifth Circuit put it, "to generalize just a bit, [Florida's] SB 7072 prohibits all censorship of some speakers, however, [Texas's] HB 20 prohibits some censorship of all speakers."[85]

The Fifth Circuit upheld the Texas law as a regulation of a common carrier.[86] Here, too, the idea is to infuse a private entity with public responsibility, ultimately in order to enforce user rights of viewpoint neutrality as against the state.[87] Thus, despite the Fifth Circuit's assertion that "Florida's and Texas's laws are very different,"[88] they are similar in one important respect: by declaring platforms to be "common carriers," they seek to impose antidiscrimination rights of users against private platforms.[89] Concurring in the judgment in *Moody v. NetChoice, LLC*, Justice Alito encouraged the federal appeals courts to keep exploring the application of common carrier doctrine,[90] whereas the majority, via Justice Kagan, did not specifically address the doctrine's application to social media platforms.[91]

New York's "Hateful Conduct" law, by contrast, was enacted in the immediate aftermath of the 2022 Buffalo shooting, perpetrated and live streamed on Twitch by a white supremacist.[92] However, "the original iteration of the bill was drafted in the wake of the events of January 6, 2021."[93] The law requires a reporting mechanism for "hateful conduct" and disclosure of the platform's policy regarding such complaints.[94] Though "ostensibly . . . aimed at social media networks, it fundamentally implicates the speech of the networks' users by mandating a policy and mechanism by which users can complain about other users' protected speech."[95] A federal district court in New York granted a preliminary injunction, noting that the content-based law did not survive strict scrutiny review.[96] Importantly, the

85. NetChoice, LLC v. Paxton, 49 F.4th 439, 489 (5th Cir. 2022), *vacated and remanded*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024).

86. *Id.* at 493–94.

87. The same is true for Justice Thomas's view in *Biden v. Knight First Amendment Institute at Columbia University*. 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) ("Where, as here, private parties control the avenues for speech, our law has typically addressed concerns about stifled speech through other legal doctrines, which may have a secondary effect on the application of the First Amendment.").

88. *Paxton*, 49 F.4th at 488.

89. Scholars have argued extensively both sides of the common carrier issue. *See, e.g.*, Bhagwat, *supra* note 5, at 127 (arguing that platforms as a matter of doctrine are not common carriers and it would be normatively undesirable for them to be common carriers); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 377 (2021) (arguing that "common-carrier-like mandates would be constitutional"). The point for purposes of this Article is that the attempt to enforce private users' rights, particularly viewpoint and content neutrality, against private platforms via common carriage doctrine or by deeming them state actors structurally bears resemblance to the horizontal effect of fundamental rights.

90. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2438 (2024) (Alito, J., concurring).

91. *Id.* at 2393–409 (majority opinion).

92. Volokh v. James, 656 F. Supp. 3d 431, 436–37 (S.D.N.Y. 2023).

93. *Id.* at 444.

94. *Id.* at 437.

95. *Id.* at 445.

96. *Id.* at 445–46.

court emphasized the "profound chilling effect on social media users and their protected freedom of expression."[97] A federal district court in California, however, reached the opposite conclusion on similar issues, denying a preliminary injunction against that state's law.[98] The U.S. Court of Appeals for the Ninth Circuit reversed and remanded, and further litigation is likely.[99]

As noted earlier, all of these legislative approaches face serious First Amendment obstacles. But there is an increasing divergence in the understanding of "free speech" between the Supreme Court's interpretation of the First Amendment and its understanding by other constitutional actors. The understanding of state legislatures as illustrated by recent legislative proposals attributed to both the right and left of the political spectrum also diverges from court-articulated First Amendment doctrine. In light of these understandings of free speech, it is worth examining these proposals even though the current Court's interpretation differs. Moreover, popular understandings also do not track Supreme Court jurisprudence. Recent surveys reveal that it does not matter to respondents who "censors" speech, public or private entities.[100] And some kind of "civility" enforcement tends to be favored, counter to First Amendment doctrine.[101] Though these actors' understanding differs in relevant ways from current free speech doctrine, the popular constitutionalism literature counsels that it is worth taking seriously despite formal doctrinal obstacles.[102]

II. THE COMPONENTS OF DEMOCRATIC SELF-DEFENSE

Militant democracy has notoriously puzzled scholars of law and political science. The core theoretical paradox of a liberal democracy employing illiberal mechanisms against its enemies, risking the destruction of democracy itself in the process, persists.[103] Consider only Professor John Rawls who noted that men need not "stand idly by while others destroy the basis of their existence,"[104] yet, as political theorist Professor Jan-Werner Müller notes, "debating liberal democratic self-defense, [Rawls] essentially seemed to throw up his hands in the face of a 'practical dilemma which

97. *Id.* at 445.

98. X Corp. v. Bonta, No. 23-CV-1939, 2023 WL 8948286, at *3 (E.D. Cal. Dec. 28, 2023) (denying preliminary injunction).

99. X Corp. v. Bonta, 116 F.4th 888, 904 (9th Cir. 2024).

100. KNIGHT FOUNDATION-IPSOS, *supra* note 36, at 32–36.

101. *Id*. at 29; *see* Christopher St. Aubin & Jacob Liedke, *Most Americans Favor Restrictions on False Information, Violent Content Online*, PEW RSCH. CTR. (July 20, 2023), https://www.pewresearch.org/short-reads/2023/07/20/most-americans-favor-restrictions-on-false-information-violent-content-online/ [https://perma.cc/MY9Q-YS5A].

102. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

103. *See, e.g.*, Jan-Werner Müller, *Protecting Popular Self-Government from the People?: New Normative Perspectives on Militant Democracy*, 19 ANN. REV. POL. SCI. 249, 253 (2016).

104. JOHN RAWLS, A THEORY OF JUSTICE 218 (1971).

philosophy alone cannot resolve.'"[105] The normative challenge to justify antidemocratic measures, potentially excluding individuals and groups from public discourse and the democratic process, to protect democracy is substantial. But, as political scientist Professor Alexander Kirshner appropriately warns, "inquiries into the normative status of antidemocratic legislation shift our focus away from a critical reality: antidemocrats, not just antidemocratic laws, threaten democracy."[106]

Militant democracy mechanisms exist in numerous constitutional systems. Through the lens of modern German speech jurisprudence, this part reexamines the traditional concept of militant democracy and combines it with the horizontal effect of fundamental rights to design democratic self-defense. Though there are other countries that feature both militant democracy instruments[107] and horizontal effect doctrine,[108] the selection of Germany as a case study has several advantages. It is perhaps the most well-known example of a militant democracy,[109] with a constitutional jurisprudence reaching back to the immediate post–World War II period.[110] It is also typically invoked in domestic considerations of the topic.[111] Moreover, horizontal effect doctrine, though not uncontested in its precise scope and application, is firmly anchored in German constitutional doctrine and the Federal Constitutional Court is at the cutting edge of its application to social media.[112]

Although this part focuses on the specific context of social media, it forms the basis for later discussion beyond this context.[113] The key innovation courts and scholars must now grapple with is the expansion beyond the relationship between the individual and the state. The novel approach of democratic self-defense this Article proposes is responsive to these new challenges.

This part first examines the scope of militant democracy in German jurisprudence. It then turns to recent decisions regarding the horizontal effect of fundamental rights, focusing on two 2021 decisions by the Federal Court of Justice. So doing, it provides an empirical-analytic perspective on key questions of what it means to apply democratic self-defense to social media.

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105. *See, e.g.*, Jan-Werner Müller, *A "Practical Dilemma Which Philosophy Alone Cannot Resolve"?: Rethinking Militant Democracy: An Introduction*, 19 CONSTELLATIONS 536, 537 (2012) (quoting RAWLS, *supra* note 104, at 219).

106. KIRSHNER, *supra* note 28, at 4.

107. Müller, *supra* note 105, at 536 (citing the constitutions of France and Spain).

108. *See* Gardbaum, *supra* note 15, at 536 (mentioning Canada, the European Union, Germany, Ireland, and South Africa, as well as debates in the United Kingdom).

109. *See, e.g.*, Angela K. Bourne, *The Proscription of Political Parties and "Militant Democracy"*, 7 J. COMP. L. 196, 196 (2012) (identifying Germany as "the best known example of a so-called militant democracy"); *see also* Capoccia, *supra* note 20, at 213 (asserting that "perhaps no other democracy is based on as coherent a doctrine of militant democracy").

110. Müller, *supra* note 105, at 536 (noting that in Germany, "a doctrine of militant democracy was not just comprehensively developed by legal scholars, but also officially adopted by the Constitutional Court in the early 1950s").

111. *See supra* notes 16–18 and accompanying text.

112. *See* Haupt, *supra* note 19, at 4.

113. *See infra* Part III.

Most importantly, it illustrates the interplay of the constitutional decision to limit certain types of speech and the horizontal effect doctrine.

A. The Framework of Militant Democracy

Before this Article turns to discussing the constitutional mechanisms that characterize militant democracy, a word on terminology. Professor Loewenstein was the first to use the term "militant democracy" in the title of his seminal articles,[114] and it has subsequently been used as a term of art.[115] The German term, used by the Federal Constitutional Court, is "*streitbare Demokratie*,"[116] which translates to argumentative democracy. Another term frequently used in the German legal literature is "*wehrhafte Demokratie*"[117] that denoting a more defensive than offensive stance; democracy capable of defending itself rather than aggressively chasing down its enemies. Standard German law commentaries, too, struggle with finding the suitable moniker.[118] In short, "militant" might not be an ideal term, with a ring that is perhaps unnecessarily alarming to those unaware of its origin. Although "fortified democracy" might better capture its essence, this Article will nonetheless continue to use the traditional term of art reflecting the provenance of the concepts discussed in this Article.[119]

Crucially, though, theoretical difficulties are not solved by dictionary definitions. Scholarship in law and political science has developed rich critiques and defenses of Professor Loewenstein's work, and this Article will turn to this literature in Part III.[120] For now, this Article will roughly sketch Professor Loewenstein's influence on German constitutional jurisprudence in a straight line to provide the necessary background for current judicial decisions.

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114. Müller, *supra* note 105, at 536.

115. *Cf.* Huq, *supra* note 18, at 1111 (noting that "Lowenstein's [sic] label was quickly taken up by public intellectuals in the United States and Germany").

116. The Federal Constitutional Court first used this phrase in the Communist Party of Germany (KPD) ban judgment, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 17, 1956, 5 BVERFGE 85, 139, https://www.servat.unibe.ch/dfr/bv005085.html [https://perma.cc/4F5W-X4S3], and most recently affirmed it in this context in the NPD ban proceedings, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 17, 2017, 144 BVERFGE 20, 195–96, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/01/bs20170117_2bvb000113.html?nn=68020 [https://perma.cc/4F5W-X4S3].

117. *See, e.g.*, MARKUS THIEL, WEHRHAFTE DEMOKRATIE: BEITRÄGE ÜBER DIE REGELUNGEN ZUM SCHUTZE DER FREIHEITLICHEN DEMOKRATISCHEN GRUNDORDNUNG (MOHR SIEBECK 2003).

118. *See, e.g.*, DÜRIG/HERZOG/SCHOLZ, GRUNDGESETZ-KOMMENTAR, at Art. 18 n.10 (C.H. Beck Aug. 2024) (stating that the Basic Law has created a new type of democratic constitution for which we are still trying to find the right label). They focus on the generation of values that may not be infringed, providing the permission to "depoliticize" the enemies of democracy. *Id.*

119. Others have used the term "defensive democracy." *See* Müller, *supra* note 105, at 536; *see also infra* note 270 and accompanying text.

120. *See also* Huq, *supra* note 18, at 1112 n.32 (providing examples of literature).

In Professor Loewenstein's account, written in the interwar period, democracy set the stage for its own demise:

> Democracy and democratic tolerance have been used for their own destruction. Under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally. Calculating adroitly that democracy could not, without self-abnegation, deny to any body of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary participation, fascist exponents systematically discredit the democratic order and make it unworkable by paralyzing its functions until chaos reigns. They exploit the tolerant confidence of democratic ideology that in the long run truth is stronger than falsehood, that the spirit asserts itself against force. Democracy was unable to forbid the enemies of its very existence the use of democratic instrumentalities.[121]

And the foes of democracy were well aware that the democratic constitutional regime worked in their favor. Against the backdrop of the Weimar Constitution's collapse, though not its formal abolition,[122] "[t]he paradigmatic example was Germany, where Joseph Goebbels infamously gloated after the Nazis' legal 'seizure of power': 'it will always remain one of the best jokes of democracy that it provided its mortal enemies itself with the means through which it was annihilated.'"[123]

Professor Loewenstein surveyed a range of tools used to guard democracy against threats from communism and fascism. In addition to banning political parties and groups, these tools included "using emergency statutes to cripple threats once they materialized; proscribing private para-military groups, including party militias; preventing the abuse of parliamentary institutions by political extremists; bans on incitement and hate speech, including demonstrations whose only purpose was provocation; and

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121. Loewenstein, *supra* note 28, at 423–24.

122. *See, e.g.*, GINSBURG & HUQ, *supra* note 28, at 40 ("Indeed, it is worth emphasizing once more that in the German case, the Weimar Constitution was never abrogated; . . . . Even if the Weimar Constitution was 'good law' in some sense in March 1933, there is no question that the de facto constitutional system in operation in Germany had abruptly changed."); Fox & Nolte, *supra* note 21, at 11 ("A totalitarian regime thus came to power in Germany without clearly violating the strictures of a democratic constitution."). However, as Professor Müller notes:

> The Weimar Republic is, of course, considered exhibit A for a scenario of democratic self-destruction, but many invocations of the demise of the Republic in 1933 tend to leave out crucial details. In particular, it is often forgotten that no functioning democratic legislature authorized the effective end of self-government. The Reichstag that voted for the Enabling Law of March 1933 could not be considered as such.

Müller, *supra* note 103, at 252. On this point, see also KIRSHNER, *supra* note 28, at 1–2 ("Neither [the national] election nor the legislative vote immediately preceding the dissolution of the Weimar Republic met minimal standards of democratic legitimacy."). For a brief discussion of Weimar legislation aimed to protect democracy, see Müller, *supra* note 24, at 1257.

123. Müller, *supra* note 24, at 1254; Müller, *supra* note 105, at 536.

protecting the civil service and armed forces from infiltration."[124] In the subsequent constitution-making efforts of post–World War II Europe, many of these approaches featured prominently.[125]

Importantly for the discussion of social media, Professor Loewenstein noted that:

> Perhaps the thorniest problem of democratic states still upholding fundamental rights is that of curbing the freedom of public opinion, speech, and press in order to check the unlawful use thereof by revolutionary and subversive propaganda, when attack presents itself in the guise of lawful political criticism of existing institutions.[126]

In contrast to overt incitement, this type of speech "includes the more subtle weapons of vilifying, defaming, slandering, and last but not least, ridiculing the democratic state itself, its political institutions and leading personalities."[127] And interestingly, Professor Loewenstein lamented that "[a]pparently, nothing can be done against radio propaganda from foreign transmitters which, in dictatorial countries, are of course agencies of the government."[128] The modern example of foreign interference in domestic affairs on social media is all too familiar.[129]

In the Basic Law for the Federal Republic of Germany (*Grundgesetz*, GG or "Basic Law"), militant democracy is primarily anchored in Article 18 GG, that states that individuals who use certain enumerated rights to undermine democracy may forfeit these rights pursuant to a ruling by the Federal Constitutional Court,[130] and Article 20 GG, which states that Germans have the right to resistance against those who seek to undermine the democratic order.[131] However, thus far no applications under Article 18 have been

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124. Tom Ginsburg & Aziz Huq, *Democratic Erosion and Militant Democracy*, ICONNECT, BLOG OF THE INT'L J. OF CONST. L. (Oct. 18, 2018), https://www.iconnectblog.com/democratic-erosion-and-militant-democracy/ [https://perma.cc/N8H4-ZKQ2].

125. *Id.*

126. Loewenstein, *supra* note 28, at 652.

127. *Id.*

128. *Id.* at 656.

129. *See, e.g.*, 1 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019); *see also* Müller, *supra* note 24, at 1264 (discussing foreign control concerns during the Cold War).

130. Grundgesetz [GG] [Basic Law] art. 18, translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0103 [https://perma.cc/3KBP-TFDG].

> Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14) or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

Id.

131. GG art. 20.

> (1) The Federal Republic of Germany is a democratic and social federal state.

successful.[132] Moreover, antidemocratic political parties may be prohibited.[133] Pursuant to Article 21(2) GG, parties whose aim it is to abolish democracy are unconstitutional and may be prohibited, though only by the Federal Constitutional Court.[134] Finally, the "eternity clause" of Article 79(3) GG enshrines federalism and fundamental rights as unamendable.[135]

Political party bans are among the most prominent within the militant democracy canon of cases decided by the Federal Constitutional Court. In the 1950s, two parties from opposite sides of the political spectrum—the Socialist Reich Party (SRP) and the Communist Party of Germany (KPD)—were declared unconstitutional and ordered to dissolve.[136] An attempt to ban the right-wing National Democratic Party of Germany (NPD), however, failed in 2003.[137] In light of the far-right Alternative für Deutschland's (AfD) steep rise in the polls, current discussions surrounding its potential ban have picked up steam in Germany.[138] Party ban mechanisms exist in several countries, and arguably, "[m]ilitant democracy, at least in this form, has become the global norm and not the exception."[139]

But the scope of militant democracy measures—considered in light of Professor Loewenstein's theory rather than strictly interpreted German constitutional law doctrine—is more encompassing and typically also includes permissible limits on free speech, press and assembly.[140] Such

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> (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
>
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
>
> (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.

Id.

132. *See* Müller, *supra* note 103, at 257 ("There have been four applications to bring about what one might call the civic death of individuals; none of them has been successful."); *see also* Müller, *supra* note 24, at 1258 (suggesting that although the German Basic Law contains militant democracy measures against institutions and individuals, the provisions concerning "individualist militant democracy are now generally interpreted as fulfilling a mere symbolic function: they are a prominent political *warning* more than anything else").

133. Huq, *supra* note 18, at 1127 (noting that "the party ban has become the exemplary instrument of militant democracy"); *see also* DORSEN ET AL., *supra* note 28, at 1468–90; GINSBURG & HUQ, *supra* note 28, at 170 (both discussing political party bans as features of militant democracy in comparative perspective).

134. Haupt, *Democratic Public Discourse*, *supra* note 21, at 174–75 (explaining the mechanics of Article 21).

135. *See* GG art. 79(3). "(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." *Id.*

136. Haupt, *Democratic Public Discourse*, *supra* note 21, at 178.

137. *Id.* at 180.

138. *See* Brady, *supra* note 66.

139. Huq, *supra* note 18, at 1127; *see also* Fox & Nolte, *supra* note 21, at 37 (noting that "some form of party prohibition procedure is common to most democratic systems").

140. *See* DORSEN ET AL., *supra* note 28, at 1478–79 (discussing the range of provisions understood as part of "militant democracy"). For a critique of "concept stretching," see, for

limits are deemed necessary to ensure the citizens' ability to equally participate in democratic public discourse.[141] Thus, "[r]estrictions on hate speech of various forms are much broader and are found in many democracies today as a result of Professor Loewenstein's influence and other factors."[142] Illustrating such a broader understanding, this Article has suggested elsewhere that NetzDG, implementing German criminal prohibitions on certain kinds of speech that previously existed for offline speech to also apply to speech online, might even be a type of intervention necessary on a militant democracy reasoning.[143] The central purpose behind NetzDG (even if the law itself is imperfect) was to protect democratic participation and self-governance by enforcing protections against online threats and online harassment: "The focus of this regime is on the role of participants in democratic public discourse, rather than the acontextual, reflexive protection of speech."[144] Thus, "this type of law is of a piece with the larger approach to protect democratic public discourse and defend democracy itself."[145]

As the following discussion of modern German speech jurisprudence involving social media demonstrates, militant democracy principles are a part of the constitutional frame for speech values.[146] The scope of protected free speech in Germany thus does not include hate speech.[147] But neither the Federal Constitutional Court in its decision concerning a right-wing party's ban from social media[148] nor the Federal Court of Justice in its most recent landmark decisions reversing Facebook's bans of xenophobic and Islamophobic speech[149] explicitly invoke militant democracy. The reason for this absence ties back to the juxtaposition of Professor Loewenstein's theory and strict German constitutional doctrine just discussed.[150]

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example, Bourne, *supra* note 109, at 197 (noting that "its meaning has tended to expand from a narrow focus on fascist and communist parties using democratic entitlements to gain control of the State into shorthand for a much wider range of measures employed against all kinds of extremist threats"). Similarly, Professor Müller emphasizes the differences between terrorism and nonviolent threats to democracy, where the former is an ill fit for militant democracy responses. Müller, *supra* note 103, at 250; Müller, *supra* note 24, at 1256.

141. Haupt, *Democratic Public Discourse*, *supra* note 21, at 204–05; Haupt, *supra* note 12, at 779.

142. GINSBURG & HUQ, *supra* note 28, at 170; *see also* Netanel, *supra* note 18, at 550 ("Applying principles of militant democracy, democratic countries also commonly prohibit speech that foments racial, ethnic, or national hatred, as well as hate speech that targets individuals based on their gender, religious belief, or sexual orientation. In addition, Germany and other countries criminalize Holocaust denial as a form of hate speech.").

143. *See* Haupt, *supra* note 12, at 770, 779.

144. *Id.* at 778.

145. *Id.* at 780.

146. *Id.* at 753.

147. Pursuant to the limitations clause of Article 5(2), the fundamental right may be limited. Such limits are found for example in various criminal code provisions. NetzDG in turn enforces these existing provisions online. *See* Haupt, *supra* note 12, at 761.

148. *See infra* notes 177–85 and accompanying text.

149. *See infra* notes 186–250 and accompanying text.

150. *See supra* note 140 and accompanying text.

Whereas Professor Loewenstein discusses limits on free speech in his treatment of militant democracy, the Federal Constitutional Court's interpretation of the Basic Law's provisions is narrower. Strictly understood, then, only the provisions outlined earlier are part of the doctrine of militant democracy. Limitations on speech, such as hate speech, are doctrinally anchored in the limitations clause of Article 5(2) itself—which as general laws includes the criminal code provisions also replicated in NetzDG—or such speech falls outside the coverage of Article 5 altogether, as is the case with Holocaust denial.[151] This leads to an analysis that does not directly include militant democracy.

Despite the seeming doctrinal strictness, however, there is some slippage. For example, discussing the party ban provision of Article 21(2), Professor Winfried Brugger notes:

> This concept is based on the possibility that freedom of any kind, even constitutional freedom of expression, could be abused for the purpose of abolishing freedom. The framers of the Basic Law wanted to prevent that from recurring in Germany by enabling government to protect the foundations of the political order. This makes the German polity a "militant democracy."[152]

The proximity of the concept of militant democracy and the permissibility of limiting speech is evident and may fairly be captured by democratic self-defense past the doctrinal strictures. Beyond social media, Professors Ginsburg and Huq have suggested that "our comparative constitutional imagination has not moved on enough since Loewenstein's time."[153] The remainder of this Article, then, is an effort to contribute to a more advanced understanding by offering democratic self-defense as a broader theoretical alternative to a strict doctrinal understanding of militant democracy.

B. New Developments in Horizontal Effect Doctrine

In the United States, as in other constitutional systems, "the protection of speech applies only where it is imperiled by the state."[154] But whereas protecting private speech against government restrictions is the fundamental

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151. Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 GERMAN L.J. 1, 12–14 (2003). For a classic exposition of the distinction between coverage and protection in the First Amendment context, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

152. Brugger, *supra* note 151, at 5–6 ("[This] distinguishes [militant democracy] from the relativistic concept of democracy tolerating the expropriation and suppression of minorities by majorities espoused by U.S. Supreme Court Justice Oliver Wendell Holmes. Justice Holmes said, 'If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they be given their chance and have their way.' Following the events of the Second World War, eminent German legal thinkers crafting the Basic Law saw no such virtue in unrestrained 'proletarian dictatorships.'" (quoting Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting))).

153. Ginsburg & Huq, *supra* note 124.

154. DORSEN ET AL., *supra* note 28, at 1052.

concern of the First Amendment, German constitutional doctrine allows for fundamental rights to apply among private parties. Indeed, "[a]ll private law in Germany is directly subject to the constitutional rights contained in the Basic Law."[155] As the Federal Constitutional Court acknowledged, in assessing free speech interests, there is "another dimension of the problem: the free speech rights of the speaker competing against the individual rights of other actors."[156] As Professor Stephen Gardbaum explains, "[i]n essence, this doctrine holds that although constitutional rights bind only governmental organs, they apply directly to all private law and so have indirect effect on private actors whose legal relationships are regulated by that law."[157]

The roots of the German approach reach into the Weimar Constitution that contained a provision for the direct application of the fundamental right to free speech in the employment context as between employer and employee.[158] Similarly, several existing state constitutions in the German *Länder* contain such provisions.[159] A 1954 decision of the Federal Labour Court adopted this doctrine after the Basic Law took effect.[160] But subsequently, the *direct* horizontal effect approach was largely rejected by judges and scholars, and the Federal Constitutional Court instead adopted a doctrine of *indirect* horizontal effect.[161]

Although its precise contours remain debated,[162] the doctrine of indirect horizontal effect is now firmly anchored in German constitutional law. The following discussion will sketch the Federal Constitutional Court's development of the doctrine before turning to its application in two cases involving social media platforms decided by the Federal Court of Justice.[163]

In the seminal 1958 *Lüth* decision, the Federal Constitutional Court held that the fundamental right of freedom of expression can reach into private law: "The solution in *Lüth* was that the Basic Law has a third-party effect (*Drittwirkung*); Lüth's speech rights were taken into consideration in his private relations."[164] The Court held that the Basic Law not only contains

155. Gardbaum, *supra* note 15, at 402.

156. DORSEN ET AL., *supra* note 28, at 1054 (also noting parallel concerns in South African constitutional jurisprudence); *see also* Gardbaum, *supra* note 15, at 395–411 (discussing Canada, Germany, Ireland, South Africa, and the United Kingdom); Tushnet, *supra* note 22, at 81–84 (discussing Canada, Czech Republic, Germany, and South Africa).

157. *See* Gardbaum, *supra* note 15, at 403.

158. *See* AMÉLIE HELDT, INTENSIVERE DRITTWIRKUNG 11 (2023).

159. *See id.*

160. *See* Basil Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47, 49–50 (1999).

161. *See* HELDT, *supra* note 158, at 13.

162. *See id.* at 20–25.

163. A caveat: since the DSA has taken effect in 2024, the continued relevance of the German Federal Court of Justice decisions regarding horizontal effect has become somewhat less clear. *See, e.g.*, Thomas Wischmeyer & Peter Meißner, *Horizontalwirkung der Uniongrundsrechte – Folgen für den Digital Services Act*, 76 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2673 (2023). Though horizontal effect in general is recognized by the European Court of Justice, there are (to date) no decisions precisely on point with respect to social media and free speech. Nonetheless, for purposes of this Article, the decisions are relevant as illustrating the constitutional mechanism of horizontal effect.

164. DORSEN ET AL., *supra* note 28, at 1053–54.

negative rights to shield individual liberties from the government, but it also establishes an objective value order (*objektive Werteordnung*) capable of reaching into private law.[165] In this hierarchy of values established by the Basic Law:

> [T]he constitution's objective values "reinforce the effective power of these rights," extending their reach indirectly into the domain of private law, affecting the relations between private parties. The indirect reach of constitutional rights into private law . . . means that fundamental rights, as the Court occasionally puts it, have a "radiating effect" upon private law, requiring the latter to be interpreted in conformity with the former.[166]

Thus, constitutional law guides the interpretation of private law.

Since this foundational decision, the Federal Constitutional Court has continued to advance the horizontal effect doctrine. Perhaps the most relevant modern development in this context is the 2011 *Fraport* decision, a case involving a ban on expressions of opinion and protest at Frankfurt am Main Airport without the private airport operator's permission.[167] The lower courts rejected a challenge brought by a group of individuals who sought to protest deportations and hand out flyers inside the airport terminal, concluding that the private airport operator was not directly bound by fundamental rights, nor did it matter that the majority of the airport's ownership shares were held by public entities.[168] But the Federal Constitutional Court disagreed, holding that the fundamental rights to freedom of expression and assembly did apply in the relationship between private individuals and the airport, and that the airport had violated both.[169] The Federal Constitutional Court noted that "[t]he direct binding force of the fundamental rights does not only apply to enterprises which are completely in public ownership, but also to enterprises owned both by private shareholders and the state over which the state has a controlling influence."[170]

However, state control is not the end of the story when it comes to the application of fundamental rights. After distinguishing "the direct binding force of the fundamental rights on publicly controlled enterprises" from the "generally indirect binding force of the fundamental rights," the Federal Constitutional Court further explained:

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165. KOMMERS & MILLER, *supra* note 28, at 60–61.

166. *Id.*

167. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 22, 2011, 128 BVerfG 226, para. 1, http://www.bverfg.de/e/rs20110222_1bvr069906en.html [https://perma.cc/5CF6-EC2Q].

168. *Id.* at paras. 11–12.

169. *Id.* at paras. 44–45.

170. *Id.* at para. 49. This also mirrors the jurisprudence of the Federal Administrative Court which advised in the proceedings "that under its case-law . . . a private enterprise controlled by the state is directly bound by the fundamental rights." *Id.* at para. 26. The dissenting opinion would have emphasized the collaboration of the public shareholders who otherwise only control a minority of shares. *Id.* at para. 113.

> Depending on the content of the guarantee and the circumstances of the case, the indirect binding force of the fundamental rights on private persons may instead come closer to or even be the same as the binding force of the fundamental rights on the state. This is relevant to the protection of communications, in particular when private enterprises themselves take over the provision of public communications and thus assume functions which were previously allocated to the state as part of its services of general interest—such as the provision of postal and telecommunications services. To what extent this also applies today in relation to freedom of assembly and freedom of expression in relation to private enterprises that establish space for public traffic and thus create places of general communication does not need to be decided here.[171]

In short, the opinion raised, but left for another day, the crucial question of whether private communication platforms are bound by the fundamental rights in their interactions with users.

Additionally, the third chamber of the First Senate of the Federal Constitutional Court addressed horizontal effects in a 2015 order granting an injunction to individuals challenging a prohibition to assemble on a privately-owned city square, seeking to protest the increasing role of private surveillance in public spaces.[172] The chamber granted an injunction, permitting the event to occur because the owners' prohibition violated the fundamental right to freedom of assembly. Where publicly accessible spaces, though privately owned, are intended for public use, private parties are indirectly bound by the fundamental rights.[173]

Moreover, an order of the First Senate of the Federal Constitutional Court in 2018 denied the challenge brought by a soccer fan who, following violent altercations in connection with a match he had attended, was barred from entering soccer stadiums throughout Germany.[174] The order determined that the lower courts and the Federal Court of Justice had appropriately considered the horizontal effect of fundamental rights in their decisions.[175] In so doing, the Federal Constitutional Court helpfully summarized horizontal effects doctrine as follows:

> Fundamental rights do not generally create direct obligations between private actors. They do, however, permeate legal relationships under private law; it is thus incumbent upon the regular courts to give effect to fundamental rights in the interpretation of ordinary law, in particular by means of general clauses contained in private law provisions and legal concepts that are not precisely defined in statutory law. These effects are rooted in the decisions on constitutional values (*verfassungsrechtliche*

171. *Id.* at para. 59.

172. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2015, 139 BVerfG 378, https://www.bverfg.de/e/qk20150718_1bvq002515 [https://perma.cc/4ZZW-QAM9].

173. *Id.* at para. 5.

174. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 11, 2018, 148 BVerfG 217, https://www.bverfg.de/e/rs20180411_1bvr308009en [https://perma.cc/WP9D-KC2U].

175. *Id.* at paras. 30–31.

> *Wertentscheidungen*) enshrined in fundamental rights, which permeate private law in terms of "guiding principles" . . .; accordingly, the case-law of the Federal Constitutional Court has referred to the fundamental rights as an "objective order of constitutional values" . . . . In this context, the fundamental rights do not serve the purpose of consistently keeping freedom-restricting interferences to a minimum; rather, they are to be developed as fundamental values informing the balancing of freedoms of equally entitled rights holders. The freedom afforded one right holder must be reconciled with the freedom afforded another. For this purpose, it is necessary to assess conflicting fundamental rights positions in terms of how they interact, and to strike a balance in accordance with the principle of practical concordance (*praktische Konkordanz*), which requires that the fundamental rights of all persons concerned be given effect to the broadest possible extent. . . .
>
> In this regard, the extent to which fundamental rights indirectly permeate private law depends on the circumstances of the individual case. In order to sufficiently lend effect to the constitutional values enshrined in fundamental rights, it is imperative that a balance be sought between the spheres of freedom of the various rights holders. Decisive factors may include the inevitable consequences resulting from certain situations, the disparity between opposing parties, the importance attached to certain services in society, or the social position of power held by one of the parties.[176]

The Federal Constitutional Court finally applied this framework to social media when it issued a preliminary injunction requiring Facebook to reverse the deplatforming of a neo-Nazi political group, "Der III. Weg," for posting hate speech in violation of the platform's community standards in 2019.[177] Facebook prevailed in the lower courts, but the Federal Constitutional Court ordered a preliminary reinstatement of the group's account, though it rejected the request for restoring the deleted post itself.[178] In issuing its preliminary injunction, the Federal Constitutional Court observed that the challenged decision arose out of a dispute among private parties regarding the power of a social media platform with considerable market strength over its users.[179] According to the permanent jurisprudence of the Federal Constitutional Court, the decision noted, fundamental rights can develop horizontal effects in such constellations.[180] Moreover, there may also be equal protection implications for the relationship between private parties.[181] But, echoing the *Fraport* decision, whether and to what extent legal consequences follow for online social media platforms remains unclear.[182] The Court enumerated

176. *Id.* at para. 32 (citations omitted).

177. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvQ 42/19, May 22, 2019, http://www.bverfg.de/e/qk20190522_1bvq004219.html [https://perma.cc/P6LM-NE8Q].

178. *Id.* at paras. 5–10.

179. *Id.* at paras. 13–25.

180. *Id.* at para. 15.

181. *Id.*

182. *Id.*

potential factors, such as the platform's dominant market position, its direction and the degree to which a user depends on using this specific platform to reach their audience, and the interests of the platforms and other third parties.[183] Neither the civil courts nor the Federal Constitutional Court, however, have determined these legal consequences in detail. Thus, the precise constitutional obligations of social media platforms in relation to their users are as yet undecided.[184] Rather than in preliminary injunction proceedings, though, these difficult questions ought to be decided subsequently on the merits.[185] Inching toward a final word resolving the issue of horizontal effect doctrine on social media platforms, the Federal Constitutional Court has thus provided a rough constitutional framework in the process.

C. Applying the Components to Online Speech

The Federal Court of Justice, Germany's highest court in civil and criminal matters, applied this constitutional framework in two landmark decisions issued in 2021 in which Facebook users challenged their respective deplatformings.[186] These two decisions—which aside from procedural issues largely engage in the same merits analysis—squarely address the horizontal effect of fundamental rights in social media platforms' content moderation decisions.[187] In these cases, Facebook removed xenophobic and Islamophobic posts that violated hate speech prohibitions in its community standards.[188] The court ordered Facebook to restore the deleted posts, and in one of the cases, reinstate the user's account because the terms of service did not explicitly contain provisions for the takedown of posts and removal of accounts.[189] The court's opinions instructively illustrate horizontal effect analysis within the constitutional framework articulated by the Federal Constitutional Court.[190]

In both cases, Facebook removed posts that violated hate speech prohibitions in the terms of service and community standards, prompting judicial analysis of horizontal effect doctrine in contract law.[191] In the first case, a user sued Facebook for removing an Islamophobic post as hate speech in violation of its terms of service and community standards, and temporarily suspending the user's account.[192] The lower courts ruled in favor of the platform, which contended that, as a private company, it may limit the

183. *Id.*
184. *Id.* at para. 15.
185. *Id.* at para. 17.
186. *See* Bundesgerichtshof [BGH] [Federal Court of Justice], III ZR 179/20, July 29, 2021, juris (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], July 29, 2021, III ZR 192/20, juris (Ger.).
187. *See* BGH, III ZR 179/20; BGH, III ZR 192/20.
188. *See* BGH, III ZR 179/20; BGH, III ZR 192/20.
189. *See* BGH, III ZR 179/20; BGH, III ZR 192/20.
190. *See* BGH, III ZR 179/20; BGH, III ZR 192/20.
191. *See* BGH, III ZR 179/20; BGH, III ZR 192/20.
192. BGH, III ZR 179/20, at paras. 5–7.

content of posts to protect other users.[193] The interest in posting does not supersede the platform's interest in maintaining civilized discussion.[194] In the second case, a user who shared a xenophobic post was relegated into "read only" mode for three days, and the post was deleted.[195] The court ordered the deleted post to be reinstated.[196] Because the analysis on the merits is largely the same in both cases, this Article will use the first case to illustrate the court's reasoning in detail.

The Federal Court of Justice held that the user has a claim based on breach of contract to reinstatement of the removed post.[197] Moreover, it enjoined the platform from suspending the account for posting the same content in the future.[198] Examining the contractual relationship between the platform and the user, the court determined that the terms of service and community standards were appropriately incorporated.[199] Turning to the prohibition of hate speech in the community standards, the court noted that the fundamental right to freedom of expression is implicated.[200] Citing the *Lüth* decision, the court explained that the fundamental right's indirect effect reaches into private law.[201] In this case, the opening for fundamental rights to enter private contractual relations is found in the provisions of the Civil Code (*Bürgerliches Gesetzbuch, BGB*) governing standard form contracts.[202]

The extent to which social media platforms are bound by the fundamental right to freedom of expression in their content moderation decisions, the court noted, is debated.[203] One group of lower courts and scholars maintains that the horizontal effect of freedom of expression prohibits platforms from imposing more stringent restrictions on speech in their terms of service than the law demands.[204] In other words, only defamatory or criminal content may be prohibited via terms of service.[205] By contrast, another group of lower courts and scholars contends that private platforms' hate speech prohibitions may go beyond criminally prohibited or otherwise illegal speech.[206] Content removal decisions, however, must respect the user's fundamental rights and be individually justified.[207]

193. *Id.*
194. *Id.* at paras. 9–14.
195. BGH, III ZR 192/20, at 2–3.
196. *Id.*
197. BGH, III ZR 179/20, at 17.
198. *Id.*
199. *Id.* at 19–26.
200. *Id.* at 28–29.
201. *Id.* at 29.
202. Specifically, section 307(1)(1) BGB states that "[p]rovisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user." Bürgerliches Gesetzbuch [BGB] [German Civil Code], § 307(a)(1), translation available at https://www.gesetze-im-internet.de/englisch_bgb/ [https://perma.cc/8SEZ-RMEQ].
203. III ZR 179/20, at 30.
204. *Id.* (citations omitted).
205. *Id.*
206. *Id.* at 30–31 (citations omitted).
207. *Id.*

The Federal Court of Justice endorsed the latter position.[208] As a private actor, unlike the state, Facebook is not directly bound by the fundamental rights.[209] Nor is Facebook bound in analogy to a state actor due to its dominant position among social media platforms as its power is not equal to earlier state monopolies for public utilities. The platform does not provide necessary services for public communication, such as ensuring telecommunication services, which would have put it in the position of being bound like the state.[210] Though it does provide an important channel of online communication, it does not control access to the internet as such.[211] Rather, unlike the state, Facebook itself can invoke fundamental rights to be balanced with user rights in a manner that ensures, under the principle of "practical concordance" articulated by the Federal Constitutional Court,[212] the maximum amount of protection for each side.[213] Thus, the question of whether the terms of service and community standards pass muster depends on a balancing of the platform's and the user's fundamental rights.[214] As a part of this balancing, third party interests may also be included. Finally, the platform's interest in avoiding liability receives consideration.[215]

The user's freedom of expression and the equality principle are implicated.[216] The platform's business decision was to open a social network to the general public to facilitate users' freedom of expression.[217] In light of the number of users in Germany (thirty-one million users in 2017 and thirty-two million in 2019), the court concluded that the network is an important communications platform enabling broad participation in social life.[218] Noting especially the network's importance for younger users, the court stated that excluding these users from the platform effectively limits or shuts down their participation in public discussion.[219] Other available platforms do not cure the problem because not everyone is on every platform, and switching platforms potentially results in the loss of previous contacts.[220] This "lock-in-effect" combined with the large market share and the far reach of the network means that Facebook has considerable market and social power.[221]

Facebook may claim fundamental rights applying to domestic corporations, namely the freedom to engage in a profession and freedom of

208. *Id.* at 31.
209. *Id.*
210. *Id.*
211. *Id.* at 31–32.
212. *See supra* note 176 and accompanying text.
213. BGH, III ZR 179/20, at 32.
214. *Id.* at 32.
215. *Id.*
216. *Id.* at 32–33.
217. *Id.* at 34–35.
218. *Id.* at 35.
219. *Id.*
220. *Id.* at 35–36.
221. *Id.* at 36.

expression.[222] The former includes the freedom to decide the conditions of market activity, that is, the decision to offer a social media platform allowing communication and exchange of ideas in a safe environment.[223] In light of its financing via advertising revenue, the value of the network as an advertising platform hinges on extensive user engagement. The platform's business interest thus is to create an attractive communications and advertising environment for users and advertisers in order to continue selling user data to advertisers which would be undermined by an uncivil tone on the platform, deterring both users and advertisers.[224] In order to maintain an attractive environment, the community standards, including the prohibition of hate speech, are designed to ensure the success of the business model.[225]

Although the platform does not primarily communicate its own messages, the communications process itself is subject to fundamental rights protection such that the platform neither must communicate its own message nor adopt the user's message as its own to claim freedom of expression.[226] Facilitating communication among strangers, the platform is an indispensable intermediary that is sufficient to fall within the scope of freedom of speech.[227] In contrast to the purely technical dissemination of others' messages, platforms set the parameters of engagement on the site in the community standards.[228] The platform itself is exercising its right to free expression by determining which messages are acceptable, and the removal of certain user messages in the course of enforcing community standards constitutes the platform's own expression.[229]

Beyond its own fundamental rights, the platform also protects the interests of other users by maintaining certain communication standards, and these third-party interests are also relevant to weighing the parties' interests.[230]

Finally, the platform has an interest in avoiding liability for the speech it hosts.[231] To avoid criminal or civil liability or liability under NetzDG, the platform must act as soon as it acquires knowledge of illegal content.[232] However, the court acknowledges that determining whether content is illegal often requires complex factual or legal examination.[233] Especially violations of the criminal code such as defamation or hate speech, which also are illegal under NetzDG, demand the balancing of competing (fundamental) rights. Consequently, the platform must decide whether to take down the content

222. *Id.* at 36–37.
223. *Id.* at 38.
224. *Id.*
225. *Id.* at 38–39.
226. *Id.* at 39.
227. *Id.*
228. *Id.* at 39–40.
229. *Id.* at 40.
230. *Id.*
231. *Id.*
232. *Id.* at 41.
233. *Id.*

and possibly breach its obligations to the user or leave content in place at the risk of incurring liability.[234]

In weighing these fundamental rights, the court determined that the platform may set communications standards in its form terms and conditions that go beyond criminal liability.[235] It may enforce these standards by removing the content and (temporarily) suspending user accounts to protect the platform's freedom to engage in its business pursuant to its own decisions.[236] This includes the decision to prohibit aggressive speech such as hate speech in the interest of market success and to protect the interests of other users in a respectful speech environment and its protection of their rights.[237] If only the petitioners' interests were part of the balancing, this would result in incorrectly treating the platform like a state actor without the ability to claim its own fundamental rights.[238]

The court also noted that allowing the platform to reserve the right to remove content that is not criminal in nature mitigates the dilemma of deciding between deleting content or leaving up content that potentially results in criminal liability.[239]

At the same time, the platform must respect users' free expression and equality rights in order to ensure their maximum protection alongside its own fundamental rights.[240] This results in several requirements. First, there must be a factual reason for removing content; the platform may not arbitrarily remove content.[241] The platform may not discriminate among different political opinions, and it must ensure that its decisions are tied to objective factors rather than subjective concerns.[242] Second, there must be certain procedural standards. Platforms must engage in reasonable investigation of the factual circumstances, including an opportunity to be heard.[243] Though private law governs the relationship between platforms and users, the fundamental right to equality finds entry into the relationship and nonperformance under the contract must be justified. Procedural protections, including the right to be heard, are required to effectively protect fundamental rights.[244] Thus, in order to reconcile the competing fundamental rights positions, the platform must include its own obligation in the terms of service to immediately inform the user of content removal and of an imminent suspension of their account, give reasons for doing so, and provide an opportunity to be heard which can lead to a reassessment and the possibility of reinstating the removed content.[245] At the same time, the

234. *Id.* at 41–42.
235. *Id.* at 42.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 43.
240. *Id.*
241. *Id.*
242. *Id.* at 44.
243. *Id.* at 44–45.
244. *Id.* at 45.
245. *Id.* at 46.

platform must ensure that the content is not permanently deleted before the procedure is completed.[246] As between content removal and account suspension, the latter is the more consequential such that the user must be heard prior to suspension.[247] By contrast, an opportunity to be heard is not necessary prior to content removal, both because the platform has a strong interest in avoiding liability and because with each day that illegal content is available, it is more likely to be distributed, which perpetuates the illegality.[248]

The obligation to provide users in the terms of service with a right to notice, reasons, and the opportunity to be heard associated with a renewed decision is purely reactive, thus it does not result in economic hardship or make running a platform disproportionately difficult.[249]

In the end, the court held that a platform must stipulate in its terms and conditions that it will inform a user of the removal of content immediately after the fact and of an imminent suspension of the account prior to the suspension.[250]

III. OPERATIONALIZING DEMOCRATIC SELF-DEFENSE

This part provides a framework for operationalizing democratic self-defense. It first explains why it is necessary to combine militant democracy and horizontal effect doctrine. The indispensable theoretical interplay is particularly evident in the social media context where private actors replace the state as the regulator. The theoretical treatment of militant democracy in law and political science yields a range of difficulties which may be ameliorated by robust enforcement of constitutional rights against the state. In the paradigmatic example of political party bans, the hurdles set by the constitutional process are high. The expansion of the concept into hate speech prohibitions, a key concern of democratic self-defense, must respect countervailing constitutional free speech interests. The German Federal Constitutional Court has insisted on this point (even more so than lower courts).[251] But this constitutional mechanism only works in response to state interventions. Where private platforms moderate content, fundamental rights enforcement depends on the ability to enforce them against private entities. That makes horizontal effect doctrine necessary. And even in a system that recognizes horizontal effect, notably, one of the contested questions in which the Federal Court of Justice intervened was whether platforms may go further in their content moderation decisions than the criminal law requires.[252]

This part then unpacks lessons from combining militant democracy and horizontal effect of fundamental rights from the domestic free speech

246. *Id.*
247. *Id.* at 47.
248. *Id.* at 48.
249. *Id.* at 49.
250. *Id.* at 1.
251. Haupt, *Democratic Public Discourse*, *supra* note 21, at 181–91.
252. *See supra* notes 203–07 and accompanying text.

perspective. Though scholars have suggested that operationalizing militant democracy is possible, this discussion adds the fundamental rights enforcement dimension via horizontal effect doctrine, which so far remained underdeveloped, and the necessary link between them largely ignored in contemporary debates.

A. Theoretical Lessons

This section first revisits the scholarly debate surrounding militant democracy. Beyond invoking its potential utility in social media regulation, this review highlights the theoretical problems of the constitutional concept. The upshot is that militant democracy by itself is a problematic concept that must grapple with its own arguably illiberal stance. In addition, its application to social media requires accounting for private actors. Two additional questions this Article introduces and investigates beyond those raised in the incipient literature on the topic are, first, how can the state conscript private companies into militant democracy's service? And second, how can individuals assert their fundamental rights against private platforms so deputized? Identifying the threatening actor and the nature of the threat refocuses the inquiry around the changed social relationships in the social media environment.

This section then turns to horizontal effects doctrine and explains why it, too, is by itself a problematic proposition. The constitutional mechanism particularly with respect to free speech is deeply connected to the ability to limit fundamental rights. Where such limits are elusive, such as in U.S. free speech doctrine where content and viewpoint restrictions are presumptively unconstitutional, any regulatory use would necessarily run into constitutional trouble. But where limits on speech may be constitutionally imposed, horizontal effect doctrine can effectively bind private actors.

As already alluded to with respect to the absence of a formal doctrinal discussion of militant democracy in the German social media cases, a narrow understanding would place the emphasis on the availability of constitutional limits to free speech.[253] Where the general laws may limit speech, as Article 5(2) permits,[254] the criminal law provisions against defamation or incitement to hatred (also replicated in NetzDG) can limit speech. The reason German judicial decisions can do this with a narrow definition of militant democracy is that a limitations clause by itself doctrinally does all the work. In fact, German audiences who share the judicially adopted narrow view might find it strange to invoke militant democracy in these cases at all—and the social media cases do not. However, a more robust view of democratic self-defense does not rely on the limitations clauses themselves, but rather emphasizes the democracy-preserving function of limiting free speech. Thus, the lessons of militant democracy may be useful for systems that do not directly impose formal doctrinal limits on free speech, as is the case in

253. *See supra* notes 151–53 and accompanying text.
254. *See supra* note 151 and accompanying text.

the United States under current interpretations of the First Amendment requiring content and viewpoint neutrality.

1. Militant Democracy

Militant democracy has generated ample scholarly reflection, and debates tend to revolve around a set of key questions. Against whom is militant democracy directed?[255] What exactly does militant democracy protect? How is militant democracy justified, and, relatedly, how is protection achieved without itself threatening democracy? Which constitutional actors enforce militant democracy mechanisms?[256]

Democracy, of course, is a contested term: "How to define 'democracy' has remained one of the fundamental questions of political theory, engaging statesmen and philosophers in debate since ancient times."[257] Professor Loewenstein was writing against fascism. He noted, "[d]emocracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press."[258] Modern scholars are deeply divided about the meaning of democracy. Professor Müller posits: "Whether democracy should ever become militant will of course depend significantly on what one thinks democracy is in the first place. At the same time, an informed view on the general desirability of militant democracy should not hinge on accepting some highly particular version of democratic theory."[259] Moreover, he notes with respect to the normative justifications for militant democracy that "[v]irtually all such justifications of militant democracy remain highly contested, but there is some consensus as to the relevant measures and likely actors to implement militant democracy."[260] For now, a focus on the fundamental right to free speech seems sufficient as an initial starting point for inquiry, particularly because of its foundational importance to equally participate in democratic self-government.[261] This forms one of the

255. Müller, *supra* note 24, at 1255 ("[Since] the end of the Cold War, definitions of the supposed enemies of democracy have become much more diffuse and difficult to establish."). Professor Müller further notes that "'populism' remains a notoriously vague concept" and "attempts to link present-day parties to the totalitarian past . . . often feel forced." *Id.*

256. *See, e.g.*, Müller, *supra* note 103, at 253 ("Serious reflection on militant democracy should focus on at least three questions. First, what might serve as an underlying justification for militant democracy? Second, which measures, such as party bans and individual rights restrictions, might be authorized by a particular justification of militant democracy, and what should be the criteria for deciding to employ them? And third, which actor or institution should authorize and implement such measures?").

257. Fox & Nolte, *supra* note 21, at 2.

258. Loewenstein, *supra* note 28, at 430–31. In other work, Professor Loewenstein contrasted democracy with emergent dictatorships and autocratic regimes in Europe. *See generally* Karl Loewenstein, *Autocracy Versus Democracy in Contemporary Europe I*, 29 AM. POL. SCI. REV. 571 (1935); Karl Loewenstein, *Autocracy Versus Democracy in Contemporary Europe II*, 29 AM. POL. SCI. REV. 755 (1935).

259. Müller, *supra* note 103, at 251.

260. *Id.*

261. *Cf.* KIRSHNER, *supra* note 28, at 5 ("When I state that a policy will leave a regime more democratic, I narrowly mean that that the regime's practices and institutions are more consistent with individuals' equal claims to participation in a fair political system. I focus on

paradigmatic justifications for protecting speech in the first place. Part IV will return to this point in the normative discussion offered in Part IV.

Professor Loewenstein's ideas were controversial from the start.[262] Legal philosopher Professor Hans Kelsen was perhaps the most prominent early critic, decrying the antidemocratic nature of militant democracy measures.[263] Similar concerns also motivate later critiques alleging "a fundamentally anti-participatory and elitist logic at the centre of anti-extremist politics" and an "elitist understanding of the people's role in a democracy."[264] These scholars maintain that even revised modern versions of the concept "retain[] an elitist and illiberal core."[265] Instead, the solution lies in addressing underlying issues of social justice and improved economic social cohesion.[266] Other critics assert that there is an inherent arbitrariness in who will be ostracized as an enemy of democracy.[267] (The reference to ostracism may be taken literally in this context. As Professor Kirshner notes, "[i]n ancient Greece the practice of ostracism was used to defend democratic regimes against popular antidemocratic elites."[268]) Legal and political science scholarship started to move away from "militant democracy," focused primarily on repressive tools (with some scholars even going so far as to calling for "abandoning the term 'militant democracy' altogether") to "defending democracy" which can be characterized as a broader set of interventions "to protect democracy through civic education and an engagement with (and even mobilization of) civil society . . . ."[269] Moreover, with a view to political parties, such an approach might develop "strategies to take seriously the grievances of supporters of extremist parties and split off potential moderates who might be included in democratic deliberation."[270]

Responding to these critiques, scholars have argued that both theoretical and practical difficulties with militant democracy and its implementation can be adequately addressed.[271] Rather than assuming an ideal type of democracy, theorists now focus on implementation and tailoring of responses. For example, Article 21(3) of the German Basic Law, added in

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the right to participate because this right lies at the core of the ethical dilemmas raised by popular challenges to democracy.").

262. *See, e.g.*, Huq, *supra* note 18, at 1125 ("Not all of these ideas, of course, appealed to legislators and policy-makers, even in Loewenstein's fraught day.").

263. *See, e.g.*, *id.* at 1127–28; Müller, *supra* note 24, at 1257 (discussing Professor Kelsen's critique of militant democracy).

264. Anthoula Malkopoulou & Ludvig Norman, *Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives*, 66 POL. STUD. 442, 444 (2018).

265. *Id.* at 446.

266. *Id.* at 450–55.

267. Carlo Invernizzi Accetti & Ian Zuckerman, *What's Wrong with Militant Democracy?*, 65 POL. STUD. 182, 183 (2017) ("[A]rguing that there is an irreducible element of *arbitrariness* in whichever way the decision is taken as to what constitutes an 'enemy' of democracy.").

268. KIRSHNER, *supra* note 106, at 25 n.39.

269. Müller, *supra* note 24, at 1262.

270. *Id.*

271. *See, e.g.*, Huq, *supra* note 18, at 1131–33 (discussing the rehabilitation of militant democracy).

2017 in response to the failed NPD party ban, now enables the state to deny funding to antidemocratic parties.[272] Moreover, the focus has shifted to constitutional actors safeguarding against "mission creep," such as judicial review.[273] Other scholars have sought to infuse militant democracy with popular elements, counteracting its "antimajoritarian and elite-driven" character "with a *popular* model of democratic self-defense."[274]

Writing a decade ago, political scientist Professor Giovanni Capoccia summarized that "the recent comparative constitutional law literature on militant democracy has converged on the principle that democracies have a right to defend themselves against their enemies, even in the absence of violence designed to undermine the democratic state."[275] To that end, "democratic states can enact and apply formal rules restricting expression and participation, subject to impartial oversight of their application."[276] In its further details, however, great differences remain among democratic states.[277]

Despite considerable variance in the details, Professor Müller suggests that "attacks on core democratic principles are recognizable as such" when one or more of a number of criteria arise.[278] First, "the proponents of extremist views seek permanently to exclude or dis-empower parts of the democratic people."[279] Second, they "systematically assault the dignity of parts of the democratic people."[280] Third, they "clearly clothe themselves in the mantle of former perpetrators of ethnic cleansing or genocide." The final, and in his view, "probably most controversial[]" indicator is that "the proponents of extremist views seek to speak in the name of the people as a whole, systematically denying the fractures and divisions of society (in particular those associated with the contest of political parties)."[281] In addition, they "systematically seek to do away with the checks and balances which have come to be associated with *all* European democracies created after 1945 (as the clearest result of the particular post-war constitutionalist ethos)."[282] He points out that "[t]hese criteria are intended to be context-sensitive" and responsive to "specific historical background conditions."[283]

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272. Huq, *supra* note 18, at 1132; Gelijn 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). Professor Müller calls measures such as the denial of public funding for political parties "soft militant democracy." *See* Müller, *supra* note 103, at 259.

273. Huq, *supra* note 18, at 1132–33.

274. Rune Møller Stahl & Benjamin Ask Popp-Madsen, *Defending Democracy: Militant and Popular Models of Democratic Self-Defense*, 29 CONSTELLATIONS 310, 311–12 (2022).

275. Capoccia, *supra* note 20, at 214.

276. *Id.*

277. *See id.*; Müller, *supra* note 105, at 537.

278. Müller, *supra* note 24, at 1267.

279. *Id.* at 1267–68.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 1268. However, he warns:

A resurgence in scholarly interest on the topic of militant democracy[284] has led political scientists to ask whether new phenomena can be captured with "the orthodox instruments of militant democracy, such as party bans and restrictions on free speech . . . or whether militant democracy in fact needs new means."[285] This has implications for current proposals to apply militant democracy to social media. As Professor Huq cautions, "it would be a bit premature to think that the specific proposals associated with militant democracy could be transposed mechanically to the digital context."[286] Though Professor Huq is cautious in drawing lessons, noting that "differences between the two domains hinder any precise inference about the choice of optimal intervention," and accepting that "the lessons from the history of militant democracy will necessarily be more modest, and more abstract,"[287] it may be worth further unpacking the social relationships among users, platforms, and the state. So doing not only allows a more precise understanding of how militant democracy mechanisms apply to new contexts but, in turn, also furthers our modern understanding of the concept itself. This raises an interesting question: is the social media context special or can the lessons be applied to militant democracy theory more broadly?

First, this involves a framing question about where the challenge to democracy originates that militant democracy is asked to address. Professor Huq starts with a "concern about digital platforms' malign effects on democracy."[288] Acknowledging the challenge to identify and locate the specific threats, he "take[s] 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."[289] Professor Huq draws an analogy from earlier party bans to modern threats to democracy from social media platforms based on "structural parallels."[290] Thus, "[i]n both cases," he asserts: "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."[291] Further, he notes that "[i]n both cases, the normal ethical commitments of a democracy

> These are of course contestable criteria, but in conjunction with giving the monopoly over banning and other militant measures to a politically insulated institution they might stand a good chance of guarding against abuses of militant democracy . . . . [H]owever, it is highly unlikely that Western democracies will converge on such an approach in constitutional law anytime soon.

Id.

284. Müller, *supra* note 103, at 250 (noting that "more recently there has been renewed interest in militant democracy among scholars in the English-speaking world"); *See, e.g.*, BENJAMIN A. SCHUPMANN, DEMOCRACY DESPITE ITSELF: LIBERAL CONSTITUTIONALISM AND MILITANT DEMOCRACY (2024).

285. *Id.* at 251.

286. Huq, *supra* note 18, at 1125.

287. *Id.* at 1134.

288. *Id.* at 1108.

289. *Id.* at 1110.

290. *Id.* at 1133.

291. *Id.* at 1133.

counsel for a laissez faire approach—while the prospect of aggressive regulation raises a specter of incumbency protection or abuse."[292] Thus, social media's threat to democracy "is necessarily bilateral: It comes both from private actors that have made themselves indispensable to the practical operation of democracy, and also from the state itself insofar as it purports to regulate for democracy's own good."[293]

This framing places social media platforms and the state on opposite sides. But individual users' speech can also be the source of the threat. And, as the German NetzDG illustrates, platforms could be enlisted by the state to implement militant democracy measures in requiring they align their content moderation decisions with criminal prohibitions on certain types of speech, placing them on the same side of defending democracy. In the ordinary constellation, the state would seek to ban a political party (private group) and thus infringe on its (and its members') fundamental rights of free speech and assembly. To take the German example discussed earlier, the SRP or KPD would be able to invoke their status as political parties under Article 21(1) of the Basic Law and ordinary legislation against the state action.[294] But there is nothing on the other side of the ledger unless there is an accountability mechanism that mirrors that of the state. In constitutional systems that recognize a form of horizontal effect, the problem might not arise. But in constitutional systems that adhere to a strong form of state action doctrine, the conflict is evident.

Professor Neil Netanel takes a wider view. He argues that whereas "militant democracy arose to thwart political parties" the uses of social media are broader and contain multiple incentives to engage in harmful speech.[295] This more encompassing understanding of the tools and mechanisms of militant democracy includes scenarios beyond the party ban as European countries outlaw antidemocratic political parties, private militias, group libel, hate speech, terrorist incitement, and Holocaust denial.[296] These tools are "designed to underwrite a robust, enduring liberal democracy."[297] This includes "bolster[ing] inclusive, egalitarian participation in public discourse and protect[ing] minorities against effective disenfranchisement by forbidding group libel, hate speech, and Holocaust denial."[298] Professor Netanel provides a broader, and overall more optimistic, interpretation:

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292. *Id.* at 1133.

293. *Id.* at 1108.

294. *See supra* notes 136–37 and accompanying text; *see also* GG. GRUNDGESETZ [GG] [BASIC LAW], art. 21(1).

295. Netanel, *supra* note 18, at 563 ("Many who propagate disinformation and emotive content are not necessarily opposed to democracy per se. They might merely be populists who aim to undermine established elites. Or they might be hardcore opportunists using whatever tools are available to win democratic elections. Even those who employ bots, fake accounts, and other deceptive technologies have a broad range of motives, ranging from political to financial.").

296. *Id.* at 494.

297. *Id.*

298. *Id.*

> At bottom, militant democracy counsels that enduring liberal democracy must rest on some approximation of the ideal Habermasian public sphere in which citizens exercise collective democratic self-determination through a discursive exchange of informed, reason-based views among equal participants, free of coercion, manipulative propaganda, and the undue influence of wealth and power.[299]

As militant democracy evolved in practice, states have refined their approaches. State responses "have become carefully tailored rather than excessively sweeping; individual rather than categorical, and temporary rather than permanent."[300] On the move toward individual responses, one particularly vexing problem has puzzled scholars of militant democracy: How should it view "unreasonable citizens"? They may reject the equality of citizens in a polity, fair cooperation among them, or pluralism of incompatible worldviews.[301] This seems particularly problematic in the social media environment where heretofore lone voices can become amplified and their messages may be much more easily disseminated in viral content, memes and otherwise. Scholars have addressed this problem in the offline context, noting the danger of such actors when they are able to disseminate their messages in a broadly destabilizing manner. Such challenges may require protection of society as a whole: "Such an imperative for protection—or, in Rawls's language, containment—then also justifies particular rights restrictions."[302] As a result:

> [F]ree speech might have to be curtailed; the unreasonable might no longer be able to organize freely to spread their views. The notion of endangering normative stability clearly depends on some quasi-empirical judgment of how stable the underlying moral compact of a society is. . . .
>
> There is a further justification for militant democracy that does not concern itself with particular facts on the ground, so to speak. Rather than worrying about the actual power of unreasonable citizens, the claim here is that any toleration of unreasonable speech and organized activity is bound to have a harmful effect on the rest of society. Civility and dispositions to see politics as a matter of contained conflict (contained, that is, within shared political, legal, and, not least, moral parameters) will be damaged or perhaps destroyed. Allowing such antidemocratic attitudes free rein will result in the denigration of particular citizens; moreover, it will send a signal that organizing to destroy the existing form of fair social cooperation will be condoned by the legal system.[303]

This concern seems particularly pressing in the social media context.

In the end, embracing the tools of militant democracy only gets us so far. Even limiting militant democracy to party bans and restrictions on hate

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299. *Id.*

300. Huq, *supra* note 18, at 1137–38.

301. *See* Müller, *supra* note 103, at 255–56 (discussing Jonathan Quong, *The Rights of Unreasonable Citizens*, 12 J. POL. PHIL. 314 (2004)).

302. Müller, *supra* note 103, at 255 (first discussing Quong, *supra* note 301, at 323–30; then citing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

303. Müller, *supra* note 103, at 256.

speech (including context-specific prohibitions on speech like Holocaust denial) means that the state can take measures to limit individual liberties. However, that does not directly address the questions of private power. The state cannot, without more, ban antidemocratic speech from social media platforms. Thus, legislation like NetzDG can be seen as implementation mechanisms of a larger framework of democratic self-defense. But there is another side to it, which concerns the resulting threat to individual rights by private platforms. The rights enforcement dimension, then, is covered by horizontal effect. This takes the discussion back to the lessons to be extracted from the discussion of modern German jurisprudence in Part II. What becomes evident in the German case studies is the understanding that free speech may be limited.[304] On the flip side, horizontal effect doctrine demands that speech rights are also enforced against the private platforms. Both, taken together, are thus necessary components of democratic self-defense.

2. Horizontal Effect

In the social media ecosystem, the relationship between individual and state is no longer the primary concern. Instead, the mostly private social media infrastructure is the "central battleground."[305] Thus, "a strict public/private divide in the enforcement of fundamental rights—a hallmark of classic liberal constitutionalism—hinders capturing the social relationships between users and social media platforms, because modern speech and data privacy conflicts there do not manifest primarily between the individual and the state."[306] The development of German horizontal effect doctrine outlined in Part II.C illustrates these new lines of conflict.[307]

Seen in connection with restrictions on free speech motivated by the underlying militant democracy posture, the protection of individual speech rights on platforms becomes particularly important. In the three German social media cases discussed, one decided on a preliminary injunction by the Federal Constitutional Court and two decided by the Federal Court of Justice on the merits, the deplatformed individuals prevailed.[308] The balancing of interests between the users and the platforms was only possible via a constitutional mechanism that allows for horizontality.

Ultimately, a strict public/private divide, as encapsulated in a rigid state action doctrine, is not particularly useful when thinking about modern speech and privacy challenges. Horizontal effects are one way to better capture the social relationship between users, platforms, and the state. But a particularly pressing problem remains: absent the ability to limit certain forms of speech,

304. *See supra* Part II. Here, it is theoretically irrelevant whether this follows from a narrowly doctrinal imposition of a limitations clause or a broader understanding of democratic self-defense.

305. Balkin, *supra* note 33, at 2296.

306. Haupt, *supra* note 19, at 2.

307. *See supra* Part II.C.

308. *See supra* Parts II.B–C.

such as, most prominently, hate speech, even the horizontal effects doctrine will prove insufficient and normatively unsatisfactory. This takes us back to limits on free speech and, ultimately, a constitutional posture of democratic self-defense.

B. First Amendment Implications

Among the implications to be gleaned from the previous discussion, the most important for present purposes concerns the blind spots created by the contemporary understanding of free speech in the United States.[309] It is worth reemphasizing that a content- and viewpoint-neutrality-centered approach is manifestly unresponsive to fundamental challenges to democracy posed by online speech. On this point, this Article shares Professor Huq's skepticism that "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."[310] In fact, the First Amendment lens is unhelpful in assessing the social relationships among users, platforms, and the state.

The understanding that only largely unregulated speech is capable of producing the results desirable to facilitate democratic self-government has proven to be misguided in the recent past. From a comparative perspective, this belies the postulate that "national regulation must either be disallowed entirely or made compatible with the American concept of free speech."[311] Although the marketplace of ideas theory justifying unregulated speech and its doctrinal counterpart, First Amendment absolutism, undergirded much of the discussion surrounding online speech in the past, increasingly scathing critiques appear to be on the rise post-January 6. Take, for example, Professor Huq's assertion that "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 the problem."[312] Indeed, identifying threats to democracy requires sensitivity to content—"a distinction between democratic and anti-democratic content is . . . vital"[313]—and the First Amendment's doctrinal stance prohibits exactly that.[314]

Beyond doctrine, the mechanisms of militant democracy have not been widely embraced in the United States precisely because of its contextual nature and historical inflection. Professor Miguel Schor, for example, suggests:

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309. Haupt, *supra* note 12, at 754.
310. Huq, *supra* note 18, at 1110.
311. Haupt, *supra* note 12, at 781.
312. Huq, *supra* note 18, at 1134.
313. Haupt, *supra* note 12, at 784–85.
314. Huq, *supra* note 18, at 1134 ("In this sense, First Amendment doctrine, centered around the idea of content-and viewpoint-neutrality as goods in themselves, fails to grasp a central and distinctive challenge of speech regulation in the service of democracy."); *see also id.* at 1134 nn.146–47.

> The framers of Germany's constitutional order knew from first-hand experience how anti-democratic forces could use speech and elections to destroy democracy. The same cannot be said for the framers of the American constitution. They understandably had no experience or even historical knowledge of how representative, mass democracy might break down.[315]

Yet, he also argues that:

> The view that militant democracy has no home in the United States because of her free speech culture rests on an impoverished understanding of how constitutional designers seek to prevent democratic forces from chipping away at institutions. The most successful—if we measure success in terms of longevity—militant democracy in the world is not Germany but the United States.[316]

In the past, the gravest threat to free speech came from the government's ability to silence speakers. Now, the actors and thus the locus of the threat has changed, and the First Amendment's tools are inadequate to defend against the threat.

Horizontal effect mechanisms, as indicated earlier, are not entirely foreign to U.S. law.[317] However briefly the Supreme Court considered the doctrine, however, it "soon abandoned the idea."[318] Yet, free speech law outside of the First Amendment does reach private actors.[319] So do state constitutional provisions.[320] But the key takeaway remains that the U.S. Supreme Court ultimately did not embrace this line of doctrinal development.[321] Professor Stephen Gardbaum sketches the conventional doctrinal story of horizontal effect in the United States as follows:

> In the United States . . . this fundamental issue has long been deemed fully and definitively resolved by a constitutional axiom: the state action doctrine. With the exception of the Thirteenth Amendment, both the text and authoritative precedent make clear that with respect to its individual rights provisions, the Constitution binds only governmental actors and not private individuals. End of story.[322]

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315. Miguel Schor, *Militant Democracy in America*, ICONNECT, BLOG OF THE INT'L J. OF CONST. L. (Feb. 16, 2021), https://www.iconnectblog.com/militant-democracy-in-america/ [https://perma.cc/H9QP-XLMW].

316. *Id.*

317. *See supra* notes 39–45 and accompanying text.

318. Balkin, *supra* note 19, at 1225.

319. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2363 (2021).

320. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding the Supreme Court of California's application of state constitutional provision to private shopping centers in *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), did not violate the federal Constitution's Fifth, First and Fourteenth Amendments); Bhagwat, *supra* note 5, at 148 ("The California Supreme Court held in favor of the students [in *PruneYard*] on the grounds that the free speech provision of the California state constitution protected the exercise of free speech and petition rights even on private property if it was open to the public and the activities did not interfere with its regular use.").

321. Balkin, *supra* note 19, at 1224–26.

322. Gardbaum, *supra* note 15, at 388.

Likewise, Professor Mark Tushnet notes that "standard U.S. constitutional doctrine is that constitutional provisions do *not* have horizontal effect."[323] But as noted at the outset, state legislatures apparently reject this doctrinal premise[324] as do respondents to surveys who do not care whether speech is restricted by the government or private actors.[325]

The First Amendment's doctrinal prohibition to limit the scope of democratic discourse has implications for the question of horizontal effect as well. When private individuals are bound by constitutional free speech guarantees, the scope of free speech is the same as when private individuals interact with the government. In other words, prohibitions on hate speech are reflected in this interaction. As a result, enforcing free speech against private individuals also reflects the constitutional values of militant democracy as reflected in the scope of the right to free speech and its constitutionally permissible limits.

Free speech values exist in larger constitutional frames.[326] This Article applies a sustained comparative view and critical scrutiny to the use of militant democracy principles on social media. If the constitutional frame contains militant democracy, this orients free speech toward defending democracy as well. Free speech values incorporate that stance, and free speech doctrine reflects it. Thus, a prohibition of hate speech will be reflected in the scope of free speech. As Professor Schor puts it, "[m]ilitant democracies police the outer bounds of political speech."[327] Horizontal effect doctrine then binds public and private actors to this framework. Where a background of militant democracy does not inform free speech values, and content and viewpoint neutrality are doctrinally dominant, relativism exists toward whether speech furthers democracy or undermines it.[328] This value-neutral stance reflects early critiques of Professor Loewenstein's work. It also ignores qua free speech doctrine challenges to democracy. As Professor Huq summarizes, "[m]ilitant democracy doctrine at least perceives the problem."[329]

IV. NORMATIVE CONSIDERATIONS AND CRITIQUE

The framework of democratic self-defense, combining both constitutional mechanisms, better captures the underlying social relationships when the central free speech concerns shift from state to private actors. From the

323. Tushnet, *supra* note 22, at 81.
324. *See supra* notes 1–4 and accompanying text.
325. *See supra* notes 100–01 and accompanying text.
326. *See generally* Haupt, *supra* note 12.
327. Schor, *supra* note 315.
328. Haupt, *supra* note 12, at 778 ("[C]urrent First Amendment doctrine places great emphasis on content-neutrality. Thus, speech regulation cannot distinguish between democratic and nondemocratic contexts and content."); Huq, *supra* note 18, at 1134 ("First Amendment doctrine, centered around the idea of content- and viewpoint-neutrality as goods in themselves, fails to grasp a central and distinctive challenge of speech regulation in the service of democracy.").
329. Huq, *supra* note 18, at 1134.

constitutional perspective, horizontal effects doctrine seems to better capture the relationships among users, platforms, and the state than strict adherence to the state action doctrine. Given its strength in capturing social relationships between private actors, it is worth considering whether horizontal effects doctrine by itself yields normatively desirable results in its assessment of private platforms' power over users. Despite differing constitutional frames, as this author has previously suggested, normative engagement can acknowledge the convergence between developments outside of the constitutional framework in the United States and the values underlying constitutional frameworks in Europe.[330] But could a similar normative configuration be achieved in the United States by reconceptualizing social media platforms as state actors or common carriers? The short answer is no. However, this is not only due to the doctrine of horizontal effect itself, but rather a function of the overall constitutional framework which requires the ability to impose limits on free speech in order to reach the normatively desired outcome.

Normatively, this places democratic self-government and equal participation in public discourse at the center of free speech theory. Different social relationships make different free speech justifications more salient.[331] A speech environment in which democratic self-defense is employed most resonates with democratic self-government interests.[332] Where private actors fundamentally challenge equal participation in public discourse—both by private platforms' content moderation decisions and by individual actors' hate speech and abuse aimed at silencing other participants in public discourse—the undemocratic measure of speech suppression looks more akin to regulation enabling democratic public discourse.[333] Equal participation in the project of democratic self-government, in other words, needs a defense mechanism that can be deployed against both state and private actors. Democratic self-defense thus responds to the new social relationships in a normatively salient way.

A critic might suggest that none of these constitutional considerations matter for U.S. legal discourse where the trend is deconstitutionalization. But, as a descriptive matter, the current legislative activities in several states mirror either militant democracy without horizontal effect or attempt enforcement of individuals' speech rights against private platforms without speech restrictions.[334]

In the context of online speech regulation, Professor Jack M. Balkin highlights the doctrinal difficulty under the First Amendment to adequately capture conflicting private parties' free speech rights and identifies

330. *See* Haupt, *supra* note 12, at 777.

331. *See generally* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

332. *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

333. *See* Haupt, *supra* note 12, at 779.

334. *See supra* notes 1–4 and accompanying text.

horizontal effect as the alternative.[335] Further, he explains: "Generally speaking, federal courts do not apply the First Amendment horizontally against private parties or treat First Amendment rights as constitutional rights that might be enjoyed equally by private parties in conflict and balanced accordingly."[336]

If the key concern is platform accountability, at first blush, both the platforms as state actors proposal—argued by former President Trump but rejected by the courts[337]—and the more widely propagated common carrier proposal would lead to the desired extension of accountability to private actors. The former solution would straightforwardly treat platforms as state actors for constitutional purposes, but although users would be enabled to assert their rights against platforms, First Amendment doctrine would prohibit platforms from engaging in content moderation. The latter solution would construct a statutory regime creating and regulating the common carrier by which discrimination based on viewpoint and content is prohibited.

But even if free speech rights did apply between private parties in the United States, the result would be normatively unsatisfactory. Indeed, this is why scholars are deeply skeptical of such proposals. Professor Ashutosh Bhagwat, for instance, has argued that Justice Thomas's proposal to treat platforms as common carriers and the Florida and Texas laws "are not only unconstitutional but also terrible policy."[338] He emphasizes that there are large swaths of undesirable content that platforms can now regulate but would be prohibited from regulating if they were common carriers subject to nondiscrimination:

> Such content includes non-obscene pornography, hate speech, bullying that does not rise to the level of harassment or threats, and of course lies galore about just about anything, including dangerous lies such as medical misinformation. Such content is definitionally legal (because it is constitutionally protected, in most cases), and so a common-carriage requirement would entirely eliminate social media platforms' power to block, or even de-amplify such content—de-amplify because common carriers are required to provide service to all users on equal terms, on a first-come, first-served basis.[339]

Daphne Keller, a scholar of platform regulation, has memorably called this "lawful but awful" speech.[340]

Similarly, Professor Balkin points out that "if social media companies are treated as state actors and have to abide by existing free speech doctrine—at least in the United States—they will simply not be able to moderate

335. Balkin, *supra* note 19, at 1224.
336. *Id.* at 1225–26; *see also generally* JAMAL GREENE, HOW RIGHTS WENT WRONG (2021).
337. *See, e.g.*, Trump v. Twitter, Inc., 602 F. Supp. 3d 1213 (N.D. Cal. 2022) (rejecting the argument that Twitter is a state actor).
338. Bhagwat, *supra* note 5, at 151–52.
339. *Id.* at 153–54.
340. *See generally* Keller, *supra* note 23.

effectively."[341] This is because absent a militant democracy framework or the ability to limit the scope of free speech in democratic public discourse, the imposition of content and viewpoint regulation fails as a matter of First Amendment doctrine.[342] In an attempt to shut down political propaganda on social media, he thus argues that:

> [T]he last thing you would want to do is to make social media state actors, because state actors are severely constrained in how they can sanction political speech, even false political speech. And, once again, even when state actors may sanction political speech, they must first afford the speaker the full panoply of Bill of Rights protections and a final individualized judicial determination before they can act.[343]

Though not in the same terms, Professor Balkin thus makes the same argument: horizontal effect and militant democracy only go together, not separately.

These criticisms largely rest on a First Amendment baseline, and thus employ a distinctively American lens.[344] The magnitude of the "awful but lawful" problem depends on the constitutional ability to restrict free speech. In the contexts of the German NetzDG or the European DSA, there is likely much less awful speech that is not also unlawful. In other words, the assumption that there in fact is a vast swath of undesirable speech that will be left unregulated if individual users were able to claim free speech protections against platforms may erroneously project a problem on constitutional frameworks where it does not exist.[345]

Another line of criticism might hold that militant democracy is incompatible with the U.S. Constitution and for this reason, too, reject the idea of democratic self-defense. Professor Loewenstein himself argued that certain legislative interventions in the United States may be understood as "safeguarding the existing system of republican government as established by the Constitution."[346] Without using the moniker, moreover, several provisions in the U.S. Constitution might fairly be described as militant

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341. Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 85 (2021).

342. *See id.* ("Facebook's and Twitter's community standards, for example, have many content-based regulations that would be unconstitutional if imposed by government actors.").

343. *Id.* at 86.

344. *Cf.* Bloch-Wehba, *supra* note 51, at 65–66 ("Arguments that the First Amendment provides the appropriate benchmark wrongly assume that the U.S. domestic context is the most relevant one . . . . But falling back on the First Amendment as the appropriate legal standard essentially doubles down on American unilateralism online. Far from offering an achievable solution to governments' increasingly overlapping and conflicting demands in the areas of speech and privacy governance, overreliance on U.S. legal standards replicates the worst features of American exceptionalism: it uncritically assumes not only that American law *does* govern, but also that it is normatively preferable and should supply the baseline standard for a de facto global regulation.").

345. Haupt, *supra* note 54.

346. Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies I*, 38 COLUM. L. REV. 591, 592 (1938); *see also* Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies II*, 38 COLUM. L. REV. 725–74 (1938).

democracy-like. Indeed, the Reconstruction amendments as interpreted by Professor Kirshner constitute a "paradigmatic case of militant democracy."[347] He is not alone in this characterization. Professor Travis Crum, likewise, notes in his examination of the Fifteenth Amendment: "In many ways, the Reconstruction Framers' behavior resembles the tactics of militant democracy."[348] The disqualification provision in section three of the Fourteenth Amendment is one such tactic.[349] In fact, discussions of the disqualification clause emerged in response to the events of January 6.[350] The Supreme Court has recently weighed in on the contemporary applicability of this provision (unsurprisingly, without the militant democracy characterization).[351] As Professors Ginsburg and Huq, along with David E. Landau have demonstrated, disqualification provisions are not uncommon.[352] Of course, they do not necessarily include the terminology of "militant democracy."[353]

Finally, a critic might simply reject the premise of this Article's argument outright and maintain instead that the current understanding of free speech in the United States is in fact normatively the most desirable posture. This contradicts my claim that the absence of both constitutional mechanisms—militant democracy and horizontal effect—is as undesirable as the absence of one or the other. Empirically, state legislative activity and popular understandings of what free speech means provide a counterpoint. But normatively, the question concerns the values around which speech ought to be oriented. The critic might be a proponent of the marketplace of ideas theory of free speech protection, or they might emphasize speaker autonomy interests. Yet, the context in which speech is particularly harmful in this instance concerns the ability to self-govern. Thus, centering First Amendment interests around democratic self-governance would provide a stronger normative foundation.[354]

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347. KIRSHNER, *supra* note 106, at 144.

348. Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1608 (2022). Professor Crum further notes that "[t]he Reconstruction Framers' actions foreshadow modern theories for safeguarding democracy, such as militant democracy, political process theory, and constitutional hardball." *Id.* at 1550.

349. U.S. CONST. amend. XIV, § 3.

350. Gerard N. Maglioca, *The 14th Amendment's Disqualification Clause and the Events of Jan. 6*, LAWFARE BLOG (Jan. 19, 2021, 1:43 PM), https://www.lawfareblog.com/14th-amendments-disqualification-provision-and-events-jan-6 [https://perma.cc/V8QM-RUL7].

351. Trump v. Anderson, 601 U.S. 100 (2024).

352. Tom Ginsburg, Aziz Z. Huq & David Landau, *Democracy's Other Boundary Problem: The Law of Disqualification*, 111 CAL. L. REV. 1633, 1633 (2023).

353. *Cf.* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024) (not using the term "militant democracy" in their examination of § 3).

354. Haupt, *supra* note 12, at 783 ("[G]iven the specific threats to democratic public discourse that unmoderated online speech poses, it might be worth refocusing the discussion around the speech tradition that is most responsive to the threat. In keeping with American free speech thought, democratic public discourse ought to be at the center of the debate.").

CONCLUSION

"The debate over how democracies should respond to popular threats . . . is literally as old as democracy itself."[355] The argument that forms the core of this Article is that the presence of only militant democracy or only horizontal effect is normatively undesirable, as is the absence of both constitutional mechanisms. By contrast, combining them into an approach of democratic self-defense creates normatively desirable outcomes. Democratic self-defense thus describes a defensive posture as well as enforceability of fundamental rights against private and public actors.

Social media hosts much of today's relevant content, including threats to democracy. As Professor Balkin notes with respect to social media regulation:

> [A]nything we do in the U.S. will be affected by what other countries and the E.U. do. Today, the E.U., China, and the U.S. collectively shape much of internet policy. They are the three Empires of the internet, and other countries mostly operate in their wake. Each Empire has different values and incentives, and each operates in a different way.[356]

And so, it makes sense to identify normative overlap where it may exist.

The legislative initiatives in Florida and Texas on the one hand and California and New York on the other hand could be taken together as reflecting similar values as the European approach of horizontal application and militant democracy. But the issue is larger than plucking the constitutional mechanisms of horizontal application and militant democracy and applying them to social media. Rather, to achieve normatively desirable outcomes, it is necessary to operationalize these mechanisms as part of a constitutional frame that is oriented toward democratic self-defense.

355. KIRSHNER, *supra* note 106, at 25.
356. Balkin, *supra* note 341, at 89; *see also generally* BRADFORD, *supra* note 51, at 6–11.