

DEMOCRATIC VIBES

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ABSTRACT

Who should decide who gets to say what on online social media platforms like Facebook, Twitter, and YouTube? American legal scholars have often thought that the private owners of these platforms should decide, in part because such an arrangement is thought to serve valuable free speech interests. This standard view has come under pressure with the enactment of statutes like Texas House Bill 20, which forbids certain platforms from “censoring” user content based on viewpoint. Such efforts to regulate the speech policies of online platforms have been challenged for undermining the editorial speech rights of these platforms and allowing the proliferation of hate speech.

This Article develops a democratic theory of free speech, according to which one of the most important reasons for protecting robust free speech rights is that free speech can contribute not only to democratic elections but to a democratic culture more generally. To achieve robust cultural democracy, a community’s speech environment must enable people not only to rationally persuade one another about matters of public importance and convey mutual respect to one another as political equals but also allow people to influence each other in a less articulate and rational manner—to “democratically vibe” with one another.

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This theory yields a qualified normative defense of government regulation of the speech policies of large social media platforms that can help to realize cultural democracy, suggesting that First Amendment doctrine should focus to a greater extent on protecting the speech rights of platform users, rather than platform owners. Although far from a ringing endorsement of H.B. 20 or S.B. 7072, this Article suggests that First Amendment law should be friendlier to state regulation of platform speech than many critics have thought.

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INTRODUCTION

Since the late twentieth century, political philosophy, constitutional theory, and jurisprudence about freedom of speech have increasingly focused on the relationship between speech and democracy. According to the *democratic theory* of free speech, the normative rationale for providing special constitutional protection to speech is that free speech serves an important democratic function.¹ Although this theory has

¹ G. Alex Sinha, A Requiem for Viewpoint Neutrality 8–9 (Aug. 1, 2023) (unpublished manuscript) (on file with author).

long been influential among both courts and First Amendment scholars,² in recent decades, this theory has increasingly been invoked in judicial opinions about the First Amendment by both liberal and conservative judges.³

Despite the significance of the democratic theory of free speech to courts' decision-making in First Amendment cases—and despite deep-seated disagreements among legal and political theorists about what makes a society democratic—courts and commentators who rely on democratic free speech theory only rarely articulate their beliefs about what it means for an institution to be democratic, which institutions should be democratically governed, or why democracy is morally and politically important.⁴ Democratic theories of free speech thus differ in their answers to

² *Id.* at 8 (commenting on the history of democratic conceptions of free speech in First Amendment jurisprudence); Vincent A. Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, in *THE FREE SPEECH CENTURY* 13, 24 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (contending that Justice Brandeis saw “the freedom of speech as . . . especially important for its contribution to democratic character”); Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY*, *supra*, at 106, 107 (“When the Supreme Court . . . began actually to protect First Amendment rights in the 1930s, it explicitly theorized First Amendment rights in terms of the political value of self-government.”).

³ *See, e.g.*, *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 78 (2022) (Breyer, J., concurring) (“The First Amendment, by protecting the ‘marketplace’ and the ‘transmission’ of ideas, thereby helps to protect the basic workings of democracy itself.”); *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2361 (2020) (Breyer, J., concurring in part) (commenting on “the democratic values embodied within [the First] Amendment”); *Janus v. AFSCME, Council 31*, 585 U.S. 878, 893 (2018) (“Free speech . . . is essential to our democratic form of government.”); *Reed v. Town of Gilbert*, 576 U.S. 155, 174 (2015) (Alito, J., concurring) (arguing that content-based regulations “may interfere with democratic self-government and the search for truth”); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“[S]peech is an essential mechanism of democracy—it is the means to hold officials accountable to the people . . .”); *id.* at 373 (Roberts, C.J., concurring) (arguing that confining First Amendment rights to individuals would “subvert[] the vibrant public discourse that is at the foundation of our democracy”); *cf. Mills v. Alabama*, 384 U.S. 214, 218 (1966) (commenting that “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs” but without explicitly invoking the value of democracy); *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” but not invoking the ideal of democracy by name).

⁴ *See, e.g.*, *Citizens United*, 558 U.S. at 339 (commenting that “speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people” but providing no further discussion of what democracy is or how “hold[ing] officials accountable” interacts with other requirements of democracy); *Barr*, 140 S. Ct. at 2361 (Breyer, J., concurring) (invoking “the democratic values embodied within [the First] Amendment” without explicitly articulating what these values are). *But see, e.g.*, 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, 6–9 (2004) [hereinafter Balkin, *Digital Speech*] (an uncommon

questions about democracy's (1) *meaning*, (2) *scope*, and (3) *value*. Making the range of conceptions of democracy that undergird democratic theories of free speech more explicit enables us both to better understand the political disagreements that are embedded in First Amendment disputes and to develop a normatively attractive vision of the First Amendment that is better suited to our digital age.

This Article identifies three different conceptions of democracy that answer questions about the meaning, scope, and value of democracy in different ways and draws out the connections between these conceptions of democracy and normative theories of free speech. It goes on to argue that the most compelling democratic theory of free speech is a theory of *cultural democracy*. Building on the work of George Kateb,⁵ Iris Marion Young,⁶ Jack Balkin,⁷ and Seana Shiffrin,⁸ and on my own earlier work on cultural democracy,⁹ this Article argues that the normative core of democracy is the idea that the people, collectively, should rule over all the shared aspects of their lives. To secure a high degree of cultural democracy, a community must provide avenues through which citizens can influence one another and potentially change one another's minds about all aspects of their shared lives.¹⁰ Neither markets nor formal elections suffice to provide these avenues, so cultural democracy requires an abundance and variety of democratic social institutions. At the same time, formal democratic institutions can play an important role in enabling and protecting informal and non-state democratic institutions.

This Article goes on to use this theory to explore questions about who should make speech rules for social media platforms (the owners of the platforms? users? federal courts? Congress? state legislatures?) and questions about what sort of speech should be allowed on those platforms (should platforms be allowed to engage in viewpoint discrimination? should fake news be removed?). Building on the work of First Amendment scholars who have developed novel theories of the democratic significance of free expression inspired by digital technologies,¹¹ this Article argues that

example of a free speech theory that explicitly describes the sort of democracy to which it thinks communities should aspire).

⁵ See generally George Kateb, *Walt Whitman and the Culture of Democracy*, 18 POL. THEORY 545 (1990).

⁶ See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 16–51 (2000).

⁷ See Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1055–79 (2016) [hereinafter Balkin, *Cultural Democracy*].

⁸ See SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW 17–60 (Hannah Ginsborg ed., 2021) [hereinafter SHIFFRIN, DEMOCRATIC LAW].

⁹ See Jonathan Gingerich, *Is Spotify Bad for Democracy? Artificial Intelligence, Cultural Democracy, and Law*, 24 YALE J.L. & TECH. 227, 246–66 (2022) [hereinafter Gingerich, *Is Spotify Bad?*].

¹⁰ Jonathan Gingerich, *Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies*, 11 N.E. U. L. REV. 401, 429–30 (2019) [hereinafter Gingerich, *Remixing Rawls*].

¹¹ See Balkin, *Cultural Democracy*, *supra* note 7, at 1088–95 (developing a democratic theory of the First Amendment based on the ideal of “cultural democracy”); Jack M. Balkin,

leaving decisions about what speech should be permitted, promoted, or demoted in the hands of private owners threatens to undermine the value of cultural democracy.

This Article proceeds as follows. Part I explores how standard democratic theories of free speech conceptualize the value of democracy. *Deliberative electoral democracy* theories argue that democracy requires *elections supported by public debate* and contend that *formal political institutions* should be democratic because such democratic institutions and procedures are (a) essential for free citizens to live together as political equals or (b) conducive to good decision-making by the state. *Political ethos* theories of democracy contend that democracy requires that members of a political community *communicate equal respect* to one another and that the ideal of democracy encompasses *all political interactions* that people have with one another in their role as members of a political community. Political ethos theories contend that such relations of respect among citizens are necessary for democracy to achieve free and equal citizenship.

Part II develops my theory of *cultural democracy* and contrasts it with deliberative electoral democracy and political ethos democracy. I contend that cultural democracy requires all participants in a social institution to have a *relatively equal say in how the institution is run* and requires that *all social institutions*—not just formal political institutions—should be governed democratically. Cultural democracy shares with the political ethos theory the view that democracy encompasses relationships between individuals, but cultural democracy goes further to argue that the ideal of democracy applies *whenever* people interact with one another, not just when they interact in their roles as members of a political community. Cultural democracy advances this broader view of the scope of democracy because it sees the value of democracy as enabling people to jointly decide how their lives will go.

Part III further develops my account of cultural democracy as a theory of free speech by exploring how cultural democracy analyzes the First Amendment implications of Texas House Bill 20. I argue against the standard scholarly view of platforms' speech rights to offer a qualified normative defense of an approach like that of the Fifth Circuit in *NetChoice v. Paxton*.

Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation, 51 U.C. DAVIS L. REV. 1149, 1151–54 (2018) (using Balkin's theory of cultural democracy to examine challenges for speech governance arising from the development of "big data"); see also WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 28–31, 46 (2004) (developing a theory of "semiotic democracy" connected to new digital technologies and connecting this theory of questions about free speech); Gingerich, *Is Spotify Bad?*, *supra* note 9, at 309–15 (applying Gingerich's theory of cultural democracy to develop a theory of free speech); Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1639–55 (2021) (describing ways in which developments of the digital speech environment challenge existing First Amendment doctrine and provide opportunities to tweak and improve theories of free speech).

Part IV considers an objection to this cultural democratic evaluation of H.B. 20, according to which imposing viewpoint neutrality rules on platforms would force them to host democracy-undermining speech and undermine the independence of smaller and more distinctive platforms.

The Conclusion considers broader lessons for democratic theories of free speech that emerge from my discussion of cultural democracy and the regulation of social media platforms.

I. DEMOCRACY AND FREE SPEECH IN THE TWENTY-FIRST CENTURY

Three clusters of theoretical approaches have dominated political philosophy and constitutional theory about freedom of speech since the twentieth century:¹² epistemic theories, according to which the justification for providing special legal protections for speech rests on the epistemic benefits that free speech generates;¹³ autonomy theories, which focus on the role of free speech in promoting the individual autonomy of speakers or listeners;¹⁴ and democratic theories, which focus on the role of free speech in promoting and preserving democracy.¹⁵

¹² See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011).

¹³ See Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 455–56 (2019).

¹⁴ See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 215 (1972) (arguing that a commitment to even a weak sort of autonomy entails Mill's principle of free speech); C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 259–69 (2011) (developing an autonomy theory of free speech as an interpretation of the First Amendment); Seana Valentine Shiffirin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 283–84 (2011) (developing an autonomy-focused theory of free speech that emphasizes people's role as autonomous thinkers rather than specifically their roles as listeners or speakers); see also Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 309–13 (1991) (arguing that censoring public speech can prevent people from validating their preferred forms of life).

¹⁵ See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 1–27 (1948) (articulating a theory of free speech focused on the value of self-government); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 113 (Erin Kelly ed., 2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*] (connecting political speech rights to the “moral powers” that define personhood); BURT NEUBORNE, *MADISON'S MUSIC: ON READING THE FIRST AMENDMENT* (2015) (developing an expansive theory of the First Amendment according to which the Amendment is “a narrative of democracy”); Post, *supra* note 12, at 482 (arguing that “the best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance”); Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 620 (2011) (“I regard democracy as ‘the rule of public opinion, “government by public opinion”” (quoting Carl Schmitt)); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1114 (1993) (examining challenges to Meiklejohn's conception of self-government as it relates to First Amendment doctrine); SHIFFRIN, *DEMOCRATIC LAW*,

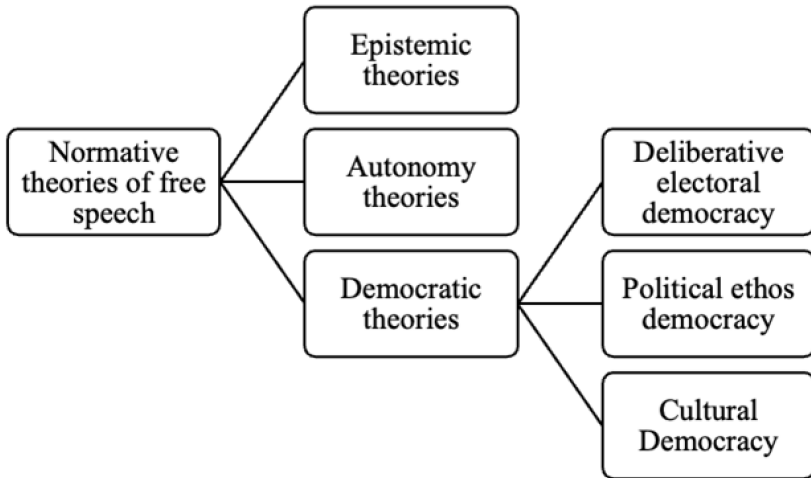
Because of the relatively weak case for the empirical claim that free speech norms are more likely to lead us towards truth, truth-based approaches to freedom of speech have been waning in importance.¹⁶ At the same time, because of a widespread commitment among liberal political and constitutional theorists to a principle of neutrality about questions of ultimate value, autonomy-based theories of freedom of expression that ascribe a transcendental value to individual autonomy have often been regarded as overly sectarian.¹⁷ Democratic theories of freedom of speech have recently been favored because they hold out hope of justifying robust free speech norms without relying on a tenuous empirical case about the epistemic effects of free speech or on any divisive or sectarian claims about non-political values: democracy is a value that all members of a political community might reasonably be expected to subscribe to in order to live together as equals, regardless of what each member believes about ultimate values. Because of its ascendance in contemporary legal theory and First Amendment jurisprudence, this Article focuses on the democratic theory of freedom of speech.¹⁸

supra note 8, at 21 (arguing that a robust free speech culture is necessary for a democratically governed society); Ronald J. Krotoszynski, *The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation*, 2020 U. CHI. LEGAL F. 145, 147 (arguing that the overriding aim of First Amendment law should be “safeguarding the process of democratic deliberation”).

¹⁶ See Robert Mark Simpson, *The Connected City of Ideas*, 1, 4 (Mar. 11, 2023) (unpublished manuscript) (on file with author).

¹⁷ See Robert Mark Simpson, *The Chilling Effect and the Heating Effect* 20 (Dec. 2022) (unpublished manuscript) (on file with author); Sinha, *supra* note 1, at 7–9; see also JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* 14–15 (2011) (describing the liberal commitment to neutrality about the good).

¹⁸ In practice, divisions between the democratic, autonomy, and epistemic values involved in theories of freedom of speech are less clean than the typology laid out here might suggest. For instance, democratic theories of freedom of speech might argue that part of what makes freedom of speech good for democracy is that it enables democratic polities to arrive at the truth reliably, see Blocher, *supra* note 13, at 457, while autonomy theories might contend that living in a democratic society is part of how individual autonomy can be realized, see Balkin, *Cultural Democracy*, *supra* note 7, at 1062. Nonetheless, this idealized typology of different values invoked by theories of freedom of speech helpfully focuses our attention on the varieties of ethical claims that matter most to different free speech theorists.

Figure 1. A Diagram of Normative Theories of Free Speech

Despite the ascendance of the democratic theory of free speech, free speech scholars and courts who invoke this theory are often silent as to what they mean by “democracy” and as to why constitutional law should seek to promote democracy. The remainder of this Part will explore some of the leading answers that democratic free speech theorists have offered to these questions.

A. The Connection Between Speech and Democracy

As a preliminary matter, we might consider why theorists have found it fruitful to connect free speech to democracy in the first place. Some scholars adopt a minimal theory of democracy, according to which democracy requires only that the decisions made by a society’s formal political institutions be authorized by an appropriate electoral procedure.¹⁹ One prominent advocate of this sort of view, Joseph Schumpeter,

¹⁹ See Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in DEMOCRACY’S VALUE 23, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 448–50 (1996). More generally, minimalist theories of democracy hold that democracy requires only that decisions made by a society’s formal political institutions be authorized by an appropriate mechanism of representation, leaving open whether elections or some other mechanism, such as lotteries, provide such a mechanism. See Alexander A. Guerrero, *Against Elections: The Lottocratic Alternative*, 42 PHIL. & PUB. AFFS. 135, 136 (2014) (arguing for “lottocratic” democracy as a potentially superior alternative to electoral democracy). In practice, however, most proponents of “minimal” theories of democracy are

defines “the democratic method [as] that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”²⁰ Minimal electoral theories of democracy potentially provide a realistic criterion for democracy that some but not all real-world societies might live up to and they plausibly describe a necessary condition for a state to exercise legitimate authority.²¹

Minimal Schumpeterian theories of democracy do not state a view of democracy that corresponds to democratic free speech theory since these theories look only to whether a state’s laws are the product of democratic elections. For these minimal theories, the scope of democracy encompasses decisions about what laws a state will have and decisions by the state’s formal political institutions, and the meaning of democracy is that these decisions are made through appropriate electoral procedures.

Declining to incorporate a theory of free speech into a theory of democracy creates challenges for such a theory. First, holding anything that plausibly qualifies as a democratic election requires some communication: voters must know who the candidates are or what the options in a referendum are, and voting is itself a form of speech, though one with a heavily restricted expressive range.²² Even in the most minimal theories of democracy, casting a vote and describing the options available in an election seem clearly necessary for an election to qualify as democratic. Much as it is often thought that individual autonomy depends on deliberating about how to act, rather than simply acting on impulse,²³ it is also often thought that for a society to rule itself democratically, it must do more than merely reflect the momentary preferences of its members.²⁴ Alexander Meiklejohn, who saw freedom of

proponents of majoritarian electoral control of formal political institutions, *see* David Plotke, *Representation Is Democracy*, 4 CONSTELLATIONS 19, 20 (1997), while proponents of “lottocratic” conceptions of democracy tend to believe that democracy requires more than using minimally representative sortition to select officers of formal political institutions, *see* Josine Blok, *Sortition and Democracy*, in POLITEIA AND KOINONIA: STUDIES IN ANCIENT GREEK HISTORY IN HONOUR OF JOSINE BLOK 289, 307 (Vinciane Pirenne-Delforge & Marek Węcowski eds., 2023) (contending that the success of sortition-based democracy in ancient Athens depended on a culture in which all citizens were committed to political equality and to take turns governing and being governed); Guerrero, *supra* note 19, at 162–63 (describing the sort of deliberation required by the lottocratic assemblies that Guerrero envisions).

²⁰ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 269 (2003).

²¹ *See* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 21–22 (1998); Przeworski, *supra* note 19, at 48.

²² *See* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 363–78 (1993) (describing several of the ways in which voting can have expressive content).

²³ *See* Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 11 (1971).

²⁴ *See* DAVID GAUTHIER, CONSTITUTING DEMOCRACY 12 (1989); *see also* Gerald J. Postema, *Public Practical Reason: An Archaeology*, 12 SOC. PHIL. & POL’Y 43, 43–44, 81 (1995) (connecting questions about public reason in democracy to questions about individual autonomy and pre-deliberative impulses).

expression as essential for democracy, argued that “[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. . . . The principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”²⁵ On this view, even if the mere aggregation of equally weighted preferences manifests a sort of equality, it is not real *democracy* since it is not rule by *the people* as a collective entity.²⁶

Furthermore, the minimalist Schumpeterian position allows that even a society marked by tremendous inequalities in politics and knowledge, economic power, and influence might qualify as democratic.²⁷ If democracy requires that *all* the people can participate in governing their society, then simply majoritarian electoral democracy appears inadequate.²⁸ Providing all members of a community with equal input into political decisions requires not only that everyone can vote but also that everyone can participate in public deliberations about these decisions.²⁹

For these reasons, most twenty-first century theorists of democracy have inclined toward conceptions of democracy that regard free speech as a necessary component of democracy.³⁰

B. *Deliberative Electoral Democracy*

The first variety of democratic theory that connects democracy to free speech is what I will call *deliberative electoral democracy*. Deliberative electoral democracy agrees with the understanding of minimal democrats that the core of the democratic ideal is the idea that decisions made by a society’s formal political institutions should be authorized by an appropriate democratic procedure.³¹ According to deliberative

²⁵ MEIKLEJOHN, *supra* note 15, at 26–27.

²⁶ See Matthew Steilen, *Minimalism and Deliberative Democracy: A Closer Look at the Virtues of “Shallowness,”* 33 SEATTLE U. L. REV. 391, 393 (2010); Christian F. Rostbøll, *Preferences and Paternalism: On Freedom and Deliberative Democracy*, 33 POL. THEORY 370, 371–72 (2005).

²⁷ See JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY 247–48 (2019); Rostbøll, *supra* note 26, at 389; see also JOHN RAWLS, POLITICAL LIBERALISM 359–63 (expanded ed. 1996) [hereinafter RAWLS, POLITICAL LIBERALISM] (discussing democratic defects arising from inequalities in political influence resulting from the design of campaign finance law).

²⁸ See JOHN STUART MILL, ON LIBERTY 75–76 (David Bromwich & George Kateb eds., 2003) (the *locus classicus* of warnings against the “tyranny of the majority”).

²⁹ See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 22–23 (Alan Hamlin & Philip Pettit eds., 1989).

³⁰ See David L. Pionet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U.L. REV. 1249, 1249 (2012) (remarking on the recent ascendance of deliberative theories of democracy in political theory).

³¹ Cf. BRUCE A. ACKERMAN & JAMES FISHKIN, DELIBERATION DAY 3–16 (2004) (providing an example of the focus of some deliberative democrats on deliberation that is tightly connected with formal political decision-making such as elections).

electoral democracy, the *scope* of democracy encompasses decisions about what laws a state will have and decisions by the state's formal political institutions as well as public discourse that directly or indirectly shapes those decisions. Deliberative electoral democrats, however, maintain that the mere fact that the decisions of formal political institutions are the product of majoritarian voting—or even consensus—is insufficient for a decision procedure to qualify as democratic.³² Beyond the fact that an election is held, a certain sort of speech environment must be in place for a political decision procedure to qualify as democratic.³³

For deliberative electoral democracy, speech deserves special political and legal protections because of the role it plays in enabling democratic voting. We must discuss to effectively make decisions through elections, so we need to protect the sorts of speech rights that conduce to good political discussions. One important version of deliberative electoral democracy can be found in John Rawls's treatment of freedom of speech.³⁴ For Rawls, democratic decision-making requires that everyone be able to make roughly equal use of their First Amendment rights to participate in political discourse.³⁵ On this view, principles of free speech aim to “equaliz[e] the relative ability of citizens to affect the outcome of elections.”³⁶ This view concentrates on the effects of speech on how electoral political institutions make decisions.³⁷ Deliberative electoral theories regard democracy as fundamentally concerning the control of formal political institutions, like elected offices, and decisions made by voting, whether directly in plebiscites or indirectly in decisions by elected legislative bodies. The *meaning* of democracy for this view is that decisions about what laws

³² See Josiah Ober, *The Original Meaning of “Democracy”: Capacity to Do Things, Not Majority Rule*, 15 CONSTELLATIONS 3, 3 (2008) (“Reducing democracy to a voting rule arguably elides much of the value and potential of democracy.”).

³³ See AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 4 (2004).

³⁴ See JOHN RAWLS, A THEORY OF JUSTICE 222–23 (1971) [hereinafter RAWLS, THEORY OF JUSTICE].

³⁵ RAWLS, POLITICAL LIBERALISM, *supra* note 27, at 361–62.

³⁶ *Id.* at 360.

³⁷ See *id.* (critiquing the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), to strike down as inconsistent with the First Amendment the Election Act Amendment of 1974's restrictions on campaign expenditures). This is not to suggest that Rawls's political philosophy lacks resources for articulating less electorally focused theories of free speech, or that the view that I describe here as Rawlsian deliberative electoral democracy is a full statement of how Rawls himself or a Rawlsian committed to the full picture of justice that Rawls develops would approach these free speech questions. Rawls's views about democracy sit alongside his commitments about social ordering generally, including his commitment to the principle of fair quality of opportunity. See RAWLS, THEORY OF JUSTICE, *supra* note 34, at 83–90. A society that satisfied Rawls's conception of justice would therefore equalize more than the ability to influence elections. See SEANA SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 168 (2014) [hereinafter SHIFFRIN, SPEECH MATTERS] (developing a broader, Rawls-inspired theory of free speech focused on the autonomy interests of both speakers and listeners not confined to speech directly about elections).

a state will have and decisions by the state's formal political institutions supported by a speech environment that enable these decisions to reflect the values (such as political equality) that underly democracy.

What is the *value* of democracy, according to deliberative electoral democracy theory? Some theorists of deliberative electoral democracy maintain that democratic decision-making is valuable because it is better at tracking the truth about what laws and policies a community should adopt than other procedures are.³⁸ For other proponents of deliberative electoral democracy, democracy is valuable because it protects the autonomy and individual rights of citizens.³⁹ For others still, democracy realizes an ideal of free and equal citizenship by "equalizing the relative ability of citizens to affect the outcome of elections."⁴⁰ According to these theories, it is worthwhile to organize our political communities in such a way that all their members can regard one another as equals, and deliberative electoral democracy provides a way to achieve this sort of socio-political organization. Deliberative electoral democracy can be understood as a criterion of democratic legitimacy, stating a condition that a state must satisfy to issue authoritative laws and judgments that obligate its citizens.⁴¹ However, it can also be understood as a normative ideal to which political communities should aspire, although they might not live up to the ideal in practice.⁴²

C. *Political Ethos Democracy*

Not everyone who thinks that democracy is valuable because of its connection to equality accepts that equal citizenship can be achieved solely through the relationships that citizens have to formal decision-making institutions. For such proponents of democratic equality, a political community might have a well-functioning electoral system and well-functioning discursive supports for that system that provide

³⁸ See, e.g., ROBERT E. GOODIN & KAI SPEKERMANN, AN EPISTEMIC THEORY OF DEMOCRACY 312–21 (2018) (developing an 'epistemic' theory of democracy).

³⁹ See JOSHUA COHEN & JOEL ROGERS, ON DEMOCRACY: TOWARD A TRANSFORMATION OF AMERICAN SOCIETY 151 (1983).

⁴⁰ RAWLS, POLITICAL LIBERALISM, *supra* note 27, at 360; see Cohen, *supra* note 29, at 18–19; RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 5 (describing "the idea of society as a fair system of social cooperation over time from one generation to the next" as "the central organizing idea" in developing "a political conception of justice for a democratic regime.").

⁴¹ See Cohen, *supra* note 29, at 21; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 110 (William Rehg trans., 1996) (arguing that "only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000); see also RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 46 (describing the "constitutional essentials" for legitimate democracies).

⁴² See AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 357 (1996) (noting that deliberative democracy's "highest ideals make demands that actual politics may never fulfill").

all citizens with relatively equal ability to influence the system's outcomes but might *still* fall short of providing for free and equal citizenship. (Imagine, for instance, a system in which every citizen has a roughly equal chance to influence the decisions of political organs but where citizens nonetheless subscribe to racist hierarchies that lead a large group of citizens to regard another racialized group as subordinate, even if the subordinated group can often partially determine the outcomes of elections.⁴³)

In part out of concern for situations such as this, a competing conception of democracy has developed. According to *political ethos* theories of democracy, democracy requires not merely voting procedures that are followed in elections and legislatures, nor even merely the political discourse that supports decision-making through elections and by representative bodies like legislatures; democracy also requires that the members of a political community relate to one another as members of that community in a way that recognizes their equality.⁴⁴

Seana Valentine Shiffrin, a leading political ethos theorist, offers the following definition of democracy:

By “democracy,” I mean, roughly, a political system that treats all its members with equal concern, regards their lives as of equal importance, and treats all competent members of the community (by which I mean those having reached the age of majority and without profound intellectual disabilities) as, by right and by conception, the equal and exclusive co-authors of and co-contributors to the system, its rules, its actions, its directives, its communications, and its other outputs. A healthy democracy is one in which the members have regular opportunities to exercise these rights and do so with some frequency.⁴⁵

In contrast to deliberative electoral theorists of democracy, political ethos theorists do not see democracy as realized exclusively through the decisions of formal political institutions and the culture of public deliberation that supports those institutions.⁴⁶ For political ethos theorists, democracy is realized, in part, in relationships that citizens have with one another directly and the attitudes that they hold regarding one another *qua* members of the political community. Political ethos

⁴³ See Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *FORDHAM L. REV.* 1643, 1655 (2004) [hereinafter Shiffrin, *Fair Equality of Opportunity Principle*].

⁴⁴ See, e.g., SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 30.

⁴⁵ *Id.* at 20–21.

⁴⁶ In this way, I take Shiffrin's view to depart from that of Jürgen Habermas, who accords an important role in his theory for the “wild” discourse of the “general public sphere,” HABERMAS, *supra* note 41, at 307–08, but for whom the democratic principle ultimately concerns the legitimacy of *legislation*.

theory acknowledges that legislation and the state are very important sites of democracy—indeed, for Shiffrin, “[t]he state is the crucial organizational structure to achieve” the communicative aims of “convey[ing] our mutual recognition of each other’s moral status” as equal members of the political community to one another.⁴⁷ But while law and the state allow us to communicate aims that we could not achieve as individuals,⁴⁸ democracy is achieved fundamentally in all the *political* relationships that we have to one another, rather than only in the decisions and procedures of formal political institutions.⁴⁹ The *scope* of democracy, according to the political ethos view, encompasses those activities through which we discharge our collective moral duties, including both duties of justice to fellow citizens and duties to people or things outside of our political community.⁵⁰ The *meaning* of democracy on this view is a political system that regards all its members as equally important and treats all of them as the equal and exclusive co-authors of the political system.⁵¹

Many of our collective duties will be discharged through institutions like the state, but many also require a “complementary [social] culture,” including a social culture of free speech.⁵² On the political ethos view, democracy concerns not only elections but also free speech culture and other institutions that facilitate citizens’ expression of equal regard for one another. Crucially, free speech culture matters for political ethos democracy not because it supports effective or legitimate decision-making by electoral institutions but because it itself partly constitutes democracy.⁵³ Because of speech’s centrality to the conveyance of mutual respect, political ethos democracy entails a very robust theory of free speech that is much wider than for most deliberative electoral democrats.⁵⁴ Political ethos theories of free speech focus on providing speech conditions that allow for the sincere expression of speakers’ beliefs so that speakers can respectfully engage with one another⁵⁵ and encompass

⁴⁷ SHIFFRIN, DEMOCRATIC LAW, *supra* note 8, at 31, 51.

⁴⁸ *See id.* at 38. Making law democratically is especially important for democracy on this view because if we simply did “what justice (otherwise) require[d] of us without declaring our commitment through law in a sense, we would perform the right actions and we might act from respect, but we would fail to do so clearly, under the banner of a self-assumed, joint public commitment.” *Id.* at 40.

⁴⁹ *See* Seana Valentine Shiffrin, *Democratic Representation as Duty Delegation*, PROC. & ADDRESSES AM. PHIL. ASS’N 90, 101–02 (2022) [hereinafter Shiffrin, *Democratic Representation as Duty Delegation*].

⁵⁰ *See id.* at 91.

⁵¹ *See* SHIFFRIN, DEMOCRATIC LAW, *supra* note 8, at 20.

⁵² *See* Shiffrin, *Democratic Representation as Duty Delegation*, *supra* note 49, at 108.

⁵³ *See* SHIFFRIN, DEMOCRATIC LAW, *supra* note 8, at 21 (“[A] free speech culture is arguably more foundational to democracy than any particular mechanism of decision formation, including elections.”).

⁵⁴ *See* SHIFFRIN, SPEECH MATTERS, *supra* note 37, at 83–85.

⁵⁵ *See* Seana Valentine Shiffrin, *Unfit to Print: Government Speech and the First Amendment*, 69 UCLA L. REV. 986, 1009 (2022) [hereinafter Shiffrin, *Unfit to Print*].

special protections for all sorts of speech that enables members of a society to “co-author” a wide array of projects not limited to legislation or actions taken by the state.⁵⁶

In contrast to deliberative electoral democracy that focuses on providing each citizen with an equal *ex ante* probability of determining electoral outcomes, political ethos democracy focuses on conditions in which we can all regard one another as political equals and express that regard to one another. This requires that collective decisions be the product of deliberation that allows the reasons for these decisions to be explained to all of us. On the political ethos conception, “other citizens and our delegates in particular will have considered the reasons for our various interpretations” of our mutual commitments and responsibilities, and if one citizen’s interpretation loses out, its lack of success “will not be merely a matter of the numbers.”⁵⁷ This requirement extends not just to decisions taken by legislatures and courts but also to some of the speech and actions of non-state institutions and of individuals in their roles of citizens insofar as they are a site where individuals relate to one another as political actors. Democratically formed *law* plays a special role in our communication of mutual regard for one another, but, in principle, all sorts of activities in which citizens relate to one another as “by right and by conception, the equal and exclusive co-authors of and co-contributors” to the political system matter for democracy.⁵⁸ When citizens interact with one another as, for instance, voters or potential voters, the attitudes that they express directly to one another might matter for determining whether or not an ideal of democracy is realized. Insofar as private institutions, like companies or individuals, take themselves to be following democratic laws, their interpretations of laws must also accord with the values of equal citizenship.⁵⁹

Political ethos democracy grounds its view of the meaning and scope of democracy in a conception of democracy’s value. For political ethos theorists, democracy realizes the value of political equality. A political system is democratic when it “treats all its members with equal concern, regards their lives as of equal importance, and treats all competent members of the community . . . as, by right and by conception, the equal and exclusive co-authors of and co-contributors to the system.”⁶⁰ This is desirable because, absent such positive recognition of the equal importance of every member—both through the systems’ formal enactments and through the interactions that contributors to the system have with one another—members will reasonably doubt whether they are *really* seen as equals by the political system.⁶¹

⁵⁶ See SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 199–200.

⁵⁷ *Id.* at 197.

⁵⁸ *Id.* at 20.

⁵⁹ See Shiffrin, *Unfit to Print*, *supra* note 55, at 1014–20. Political ethos democracy’s position is further complicated because they need not maintain that every constitutional conflict is justiciable, or even that the state is the appropriate actor to resolve all conflicts about legal interpretation. See *id.* at 992–93.

⁶⁰ SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 20.

⁶¹ See *id.* at 28–29.

II. THE IDEAL OF CULTURAL DEMOCRACY

These values associated with democracy by political ethos theorists are worthwhile and important, but for some theorists of democracy, the political ethos conception—although broader in its institutional focus than even the most flexible versions of deliberative electoral democracy—still does not fully capture the normative core of the democratic ideal. According to *cultural democracy* theory, the meaning of democracy is, roughly, a political system in which all members are equal and exclusive authors of and co-contributors to their *communal* lives.⁶² The scope of democracy, on this view, encompasses all those aspects of their lives that are the product of their joint action, in the sense of action that the people take in concert with one another. This ideal spreads the net of social freedom and equality more widely than the political system, and cultural democracy is valuable because it more fully realizes the ideals of freedom and equality than other conceptions of democracy.

This Part will describe the cultural conception of democracy and lay out its connection to democratic theories of free speech.⁶³ It is important not to overemphasize the disagreement between cultural theories of democracy and other varieties of democratic theory.

It is open to proponents of deliberative electoral democracy and political ethos democracy to agree that institutions beyond those that they theorize should also be democratic. Some theorists of deliberative electoral democracy, such as Jürgen Habermas,⁶⁴ might be interpreted as advancing *only* a theory of democratic legitimacy, rather than a full theory of what institutions should be democratic and of what it takes for an institution to count as democratic. Such theorists might happily agree that *democracy* is a richer and more expansive ideal than *democratic legitimacy*.⁶⁵ Those who hold views like Habermas's may embrace cultural democracy as an ethical ideal while retaining deliberative electoral democracy as a criterion of constitutional legitimacy.

Cultural democracy theory insists that the value of democracy is not exhausted by its realization in institutions designed to discharge our collective moral duties.⁶⁶ Democracy, according to cultural democracy theory, is fully realized only once

⁶² *Id.* at 20.

⁶³ In this Part and the following Part, I draw heavily on—and further elaborate upon—the description of cultural democracy presented in Gingerich, *Is Spotify Bad?*, *supra* note 9, at 246–66.

⁶⁴ See, e.g., HABERMAS, *supra* note 41, at 287–328.

⁶⁵ I am grateful to Stephen Galoob for raising this point.

⁶⁶ The relationship between cultural democracy and political ethos democracy is even more complicated than this because political ethos democrats may hold that the line between a democratic legal system and cultural life more broadly is not sharp. See SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 189 (“[T]he line between culture and the democratic legal system is not a stark one.”).

everyone has an equal chance to participate in shaping their total social life.⁶⁷ At the same time, political equality is heavily informed by social equality: a society with persisting social underclasses is very unlikely to fully achieve the sort of political equality necessary for a well-functioning electoral democracy, let alone the sort of recognition of all citizens as political equals that political ethos theory calls for. In practice, the societies that achieve the ideals of deliberative electoral democracy or political ethos democracy to a high degree might also embody the ideal of cultural democracy to at least a moderately high degree.⁶⁸

Despite these convergences cultural democracy differs from deliberative electoral democracy and political ethos democracy in its direct call to democratizing more of our shared lives. As we will see, the ideal of cultural democracy calls for democratizing all our shared social endeavors, including non-political institutions like daycares and families as well as even less formal institutions like social cliques, although it acknowledges that accommodating values other than democracy may limit the extent to which such democratization should be pursued.

Another way of making the point that democracy is fully realized only once everyone has an equal chance to participate in shaping their total social life would be for the cultural democrat to contend that *politics* encompasses all attempts to decide, together, how to live, where that “how to live” is construed broadly, to include all decisions that affect what lives are possible to lead in a society.⁶⁹ However, for terminological simplicity, I describe the cultural democracy view as the view that *democracy* is not confined to the *political*, rather than the view that the *political* encompasses all decisions about every form of social organisation and joint action.

A. Cultural Democracy Defined

1. The Scope of Cultural Democracy

For cultural democrats, those parts of our lives that we carry out jointly, in reliance on one another, are *all* properly governed democratically. Democracy requires that people be able to decide together about how to live together in all the respects in which they *do* live together. This is distinct from the ideal of political ethos democracy because it is not only as members of a *political* system, nor only through actions in which we discharge our collective moral duties, that we realize the value of democracy. The animating ideal behind cultural democracy is the idea that the

⁶⁷ For further discussion of the distinction between the political and the cultural domains, see Gingerich, *Remixing Rawls*, *supra* note 10, at 417.

⁶⁸ I am grateful to Erin Miller for correspondence regarding this point.

⁶⁹ See Gingerich, *Remixing Rawls*, *supra* note 10, at 234; Balkin, *Digital Speech*, *supra* note 4, at 35 (“Democratic ideals require a . . . commitment to democratic forms of social structure and social organization, a commitment to social as well as political equality.”).

people, together, should rule over all aspects of life that are shared. As the Black Panther Party put it, “All Power to the People!”⁷⁰

This radical conception of democracy is much more expansive than the conceptions of democracy contained in twentieth-century liberal political philosophy.⁷¹ Yet it forms an important part of nineteenth- and twentieth-century politics. To unpack the ideal of the people ruling together over the aspects of life that are shared, it is helpful to turn to Walt Whitman’s conception of democracy. In *Leaves of Grass*, Whitman writes:

One’s-Self I sing, a simple separate person,
Yet utter the word Democratic, the word En-Masse. . . .

Walt Whitman, a kosmos, of Manhattan the son,
Turbulent, fleshy, sensual, eating, drinking and breeding,
No sentimentalist, no stander above men and women or apart from
them,
No more modest than immodest. . . .

Whoever degrades another degrades me,
And whatever is done or said returns at last to me

I speak the pass-word primeval, I give the sign of democracy,
By God! I will accept nothing which all cannot have their coun-
terpart of on the same terms.⁷²

The Whitmanian ideal of democracy is achieved in the absence of hierarchy not just in politics but in all of life. Whitman’s democratic individual is “no stander above men and women or apart from them,” and this absence of hierarchy is associated not just with explicitly political activities but also sensuous ones: “Turbulent, fleshy, sensual, eating, drinking, and breeding”⁷³ The democratic individual refuses not just, for example, a right to vote that cannot be had by all but accepts “*nothing* which all cannot have their counterpart of on the same terms.”⁷⁴ Social hierarchy,

⁷⁰ See ALL POWER TO THE PEOPLE! (THE BLACK PANTHER PARTY AND BEYOND) (Electronic News Group 1996), https://youtu.be/pKvE6_s0jy0 [<https://perma.cc/6ZXP-SFCH>].

⁷¹ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 248.

⁷² WALT WHITMAN, LEAVES OF GRASS 9, 48 (1891–1892), <https://whitmanarchive.org/published/LG/1891/whole.html> [<https://perma.cc/LZQ4-VSZF>]. For an influential reading of Whitman as a theorist of cultural democracy and rights-based individualism, see Kateb, *supra* note 5, at 546. For a contrasting, less individualistic reading of Whitman, see Daniela Dover, *The Democratic Soul in Plato and Whitman* (unpublished manuscript) (on file with author).

⁷³ WHITMAN, *supra* note 72, at 48. This reading of Whitman is inspired by Dover, *supra* note 72.

⁷⁴ WHITMAN, *supra* note 72, at 48 (emphasis added).

understood as a social arrangement in which some members of the arrangement durably have greater influence than others in deciding what the members of the social arrangement will do together,⁷⁵ is incompatible with this ideal of freedom because it leaves some members of the arrangement less free than others to chart the course that they will follow together. This view departs from conceptions of social hierarchy that see hierarchy itself as morally neutral, becoming “offensive” only when elevated members of the hierarchy “dominate” inferiors by controlling “legitimizing myths” or through other mechanisms.⁷⁶

At the same time, cultural democratic equality allows for subcultural variation: what matters is not strict or formalistic equality but that others have “their counterpart” of what Whitman’s democratic individual has. In “Democratic Vistas,” Whitman writes:

Democracy has been so retarded and jeopardized by powerful personalities, that its first instincts are fain to clip, conform, bring in stragglers, and reduce everything to a dead level. While the ambitious thought of my song is to help the forming of a great aggregate Nation, it is, perhaps, altogether through the forming of myriads of fully develop’d and enclosing individuals.⁷⁷

Whitman’s celebration of a “great aggregate” made up of “fully develop’d and enclosing individuals” helps to make sense of what it means for the people to be equal and exclusive authors of and co-contributors *to their communal lives*.⁷⁸ The ideal of cultural democracy holds that, when we do things jointly, we have reason to do those things democratically, but it does not say that every project we undertake must be a joint one, or that every person must be a participant in every joint project.

Some projects I carry out separately from others. The self that Whitman sings is a “a simple separate person.”⁷⁹ As an individual, I depend on others to raise me, care for me, and help me to satisfy my needs; in this respect, I am connected to others in all my projects. But I can also carry out many things for myself. Whitman

⁷⁵ This definition of social hierarchy departs from other contemporary accounts, such as Han van Wietmarschen’s. For van Wietmarschen, a social hierarchy exists only when participants in a social arrangement “value” members of the arrangement who are “higher” more than they value those participants who are “lower,” where valuing involves expected “patterns of admiration, emulation, praise, attention, and so on.” Han van Wietmarschen, *What Is Social Hierarchy?*, 56 *NÔUS* 920, 925 (2022). My view counts social arrangements as hierarchical whenever they involve disparities of influence over how the group will act whether or not this disparity of influence accompanies a hierarchy of valuation.

⁷⁶ CHRISTOPHER J. LEBRON, *THE COLOR OF OUR SHAME: RACE AND JUSTICE IN OUR TIME* 56–57 (2013).

⁷⁷ WHITMAN, *supra* note 72, at 435.

⁷⁸ *Id.*; SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 20.

⁷⁹ WHITMAN, *supra* note 72, at 9.

recognizes “[t]he beauty of all adventurous and daring persons . . . / The beauty of independence, departure, actions that rely on themselves.”⁸⁰ I can paint a picture or write a poem by myself. I might rely on you in some ways to carry out my own projects. For instance, I might need to purchase a paper and a pen from you so that I can write my poem. You and I enter a joint project that includes this exchange, but this does not make my project of *poem-writing* a joint project. Insofar as I undertake a project alone, it is not a communal project in which others have a say.

Other projects I might undertake with a handful of others, but not in concert with all the other people with whom I live. I might write a poem together with you, or I might start a band with a few friends, or I might teach a class to a group of students. When I undertake this sort of project, I do something jointly with a few other people. These projects can also expand in scope; our band might play a concert for an audience, for instance. Cultural democracy calls for such projects to be carried out democratically because such projects form part of the lives of all their participants. This commitment to democracy does not prevent each of us from playing distinctive roles in projects of this sort. For our project of making music together to work out, you might need to write the lyrics and I might need to play the bass; for the band’s project of playing a concert to work out, the band might need to sing and the audience to listen. But such projects can be carried out in a more or less democratic spirit and, all else equal, we can more fully achieve the ideals of equality and democracy by carrying them out in ways that are more democratic rather than less so.

Projects carried out together with others need not include all members of a broader community as part of their co-authors to be democratic because not all members of a community need to be part of every subgroup that acts together. Different people have different interests and pursue different projects and associative ties. So long as all can pursue “their counterpart” of my projects “on the same terms,” such factional joint projects are democratic; indeed, insofar as these projects help to form “fully develop’d and enclosing individuals” who are not clipped and conformed by powerful personalities, these small scale and subcultural joint projects are necessary for democratic flourishing.⁸¹ The construction of the “great composite *Democratic Individual*” that *Leaves of Grass* celebrates requires a great deal of subcultural variation.⁸² In Whitman’s telling, “every atom belonging to me as good belongs to you.”⁸³ When our band strikes out in a different direction from what other people like or care about and creates a distinctive sort of music, it adds to amazing diversity of the “infinite potentialities” of human life.⁸⁴

⁸⁰ *Id.* at 149.

⁸¹ *See id.* at 435.

⁸² *See* WALT WHITMAN, *Preface to LEAVES OF GRASS* (1872), <https://www.bartleby.com/lit-hub/prose-works/5-preface-1872-to-as-a-strong-bird-on-pinions-free> [<https://perma.cc/5U UH-6MC4>].

⁸³ WHITMAN, *supra* note 72, at 29.

⁸⁴ *See* Kateb, *supra* note 5, at 549.

Beyond these projects, there are projects that we must carry out together with very large numbers of others. If our band becomes popular enough that our songs get played on the radio and start to influence in some small way how many people think and feel, we have entered a wider project, not confined just to me, my friends, and a small band of concertgoers. When we are involved in projects that shape the lives of everyone in a community, or everyone in the world, then all the people whose lives are shaped by that project must be able to participate in co-authoring it. For Whitman, urban life is a prime example of the sort of project that we necessarily carry out jointly with many other people. In projects of this sort, democracy requires a co-authorship that includes all the participants. “Where outside authority enters always after the precedence of inside authority . . . / There the great city stands.”⁸⁵ All participants in the urban project share authority and the city does not subject itself to overlords.

This co-creation includes political co-creation of laws through participation in elections and political debates⁸⁶ but also includes the co-creation of society and culture more broadly. In the great city “no monuments exist to heroes but in the common words and deeds” and “the men and women think lightly of the laws”⁸⁷ Our joint projects are not marked by hierarchy, nor are they fixed in place by the actions and decisions of past heroes or lawmakers. Democracy needs not only “processes” that depart from those of feudalism but also “poems,”⁸⁸ and a democratic poet refuses to stand above or apart from the people. The speaker of Whitman’s “Song of Myself” proclaims, “Of every hue and caste am I, of every rank and religion . . . / I resist any thing better than my own diversity . . . / And am not stuck up, and am in my place.”⁸⁹ The democratic ideal calls for our shared culture—the stuff that makes up part of all our lives, whether we want it to or not—to reflect and respond to all the people rather than standing “stuck up” above some of them.

2. The Meaning of Cultural Democracy

For the people, together, to rule over all shared aspects of life, the people need an opportunity to participate in shaping their total social life, including both politics

⁸⁵ WHITMAN, *supra* note 72, at 153.

⁸⁶ *See id.* at 149 (writing that in the great city, women “enter the public assembly and take places the same as the men”). Whitman’s depiction of a great city also has features that resonate with Shiffrin’s “duty delegation” model of democracy, according to which representative democracy involves not a transfer of a right to rule from individuals to public officials but instead a delegation of the fundamental duties of citizenships to co-citizens. *See Shiffrin, Democratic Representation as Duty Delegation, supra* note 49, at 91. In Whitman’s city, “the populace rise at once against the never-ending audacity of elected persons” and “the citizen is always the head and ideal, and President, Mayor, Governor and what not, are agents for pay” WHITMAN, *supra* note 72, at 152–53.

⁸⁷ WHITMAN, *supra* note 72, at 152.

⁸⁸ *See id.* at 271.

⁸⁹ *See id.* at 42.

and culture.⁹⁰ For the whole people to have such a chance, everyone needs a meaningful chance to influence “the culture that makes some social arrangements seem possible and others impossible.”⁹¹ The form that this chance takes will be different in different domains.

In political domains, the opportunity to participate in shaping a people’s shared life will involve the sort of voting regimes, political discourse, and free speech culture that deliberative electoral democracy and political ethos democracy regard as central to democracy. Cultural democracy theory agrees with many of the insights of political ethos theory and can fully adopt Shiffrin’s theory of democracy as a theory of how democracy might be achieved specifically in legal and political institutions and practices.

Beyond the formal political domain, it is the broad and unstinting ideal of cultural democracy that is often invoked when people talk about how non-state institutions like the family or trade unions or the workplace or the classroom should be (more) democratic.⁹² Depending on the institution under consideration, voting might or might not be an important part of rule by the people. For instance, voting might be important to the democratic organization of workplaces and unions where there are discrete and time limited objectives to be pursued,⁹³ but voting might be inappropriate as a mechanism to control other more diffuse forms of social life, like deciding what to talk about at a dinner party or which movie a group of friends should go to see.⁹⁴ The ideal of cultural democracy will thus be realized through very different mechanisms in different domains of social life.

Equal and exclusive co-authorship of the decisions of formal political institutions may require all the members of a community to have roughly equal rights to *control* political or legal decisions that affect everyone. But outside of situations like deciding whether a legislature should enact a proposed statute where there are formal procedures that allocate control rights, equal democratic co-authorship cannot usually be understood in terms of shared control. Instead, when we describe a city as having a democratic culture or a poet as having a democratic ethos, we think of opportunities for mutual influence and mutual recognition. In many informal domains, equal co-authorship of our joint projects requires an openness to

⁹⁰ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 259; Balkin, *Digital Speech*, *supra* note 4, at 35.

⁹¹ Gingerich, *Remixing Rawls*, *supra* note 10, at 424; Gingerich, *Is Spotify Bad?*, *supra* note 9, at 259.

⁹² See, e.g., Ulrich Beck, *Democratization of the Family*, 4 CHILDHOOD 151, 156 (discussing the democratization of the family in relation to democratic conceptions of other domains of social life); Ewan McGaughey, *Will Robots Automate Your Job Away? Full Employment, Basic Income and Economic Democracy*, 51 INDUS. L.J. 511, 553 (arguing in favor of “economic democracy”).

⁹³ See McGaughey, *supra* note 92, at 553–54 (discussing the role of voting in workplace democracy).

⁹⁴ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 253.

mutually being changed.⁹⁵ If we start a band together, running the band democratically need not involve voting about what we should write songs about or what notes we should play.

I have argued elsewhere that one element of openness to mutual change is that members of a community must have widespread direct and spontaneous engagement with diverse cultural objects and practices.⁹⁶ As I have argued elsewhere, to achieve a relatively high degree of cultural democracy,

[P]eople need to encounter culture with the possibility that their current values and beliefs about culture will change. Without this openness to change, the culture seems lacking in cultural reciprocity (in that individuals with novel aesthetic ideas do not get a meaningful chance to contribute to shaping the culture), as well as in self-rule (in that, over time, the people who make up the culture will look less and less like they are deciding for themselves what sort of culture to have, rather than letting this question be settled by the past).⁹⁷

This point generalizes beyond the domain of aesthetic culture. For cultural democracy to flourish, people need to encounter cultural materials, ideas, and values with the possibility of being changed by these encounters.

To avoid the rigidification that can undermine cultural democracy, it is helpful (if not strictly necessary, given the potential for non-speech encounters to provide a source of dynamism) for a community to have a speech culture in which members of the community “regularly attend *directly* and *spontaneously* to a *diverse range*” of expression, including speech that expresses distinct visions of “what is good or worthwhile” in some specific cultural sphere or in life more generally.⁹⁸ For people to truly encounter a *diverse range* of options, there needs to be enough range in the options for one to exercise their own distinctive taste in responding to the options.⁹⁹ (Choosing a brand of toothpaste at the grocery store, for example, is unlikely to provide enough range to manifest taste in this way.) A range’s diversity does not need to take the form of an incoherent or random arrangement of disparate expressive items; diversity can also come from a focused curation of views that include a range of opinions or methodologies. (So, for example, the scholarly literature of an academic discipline like legal theory might provide a diverse range of expressive

⁹⁵ I am indebted to Erin Miller for this formulation.

⁹⁶ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 254–56.

⁹⁷ *Id.* at 262; see also FRANTZ FANON, *THE WRETCHED OF THE EARTH* 181–82 (Richard Philcox trans., 2004) (discussing ways in which colonialism can cause a colonized people to coalesce and freeze in its past).

⁹⁸ Gingerich, *Is Spotify Bad?*, *supra* note 9, at 262–63.

⁹⁹ *Id.* at 263.

views if it encompasses forms of scholarship that substantially disagree with one another, even if they all follow the rules and conventions of the discipline.) Encountering a diverse range of expression with which someone directly and spontaneously engages does not require that the listeners or viewers *in fact* change their mind in response to the materials that they encounter—perhaps they will, or perhaps they will think that the new idea that they came across is terrible. What matters for cultural democracy is that such change is possible.¹⁰⁰

This requires that everyone must encounter stimuli that have the potential to prompt them to change their minds in ways that they could not have antecedently predicted.¹⁰¹ This sort of spontaneous engagement with one another lets our desires be guided by something other than our antecedently settled views about what we care about. This sort of spontaneity can, in turn, provide our co-citizens with grounds to hope that our individual cultural and political views could come to be different than they are now and thus to hope that we might come to agree to pursue different collective projects in the future than we have in the past.¹⁰² This sort of spontaneous reaction is also an important part of what keeps democratic life lively and dynamic.¹⁰³

This openness to being mutually changed in all the social and cultural activities that people undertake jointly further requires that people have opportunities to influence one another through the inarticulate appeals of their expression. For political ethos democracy, our democratic duty “overall, is to manifest a collective, articulate commitment to certain ends that reflects our sincere endorsement of the appropriate reasons and values.”¹⁰⁴ This can be achieved when, in our role as citizens, we judge for reasons, engaging with one another with an openness to having our minds changed when our co-citizens present us with good reason to do so.¹⁰⁵ Joint action that fulfills democratic duties is the product of “meaningful, articulate, free, and sincere” communication.¹⁰⁶

Cultural democracy expands on the sort of communication that plays a role in providing all people with a relatively equal ability to affect the culture that they share with one another. In domains like aesthetic culture, people’s inchoate desires and preferences—not just their articulate, reasoned views—must be transformable through engagement with one another. To realize the value of cultural democracy, a community needs not only democratic discourse in which citizens attempt to rationally persuade one another but also *democratic vibes*.¹⁰⁷

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.* at 264.

¹⁰³ See *id.* at 260.

¹⁰⁴ SHIFFRIN, DEMOCRATIC LAW, *supra* note 8, at 212.

¹⁰⁵ See *id.* at 197.

¹⁰⁶ *Id.* at 207.

¹⁰⁷ For an example of this sort of inarticulate influence focused on musical taste, see Gingerich, *Is Spotify Bad?*, *supra* note 9, at 276–83.

A *vibe*, as I use the term here, is an affectively laden feature of a social situation or interaction that is not fully reducible to the situation or interaction content that can be specified in propositional, truth-evaluable terms.¹⁰⁸ “Vibing” does not require consciously endorsing any set of propositional attitudes about the situation or interaction that occasions the vibe.¹⁰⁹ A situation or interaction’s vibe is part of what brings together the situation or interaction as a single unified situation or interaction.¹¹⁰ Vibes are features of *social* situations or interactions because they require uptake in the sense that many participants in a situation or interaction must express or enact a vibe’s non-propositional content in order for the situation to have that vibe.¹¹¹ A corollary of the uptake condition is that vibes cannot be externally dictated for a social situation or interaction. A band might aim to give a concert that has, say, a “thrilling” vibe, but the band cannot simply decide or determine that the concert *will* have this vibe, since this requires uptake by the audience. Because vibes are indexed to a particular social situation or interaction, the band might *itself* have a vibe that pertains to the interactions of the band members with one another, but this is distinct from whatever vibe the concert, understood as a social situation that includes both the band and audience, might have. Within the social situations in which they arise, vibes are also *resonant*, in that when the members of a situation take a vibe up, the vibe can thereby increase in intensity. Vibes contrast with “atmosphere” in that an artifact, like a building, might have an atmosphere independent of any ongoing social uptake and they contrast with “perspectives” in that perspectives can be taken on by an individual in a manner that does not require broader social uptake. The explicit description of a social situation or interaction’s vibe is inevitably a paraphrase of the vibe, in the respect that the vibe itself incorporates content that cannot be given adequate propositional expression.¹¹²

¹⁰⁸ In this respect, vibes are like perspectives as they have been theorized by Elisabeth Camp. See Elisabeth Camp, *Perspectives and Frames in Pursuit of Ultimate Understanding*, in *VARIETIES OF UNDERSTANDING: NEW PERSPECTIVES FROM PHILOSOPHY, PSYCHOLOGY, AND THEOLOGY* 17, 25 (Stephen R. Grimm ed., 2019).

¹⁰⁹ Cf. *id.* (“[H]aving a characterization involves more than having an attitude of entertainment or endorsement toward those propositions [that specify the characterization].”).

¹¹⁰ See Peli Greitzer, *A Theory of Vibe*, GLASS BEAD ¶ 4 (2017), <https://www.glass-bead.org/article/a-theory-of-vibe> [<https://perma.cc/5UUH-6MC4>] (characterizing the vibe of Dante’s *Inferno* as “that certain *je ne sais quoi* that makes every soul, demon, and machine in Dane’s vision of hell a good fit for Dante’s vision of hell”).

¹¹¹ On this account of vibes, something that is “just vibes” or “vibes all the way down” is not a genuine vibe, because a genuine vibe requires a social substrate with which it can resonate.

¹¹² Cf. STANLEY CAVELL, *Aesthetic Problems of Modern Philosophy*, in *MUST WE MEAN WHAT WE SAY?* 73, 81 (1976) (“[S]ome modes of figurative language are such that in them what an expression means cannot be said at all, at least not in any of the more or less familiar, conventionalized ways . . .”). In this respect, I take the account of vibes that I provide here to coincide with Peli Greitzer’s mathematized theory of vibes according to which a vibe is “an *abstractum* that cannot be separated from its *concreta*.” Greitzer, *supra* note 110, ¶ 12.

Given this understanding of vibes, what makes for a *democratic vibe*? Intuitively, we can grasp the distinction between situations that have more and less democratic vibes—we have a sense, for instance, of what a classroom with democratic vibes might feel like and how it differs from a classroom with fascist vibes. In this colloquial sense, cultural democracy calls for democratic vibes. But to put the point more precisely, cultural democracy calls for *democratic conditions for vibing* or what we might call democratic metavibes: it must be possible for members of a community to participate in initiating and taking up or refusing a wide variety of vibes. Satisfying the democratic conditions for vibing requires that the members of a community must be able to discover preferences and desires that they could not already articulate, since a vibe includes content that cannot be propositionally articulated. The discovery of inchoate preferences and desires can happen through encounters with ideas, artifacts, and forms of life that individuals find appealing upon initially or repeatedly encountering them, even if the appeal of these ideas, artifacts, or forms of life is at odds with their explicit and articulate commitments.¹¹³ According to the ideal of cultural democracy, social or political conditions that prevent this sort of spontaneous engagement are potentially anti-democratic, regardless of whether they inhibit the truth-tracking potential of deliberative practices (although, even if these conditions are anti-democratic, there might be good all-things-considered reasons to keep them in place).

3. The Value of Cultural Democracy

With this picture of the meaning and scope of cultural democracy in place, we can return to the values that motivate the broader conception of democracy. A broader conception of the domains of social life that are part of democracy is attractive because “cultural power is even more pervasive than state power” and so “individuals need to have a way of participating in the construction and development of the cultures that constitute their identities and affect their lives.”¹¹⁴ Inequality and unfreedom can be just as much an affront to everyone’s ability to lead the sort of life that they desire whether they are the product of the state or the product of markets, private actors, or culture writ large.¹¹⁵

¹¹³ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 265–66; ELAINE SCARRY, ON BEAUTY AND BEING JUST 16–17 (1999) (describing how Scarry hated palm trees for much of her life but had her perception of palms completely transformed through repeated chance encounters with them); *see also* DOMINIC MCIVER LOPES, BEING FOR BEAUTY: AESTHETIC AGENCY AND VALUE 202 (2018) (describing the “curb appeal” that some aesthetic practices can have for “outsiders” who encounter them and who are not themselves involved in the creation or appreciation of these practices).

¹¹⁴ Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 77 (2021) [hereinafter Balkin, *How to Regulate*].

¹¹⁵ *See id.* at 73.

The value of cultural democracy can be further explicated in terms of freedom, equality, and solidarity, although freedom is the more fundamental value because the ideal of freedom explains why the sort of equality required for robust cultural democracy is an important sort of equality and explains why the cooperative activity of solidarity is a worthwhile shared project.¹¹⁶ In terms of equality, cultural democracy is an ideal according to which everyone has an equal chance to forge the social parts of life that everyone shares. In terms of freedom, it is an ideal according to which the people are not bound by the past or by some faction.¹¹⁷ In addition to freedom and equality, cultural democracy also realizes the value of solidarity, in that cultural democracy provides a way for us to genuinely cooperate with others. When we participate in cultural democracy, we do not simply recognize the individual rights of others as a boundary that limits how we can pursue our own individual interests. Instead, we form our projects and desires together.¹¹⁸

B. Deliberative Electoral Democracy, Political Ethos Democracy, and Cultural Democracy

In contrast to deliberative electoral theories of democracy, cultural democracy does not straightforwardly generate a criterion of legitimate authority.¹¹⁹ This is, in part, because cultural democracy is a scalar notion: a community's joint activities and social forms of life can be more or less organized along democratic lines, but no society fully realizes the idea of cultural democracy in every respect.¹²⁰

Moreover, depending on the circumstances, achieving more democracy in some domains of life might come at the cost of less democracy in other domains. Whether this is so will depend on contingent features of the case in question, including on what sort of governance would best satisfy the ideal of democracy for a given

¹¹⁶ Cf. Amartya Sen, *Equality of What?*, 1 THE TANNER LECTURES ON HUMAN VALUES 195, 213, 219–20 (Sterling M. McMurrin ed., 1980) (discussing challenges of determining what should be equalized for a moral or political theory of equality).

¹¹⁷ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 262. For an allied view, see James Lindley Wilson, *An Autonomy-Based Argument for Democracy*, in 7 OXFORD STUDIES IN POLITICAL PHILOSOPHY 194, 194 (David Sobel et al. eds., 2021) (“Respecting the autonomy of others requires granting them some authority over patterns of social interaction that implicate and direct their wills . . .”).

¹¹⁸ For an allied account of how people can live together as equals that unifies the values of equality, liberty, and solidarity, see A.J. Julius, *The Jurisprudence Annual Lecture 2016: Mutual Recognition*, 7 JURISPRUDENCE 193, 196 (2016). My approach contrasts with Julius in that it ties the values of democracy less closely to other ethical values and so allows for more possibilities of conflict between democracy and other values.

¹¹⁹ Cf. Balkin, *Cultural Democracy*, *supra* note 7, at 1060 (noting that a theory of democratic culture need not deny that freedom of speech plays a vital role in constitutional legitimacy but contending that the constitutional value of speech cannot be limited to the legitimation of the constitution and laws of a particular state).

¹²⁰ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 261 n.122.

domain of activity. Such a conflict may arise when democratic rule in several different domains depends on intensive discursive activity where people talk to one another about how their workplace, school, or union should be run. Given the limits on human attention and time that can be devoted to meetings, achieving more democracy in one of these settings might, contingently, come at the cost of less democracy in another.¹²¹

Furthermore, because cultural democracy is not a conception of democracy rooted in a universal conception of rights, as are some Kantian conceptions of democratic rights,¹²² but instead a description of one ethical-political value that might conflict with other values, cultural democracy maintains that the most democratic organization of a domain of life is not always the ethically or politically optimal arrangement. For instance, in some domains of life where democratic organization is less important than other domains, like some domains that call for skilled, technical activity, the value of democracy might be less important than other values served by those technical practices. Thus, unlike the value of justice for some political liberals—democracy is not a master-value that states a conclusion about the best way to organize an institution. Sometimes the most just and virtuous way to organize an institution will be non-democratically.

Cultural democracy theory's allowance that other values might often conflict with the value of democracy tempers some of the expansive implications of cultural democracy. Although we have a *pro tanto* reason to democratize all our social lives, we might on many occasions undertake projects that limit the extent to which democracy can be achieved compatibly with other important aims. If we form a band and I have a distinctive aesthetic vision for the band that can only be achieved if I exercise outsized influence over how the band operates compared to the other members of the band, we might have good reason to run our band in a less democratic way than we could. Cultural democracy theory maintains that this is not the best way to run the band from the standpoint of democracy, but the aesthetic value that we are able to achieve through our non-democratic organization might be more important for us to pursue than the values of cultural democracy. In this respect, the value of cultural democracy is relatively "weak," in that a wide range of competing values might reasonably lead us to set it aside within the context of a particular project. Cultural democracy is, however, a much "stronger" value in the context of projects that we must undertake jointly, like living together in a city.

A further difference between cultural democracy and political conceptions of democracy is that cultural democracy is, in theory, a potentially more demanding ideal. Even if a community's political institutions live up to the requirements of deliberative electoral democracy, the community can still fall short of the ideal of

¹²¹ For a helpful discussion of political direct democracy that brings to life some of the challenges of intense deliberative activity for finite beings, see WOLFF, *supra* note 21, at 34.

¹²² See Christian F. Rostbøll, *Kant, Freedom as Independence, and Democracy*, 78 J. POL. 792, 792 (2016).

cultural democracy if its non-political institutions and forms of life are organized in a way that allows some faction of the community to control the rest of the community. Cultural democracy is also, potentially, more demanding than political ethos democracy because of scenarios such as the following: Imagine a community that satisfies the requirements of deliberative electoral democracy in which members of a majority group (the X's) and a minority group (the Y's) regard one another as *political equals*, equally capable of giving reasons that must be accounted for in democratic deliberation about the political system's rules, actions, directives, communications, and other outputs. At the same time, imagine that the X's regard the Y's as their *social inferiors*, and perhaps as "disgusting" or otherwise aesthetically defective.¹²³ Whether or not such a scenario is psychologically possible, it illuminates a difference between the value commitments of political ethos democracy and cultural democracy. This imagined society might plausibly be marked by political equality but by severe inequality and unfreedom in non-political social spheres, like the organization of families and households or the allocation of cultural prestige.¹²⁴ Such a society might largely satisfy the demands of political ethos democracy but still fall short of the ideal of cultural democracy.¹²⁵

Political ethos democracy, like deliberative electoral democracy, is, in some respects, a "site-specific" view of democracy, insofar as it is the "political system" in which democracy is constituted for these theories.¹²⁶ For cultural democracy, the political and legal systems might play particularly important instrumental roles in achieving democracy because of the sometimes-coercive force of laws and because of the potential for a strong constitutional order to insulate electoral decision-making from distorting effects of accumulated wealth and power.¹²⁷ However, for cultural democracy, *every* site of collective activity is a site of democratic possibility. According to cultural democracy theory, the scope of democracy encompasses not just laws and government activity, nor even just the operation of markets, but all

¹²³ Whether this sort of split between political regard and social regard is conceptually possible depends on how the boundaries of the political is delineated. For a discussion of the connection between social and political equality, see Shiffrin, *Fair Equality of Opportunity Principle*, *supra* note 43, at 1669–70.

¹²⁴ For a more detailed development of an example along these lines, see Gingerich, *Remixing Rawls*, *supra* note 10, at 422–25.

¹²⁵ It remains open for the political ethos theorist to hold that the hypothetical society is defective in some other way—perhaps it is unjust, for instance—even if it is not undemocratic.

¹²⁶ Similarly, although Robert Post's democratic theory of free speech is in some ways very congenial to cultural democracy in that Post regards all communication that "form[s] part of the process by which society ponders what it believes and thinks" as part of democratic participation, Post, *supra* note 15, at 621, Post's overarching focus remains on decisions rendered by formal political institutions. *See id.* ("In a democracy, government institutions translate public opinion into 'decisions.'").

¹²⁷ *See* RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 51.

collective endeavors. And, although democratic elections might provide a way of insulating decision-making from hierarchy-creating accumulations of wealth and power, such insulation is not a panacea and might coexist with anti-democratic hierarchy in other areas of life,¹²⁸ so achieving cultural democracy depends not only on using the state and law but also on moving closer to the democratic ideal in less formally institutionalized domains. What is ultimately important for cultural democracy is that how we live together must be up to the people, together.

C. The Ideal of Cultural Democracy in Action

Cultural democracy calls for systems of speech rules in all areas of social life that (1) are *themselves* democratic, in that they are the joint product of the people, rather than the imposition of a vanguard or a technocratic elite and (2) *conduce* to democratic rule, both within the social system that they are part of (political, cultural, familial, or whatever the system in question might be) and within the society more broadly.¹²⁹

The speech rules that cultural democracy regards as democratic might be very different in some cultural domains than others. For instance, when it comes to the speech rules that form the terrain of constitutional or statutory law, it might be important that those rules themselves are the product of majoritarian elections; when it comes to speech rules that regulate speech in a specific workplace, it might be less important for the speech rules to be generated through this procedure.

Because it is not restricted to the realm of politics, cultural democracy provides a standard for evaluating not only laws or statutes but also systems of rules or the constitutional order taken as a whole, relations of production, patterns of consumption, and forms of non-state organization, like the family or networks of friendship. For any socially significant system of joint action, we can inquire about the extent to which it manifests the cultural democratic ideal of rule by the people. We may not be able to give a binary verdict as to whether any such system “is” or “isn’t” culturally democratic or quantify the absolute degree to which it achieves cultural democracy at a given moment. We will make more headway by asking: Would changing this system in this way make it marginally more culturally democratic or less so?

At the same time, because of its broad sweep, it is trickier to generate determinate policy guidance from the theory of cultural democracy than from other theories of democracy.¹³⁰ Rather than providing decisive verdicts as to whether some given

¹²⁸ See Gingerich, *Remixing Rawls*, *supra* note 10, at 413.

¹²⁹ See generally Balkin, *Cultural Democracy*, *supra* note 7.

¹³⁰ Whether this is a strike against cultural democracy theory or a point in its favor may depend on one’s sympathy for highly contextual inquiries as part of the elaboration of free speech theory in First Amendment jurisprudence. Proponents of an expanded role for “proportionality” analysis in First Amendment adjudication, for instance, may find cultural democracy’s inability or refusal to articulate high-level adjudication-guiding principles congenial. See Jamal Greene, *Rights as Trumps*, 132 HARV. L. REV. 28, 61–62 (2018).

regulation is compatible or incompatible with free speech, cultural democracy theory is often better suited to consider what sort of institutions and dispositions might conduce to the realization of a democratic culture.¹³¹ This is not a serious problem because cultural democracy is not designed to provide a criterion of constitutional legitimacy, and because both state and non-state actors can contribute to the realization of cultural democracy.

According to cultural democracy theory, the value of democracy is not *exhausted* in the political but extends to all joint activity, and there will be complex interactions between democracy in formal politics and in other domains. Because it extends beyond the formal political domain, liberals committed to a strong principle of state neutrality may regard cultural democracy as one good among many that people might wish to pursue in their lives, but deny that it is a good that the *state* can legitimately pursue on behalf of all of its citizens.¹³² In other words, cultural democracy might look like a sectarian ethical ideal that individuals might legitimately pursue in their own lives, not a political ideal that the state should promote. My argument for the ideal of cultural democracy is an ethical argument: I contend that the ideal of cultural democracy should guide individuals and social institutions including but not limited to political institutions. Whether and when the state has reason to intervene in non-state institutions is a further question, and whether the state and law are the most effective tools for promoting cultural democracy in any given context is an open question.

A related concern about cultural democracy is how cultural democracy might address situations of profound disagreement among citizens with different views of the good.¹³³ Cultural democracy is better able to address deep disagreement than some forms of deliberative electoral democracy, because cultural democracy focuses on everyone having equal ability to shape the joint actions in which they participate, rather than on ensuring that a community is maximally likely to act in the manner that it has most reason to act. In a democratic culture, there will be many disagreements, and cultural democracy holds that we should resolve those disagreements through whichever democratic procedures are more appropriate for the relevant domain of activity. In the formal political domain, for instance, elections might often be the best mechanism to resolve disagreements. People will try to convince each other how to vote, and some people will lose elections while others win. Such a process can be part of a democratic culture if those electoral processes do not give

¹³¹ See Balkin, *Cultural Democracy*, *supra* note 7, at 1075–76.

¹³² See QUONG, *supra* note 17, at 14–15. I argue elsewhere that the good of cultural democracy *can* ultimately qualify as the sort of political value that even neutralist liberals can accept as a legitimate aim for the state. See Jonathan Gingerich, *Freedom Beyond Choice* 26–27 (Jan. 21, 2024) (unpublished manuscript) (on file with the author) (arguing for a political understanding of spontaneity that differentiates it from a non-political conception of autonomy). However, this argument goes beyond the scope of the present discussion and that is unlikely to persuade all liberal neutralists.

¹³³ I am grateful to Brenner Fissell for illuminating discussion of this point.

rise to entrenched hierarchies that give some people more ability than others to shape their shared political life. In other settings (like, for instance, a law school classroom), the relevant democratic ideal will be less focused on voting, so disagreement in these spaces will have more to do with factors like how students and teachers listen and talk to one another.

In both formal and informal varieties of democratic decision-making, cultural democracy involves a commitment by the participants to respecting outcomes of democratic processes,¹³⁴ but it does not involve any commitment to making those outcomes permanent or refraining from democratically contesting them again in the future.

III. CULTURAL DEMOCRACY AND SOCIAL MEDIA PLATFORMS

With this account of cultural democracy on the table, we can now return to recent legislative efforts to regulate speech rules on social media platforms and examine the implications of cultural democracy for democratic theories of free speech and free speech doctrine more generally. Insofar as the First Amendment provides a constitutional implementation of a moral and political right to free speech, insofar as the best justification for such a right comes from a democratic theory of free speech, and insofar as cultural democracy is an attractive articulation of the ideal of democracy, cultural democracy can help to inform our understanding of the First Amendment and can help us to see whether certain sorts of speech regulation might promote or undermine democracy.¹³⁵ This Part will show how such an analysis might proceed by examining Texas House Bill 20¹³⁶ and *NetChoice, LLC v. Paxton*.¹³⁷

I will begin by providing a general account of what cultural democracy theory suggests about the speech environment of social media platforms. After discussing the implications of cultural democracy for speech on social media platforms in general terms, I will describe House Bill 20's implications for speech on social media platforms and evaluate it from the standpoint of cultural democracy.

¹³⁴ This account of cultural democracy gives rise to further questions in general jurisprudence concerning what sort of legal obligation necessarily arises from its procedural conception of democratic authority, but these questions are beyond this Article's scope.

¹³⁵ The analysis that cultural democracy can provide will not directly guide First Amendment jurisprudence, because it will not consider all the ways in which First Amendment jurisprudence interacts with other fields of law, and it will not examine the full range of consequences that adopting a particular interpretation of the First Amendment might have for a wide range of speech outlets beyond social media platforms. Moreover, the analysis that cultural democracy provides will not be rooted in existing First Amendment doctrine or even in the text of the First Amendment: the relationship between these legal materials and the speech practices that cultural democracy calls for is an open question.

¹³⁶ TEX. BUS. & COM. CODE ANN. § 120.

¹³⁷ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022), *cert. granted*, 144 S. Ct. 477 (2023) (mem.).

A. Cultural Democracy and Social Media

Over the past decade, free speech scholars have increasingly focused on the question of how social media platforms should be run and regulated.¹³⁸ First Amendment scholars' concerns about democracy and social media have largely focused on the effects of the speech environment that platforms create on formal democratic institutions. Many of these concerns center on ways in which online speech can undermine the democratic efficacy of elections, such as by facilitating the dissemination of lies about how to vote¹³⁹ or spreading misinformation about candidates for office.¹⁴⁰

¹³⁸ On March 31, 2023, a search in Westlaw's Law Reviews and Journals collection for "free speech" /p "social media" returned 1,366 articles, 915 of which were published between 2018 and the present. Two hundred and seven of these articles were published in 2022 alone. See, e.g., Balkin, *How to Regulate*, *supra* note 114, at 74–79 (discussing the role of social media in the digital public sphere); Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 101 (2021) (evaluating whether social media platforms are entitled to First Amendment editorial rights); Evelyn Douek, *Governing Online Speech: From "Post-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 769 (2021) (describing content moderation as a "wicked problem" for First Amendment theory); Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. F. 427, 428 (2021) (offering a normative discussion on today's digital modern "public square"); PAUL GOWDER, *THE NETWORKED LEVIATHAN* 3 (2023) (arguing for the radical democratization of platforms); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–02 (2018) (describing private and self-regulating platforms as the "New Governors" of online speech); Shiffirin, *Unfit to Print*, *supra* note 55, at 990–91 (offering an account of how platforms like Twitter might develop their own interpretations of some parts of First Amendment law that courts are less-well suited to develop); Eugene Volokh, *Treating Social Media Platforms like Common Carriers?*, 1 J. FREE SPEECH L. 377, 383 (2021) (examining whether platforms should be treated as common carriers for First Amendment purposes); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 465 (2021) (examining the rationality of applying common carrier doctrine or public accommodation doctrine to digital platforms).

¹³⁹ See, e.g., Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL'Y REV. 353, 377 (2022) (describing ways in which "anti-speech acts" might interfere with lawful access to the ballot); Michael Weingartner, *Remedying Intimidating Voter Disinformation Through § 1985(3)'s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 87 (2021) (arguing that "social media and other online platforms provide bad actors an unprecedented ability to broadcast and target disinformation"); see also, e.g., Colin Moynihan, *Trump Supporter Convicted in 2016 Scheme to Suppress Votes for Clinton*, N.Y. TIMES (Mar. 31, 2023), <https://www.nytimes.com/2023/03/31/nyregion/douglass-mackey-trial-twitter-misinformation.html> [<https://perma.cc/RS5T-KXHQ>] (reporting the recent conviction of Douglass Mackey for conspiring to deprive others of their right to vote for spreading misinformation about how to vote on social media ahead of the 2016 presidential election).

¹⁴⁰ Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 536 (2020) (discussing the consequences of disinformation on social media for election law and integrity); Mark S. Kende, *Social Media, the First Amendment, and Democratic Dysfunction in the Trump Era*, 68 DRAKE L. REV. 273, 278–82 (2020) (describing how social media disinformation including foreign

Others focus instead on ways social media platforms might affect public discourse about politicians' or nations' political agendas.¹⁴¹

Recently, scholars of social media platforms have also begun to ask whether and how these platforms should themselves be governed democratically: Whether through mechanisms of corporate governance that provide greater voice for their users or through stronger oversight by political institutions like legislatures and regulatory agencies.¹⁴² Cultural democracy theory contributes to this discussion by showing that the ideal of democracy gives us reason to organize all of our joint projects—including projects like building and communicating on social media platforms—democratically. In this Section, I will first explore what cultural democracy tells us about *how*, procedurally, decisions about speech on social media platforms should be made and then will explore what, substantively, the speech rules and speech environment of social media platforms should be like to promote cultural democracy.

1. How Should Decisions About Speech on Social Media Platforms Be Made?

It is *prima facie* troubling from the standpoint of cultural democracy if the speech rules on platforms used by millions of people are made by a very small number of managers and owners rather than the people who use the platforms, since this

disinformation campaigns undermine election integrity); Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 578–79 (2020) (discussing ways in which social media “bullshit” about political candidates can undermine election integrity).

¹⁴¹ See, e.g., Jordan Carpenter et al., *Political Polarization and Moral Outrage on Social Media*, 52 CONN. L. REV. 1107, 1114–16 (2021) (describing ways in which social media might impact public and political discourse beyond elections by increasing moral outrage and group antagonism).

¹⁴² See, e.g., Khiara M. Bridges, *Language on the Move: “Cancel Culture,” “Critical Race Theory,” and the Digital Public Sphere*, 131 YALE L.J. F. 767, 782–84 (2022) (examining recent governance reforms at digital platforms from the standpoint of democratic theory); Brenda Dvoskin, *Representation Without Elections: Civil Society Participation as a Remedy for the Democratic Deficits of Online Speech Governance*, 67 VILL. L. REV. 447, 502–07 (2022) (articulating an ambitious theory of ways in which civil society participation might help to democratize online speech governance); GOWDER, *supra* note 138, at 183–92 (making a democratic case for powerful platform councils to govern digital platforms); Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2490 (2020) (providing a detailed case study of the Facebook Oversight Board and suggesting that such governance mechanisms might provide opportunities for participatory empowerment but not democratic accountability); Edward Lee, *Virtual Governments Special Issue: Governing the Digital Space*, 27 UCLA J.L. & TECH. 1, 19–28 (2022) (developing a theory of “virtual governments” to describe and evaluate the governance of digital platforms); Gali Racabi, *Tech Drift & Powerlessness*, 24 YALE J.L. & TECH. 554, 599–605 (2022) (arguing for nurturing more democratically governed entrants to the tech system and making existing actors more democratic to overcome democratic deficits at digital platforms); Skyler Ross, *Speech Governance Is an Autocracy: The Case for Democratizing Facebook*, 27 UCLA J.L. & TECH. 1, 20–33 (2022) (articulating an innovative and promising “democratic approach” to speech governance on internet platforms).

could easily be a situation of hierarchical authority rather than democratic rule. However, since cultural democracy encompasses institutions that cannot realistically be ruled through electoral mechanisms, this does not yet tell us whether or how law and the state should be involved in making speech rules for platforms.

One possible arrangement for making speech rules for social media platforms is relying on market forces to shape them. To a significant extent, this is the arrangement that is presently in place: platforms like Facebook, Twitter, and YouTube are publicly or privately owned and design speech rules that, in their managers' judgment, enables them to operate effectively within their markets.¹⁴³ Perhaps this arrangement is not just the arrangement that happens to predominate in 2023 but also an arrangement that is good from the standpoint of democratic governance.¹⁴⁴ Markets may be a useful device for decision-making about speech rules because they allow people to express the relative intensity of their views in a way that many voting systems do not.¹⁴⁵ Perhaps markets can encourage social media platforms to design speech rules that represent the interests of all their users. Some users of a platform might be willing to pay a lot to participate in a speech environment with no speech rules aside from prohibitions on criminal and defamatory speech, while other users who also prefer such an environment might be willing to pay very little for it.¹⁴⁶

However, while there are some contexts in which markets provide important mechanisms for democratic rule, like providing signals about what sorts of goods an economy should produce,¹⁴⁷ it is much less clear that they can helpfully facilitate the development of culturally democratic speech environments on social media platforms. Unconstrained markets enable people to express their views in proportion to background property allocations.¹⁴⁸ This feature of markets means that they can often undermine equal spontaneous engagement and can themselves manifest anti-democratic hierarchies that enable some subset of people to exercise greater decision-making power than others.¹⁴⁹

¹⁴³ See Ashley Johnson & Daniel Castro, *How to Address Political Speech on Social Media in the United States*, INFO. TECH. & INNOVATION FOUND. 8 (Oct. 11, 2022), <https://itif.org/publications/2022/10/11/how-to-address-political-speech-on-social-media-in-the-united-states/> [<https://perma.cc/8UMX-4JWV>].

¹⁴⁴ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 550 (examining the role of secondary markets in achieving a democratic ideal in the production of aesthetic culture).

¹⁴⁵ See Alec Nove, *Feasible Socialism? Some Social-Political Assumptions*, in *WHY MARKET SOCIALISM? VOICES FROM DISSENT* 183, 216–19 (Frank Roosevelt & David Belkin eds., 1994); see also Saul Levmore, *Voting with Intensity*, 53 *STAN. L. REV.* 111, 142–59 (2000) (commenting on the possibility of voting systems that represent intensity of voter preference).

¹⁴⁶ Because of the way social media platforms operate, a user's willingness to pay is often better thought of as their willingness to leave a given social media platform in favor of another social media platform or in favor of devoting less attention to social media. See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 240–41.

¹⁴⁷ See Nove, *supra* note 145, at 216–19.

¹⁴⁸ See Gingerich, *Remixing Rawls*, *supra* note 10, at 428.

¹⁴⁹ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 259–60.

Even when markets do not allocate decision-making rights on the basis of unjustifiable antecedent property distributions, it is unclear how much they might help in the context of large social media platforms, particularly when there are a small number of such platforms and where these platforms rely on network effects to make their services valuable to users.¹⁵⁰ Since there are a small number of networks on which hundreds of millions of users rely, it can be impossible for many users to find a good substitute for a given platform that would allow them to accomplish their aims for using social media, even if they are deeply unhappy with the speech rules or other features of a given platform.¹⁵¹ Furthermore, as Elon Musk's handling of Twitter has illustrated, when platforms are owned by a single multibillionaire, rather than publicly owned, even profit considerations might not play a particularly important role in influencing the platform's speech rules, and so markets among users might do little to enable all the participants in the system of social media to have a say in designing speech rules for that system.¹⁵²

Perhaps there are other informal, non-market mechanisms that might be used to design speech rules for platforms. For instance, we might imagine an anarchist social media platform in which all the users of a platform would agree on what the rules for speech for that platform would be. For small speech communities with strong shared interests, this might be workable. For example, perhaps the several thousand members of the "Trinity Alps Wilderness Pictures & Information" Facebook group¹⁵³ can more-or-less agree on what sort of speech should take place in this group, if not by reaching a consensus, then by reaching a near-consensus.

But insofar as large social media platforms facilitate an extremely wide range of speech with minimal curation and are used by an extremely large and disparate community of users, such consensual solutions emerging from the community of users seem implausible. Although the users of the Trinity Alps Wilderness Pictures & Information group presumably all share some sort of interest in the Trinity Alps of Northern California, the set of all users of a globally ubiquitous platform like Facebook or Twitter are unlikely to share any interests aside from those that we can impute to all humans (or those extremely thin interests that follow analytically from being users of social media platforms).

¹⁵⁰ See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 476 (5th Cir. 2022), *cert. granted*, 144 S. Ct. 477 (2023) (mem.).

¹⁵¹ See *id.* at 476 ("To effectively monetize, say, carpet cleaning instructional videos (a real niche), one needs access to YouTube. Alternatively, sports 'influencers' need access to Instagram It's thus no answer to tell the censored athlete, as the Platforms do, that she can just post from a different platform.").

¹⁵² See Julia Conley, "A Real Threat to Democracy": Musk Buys Twitter for \$44 Billion, COMMON DREAMS (Apr. 25, 2022), <https://www.commondreams.org/news/2022/04/25/real-threat-democracy-musk-buys-twitter-44-billion> [<https://perma.cc/T37E-PE6G>].

¹⁵³ Trinity Alps Wilderness Pictures & Information, FACEBOOK, <https://www.facebook.com/groups/833529483700502/> [<https://perma.cc/RD6D-VGZM>] (last visited Apr. 30, 2024).

Users of these large platforms do not even share membership in the same political communities, being spread throughout most of the globe.¹⁵⁴ For this reason, one promising avenue for democratizing social media platforms is extensive user control rights.¹⁵⁵ Although cultural democracy does not always call for mutual co-authorship to be realized through control rights,¹⁵⁶ decisions about how to run large institutions whose participants have highly disparate interests is a situation in which shared control rights are likely to provide a more effective mechanism for co-authorship than are more informal means of influence. Of course, simply running polls on Twitter or Facebook asking users to vote on whether a particular post should be taken down or not is unlikely to promote the goals of democracy.¹⁵⁷ This is, in part, because many users of large social media platforms do not wish to spend a great deal of time making decisions about how speech on those platforms should be governed, especially when the primary beneficiaries of such decisions appear to be investors in those platforms rather than users.¹⁵⁸ A more promising mechanism might involve a greater degree of representation, such as by providing for platform users to elect the majority of the board of directors of large social media platforms.¹⁵⁹

Although robust user control rights exercised by all of a platform's users from across the globe are an attractive mechanism for promoting cultural democracy in social media, implementing such a system of user control would require a radical reconfiguration of platform governance. Such a reconfiguration is desirable from the standpoint of cultural democracy, but there are other reforms that could bring the speech environment of social media platforms slightly closer to the ideal of cultural democracy if not as close as a system of robust user control would. A second-best option for democratically governing large social media platforms is by exercising control of platforms' speech environments through formal political institutions at the level of nation-states and subnational states. Insofar as members of smaller or

¹⁵⁴ See, e.g., Stacy Jo Dixon, *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2023*, STATISTA (Feb. 9, 2024), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide> [<https://perma.cc/89LJ-X5EU>] (reporting that Facebook had 3.065 billion active users worldwide at the end of December 2023).

¹⁵⁵ For a fuller statement of this proposal, see Gingerich, *Is Spotify Bad?*, *supra* note 9, at 300–02.

¹⁵⁶ See *supra* note 95 and accompanying text.

¹⁵⁷ See Mrinmay Dey & Jyoti Narayan, *Conspiracy Theorist Alex Jones Reinstated on X After Musk Poll*, REUTERS (Dec. 10, 2023, 6:53 PM), <https://www.reuters.com/technology/musk-poll-shows-x-users-want-us-conspiracy-theorist-jones-account-back-2023-12-10> [<https://perma.cc/4LHX-G4SM>] (reporting on a poll on Twitter conducted by Elon Musk, resulting in Musk reinstating conspiracy theorist Alex Jones's account).

¹⁵⁸ See, e.g., Conley, *supra* note 152; Yannis Theocharis et al., *Do Twitter Users Want Musk to Censure or Ban Offensive or Threatening Posts?*, WASH. POST (Dec. 2, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/12/02/elon-musk-twitter-policies/> [<https://perma.cc/3KJX-5E8F>] (outlining user preferences for regulation based on the type of speech).

¹⁵⁹ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 300–02.

more geographically confined political communities are more likely to have aligned interests or to be able to communicate with one another in ways that allow for effective democratic decision-making about speech rules for platforms, it might be best for more localized subnational administrative units (like individual states of the United States) to exercise these functions rather than larger political entities representing more disparate populations, like the United States Federal Government or the European Union.¹⁶⁰

A more fine-grained question is what parts of the administrative apparatus of nation-states should make decisions about the speech rules for platforms. Should these decisions be made by voters themselves through direct democracy? Should they be made by parliaments or legislatures? By administrative agencies that are indirectly accountable to voters? By appointed but unelected judges engaged in statutory or constitutional interpretation or common law adjudication? In principle, any of these arrangements might be consistent with the ideal of cultural democracy, depending on the overall structure of a community.

For cultural democracy, the mere fact that *some* public institution is involved in overseeing or shaping the speech rules for platforms is not enough to fully meet the demands of democracy. The people can be more or less involved in public decision-making, and cultural democrats might worry about administrative arrangements that make it difficult for the people of today to change practices or rules inherited from the past or that provide extraordinary decision-making powers to small factions who are entrenched in positions of authority.¹⁶¹ Thus, cultural democrats are likely to feel that an arrangement that allows unelected judges holding lifetime appointments to prevent elected bodies from overseeing platforms' speech rules is more suspect than an arrangement that accords more power to elected bodies.¹⁶² This concern at its highest pitch when such judges are engaged in constitutional interpretation of a constitution that is, practically speaking, impossible to amend.¹⁶³ On the other hand,

¹⁶⁰ See SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 67 (“Some democratic legal aims are better realized when the community is powerful enough to develop a distinctive voice yet small enough to generate a distinctive identity and camaraderie between citizens.”).

¹⁶¹ See *supra* note 117 and accompanying text.

¹⁶² These considerations may not be decisive. Many constitutional theorists have thought that certain sorts of anti-majoritarian judicial and constitutional institutions might promote democracy. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1395–96 (2006) (considering the “tyranny of the majority” objection that defenders of judicial review might raise to his case against judicial review). This sort of assessment depends on the broader political context in which legislative action takes place. See Greene, *supra* note 130, at 91 (commenting that the mere fact that a legislative enactment adversely affects the rights of some members of a community cannot be a reason to regard such enactments as a “tyranny of the majority” without undermining society’s capacity “to govern itself”). I postpone discussion of this issue until the Conclusion, *infra*.

¹⁶³ See Richard Albert, *The World’s Most Difficult Constitution to Amend?*, 110 *CALIF. L. REV.* 2005, 2016–20 (2022).

for electoral processes to count as relatively more democratic than judicial processes, those electoral processes must *in fact* “equaliz[e] the relative ability of citizens to affect the outcome of elections.”¹⁶⁴ Whether they do so will depend on a wide range of features, including how legislative districts are drawn up,¹⁶⁵ rules governing who can vote and what procedures they must follow to cast a ballot,¹⁶⁶ and how campaign finance works in practice,¹⁶⁷ among other considerations.

2. What Should the Speech Environment on Social Media Platforms Be Like?

Apart from the procedures through which they are made, what sort of speech environment on social media platforms would promote the cultural democratic ideal? Here, the way in which cultural democracy theory assesses rules about speech may depart from how it considers non-speech rules and practices because of the consequences of speech rules for democratic decision-making. Speech rules are an important feature of governance for cultural democrats to examine, insofar as speech rules shape our speech environment and insofar as our speech environment in turn shapes how we make our decisions together.

Where might this analysis begin for cultural democracy theory? As we have seen, one important condition for fulfilling the ideal of cultural democracy is that members of a community must be able to spontaneously engage with one another. Such encounters often happen through speech (although this is not the only avenue for this sort of encounter).¹⁶⁸ So, cultural democracy calls for speech environments that promote spontaneous encounters between community members and speech rules that support the development and sustenance of such environments.

If this is what a culturally democratic speech environment looks like, we might ask, as the next step of our analysis, whether speech rules as they exist in a pre-H.B. 20 world promote or undermine this sort of speech environment. We need to ask this question before asking about H.B. 20 itself, so that we can analyze the statute’s marginal effects on the speech environment.

On the one hand, the architecture of many social media platforms plausibly leads us to have fewer encounters with a diverse range of views than we would if we spent less time reading social media or than if social media platforms were organized

¹⁶⁴ See RAWLS, *POLITICAL LIBERALISM*, *supra* note 27, at 360.

¹⁶⁵ See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 71–118 (1994).

¹⁶⁶ See Juan F. Perea, *Echoes of Slavery II: How Slavery’s Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1094–96 (2018) (discussing the anti-democratic effects of voter ID laws).

¹⁶⁷ See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 635–57.

¹⁶⁸ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 264–65 (discussing a visual encounter with a palm tree as an instance of “direct and spontaneous” engagement).

along radically different lines. For instance, scholars of social media have often commented on how politically polarizing social media sorts users into “filter bubbles” in which they are likely to encounter speech that they already agree with, or encounter speech that they disagree with in such a manner that the encounter is more likely to provoke outrage than to occasion any possibility of genuine self-transformation.¹⁶⁹

On the other hand, it can be difficult to determine the extent to which these practices of social media companies truly interfere with direct and spontaneous engagement with a range of materials. We might wonder, for instance, whether most people living in the United States in 1920 were more or less likely than people living today to encounter a wide range of views that they did not already agree with.¹⁷⁰ Although these comparative assessments can be challenging to make and require addressing a wide range of empirical questions, these are the sorts of questions that we need to address to understand whether speech rules on large social media platforms as they exist today promote cultural democracy. Relative to some alternative—whether that alternative is a world in which social media companies have different financial incentives than they do now¹⁷¹ or a world in which people make less use of social media platforms altogether—do current social media speech rules lead people to have more direct and spontaneous engagement with diverse forms of expression or less of it?

B. Assessing Texas House Bill 20 from the Standpoint of Cultural Democracy

With the speech framework generated by cultural democracy theory in place, we can now turn to a specific example to get a more concrete understanding of how the ideal of cultural democracy operates.

Following the January 2021 suspension of President Donald J. Trump from Twitter¹⁷² and Facebook,¹⁷³ several conservative state legislatures enacted statutes

¹⁶⁹ Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1768 (2019); see CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 106–07 (2017). Other scholars have argued that social media platforms may over time become increasingly likely to remove vaguely defined “hate speech” because of a combination of market forces and regulatory pressure. See Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1049–61 (describing the concept of “censorship creep”).

¹⁷⁰ See Emily Kubin & Christian von Sikorski, *The Role of (Social) Media in Political Polarization: A Systematic Review*, 45 ANNALS INT’L COMM’N ASS’N 188, 197–99 (2021) (discussing methodological challenges of conducting research on the relationship between social media and polarization).

¹⁷¹ See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 315–16.

¹⁷² X, *Permanent Suspension of @realDonaldTrump*, XBLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [<https://perma.cc/6A5P-736R>].

¹⁷³ Guy Rosen & Monika Bickert, *Our Response to the Violence in Washington*, META

designed to protect the ability of Trump, and figures like him, to reach audiences on social media platforms.¹⁷⁴ In May 2021, Florida enacted Senate Bill 7072 to provide “real Floridians” with “protection against the Silicon Valley elites”¹⁷⁵ by “taking back the virtual public square as a place where information and ideas can flow freely.”¹⁷⁶ Senate Bill 7072 prohibits social media platforms with gross annual revenues of more than \$100 million or with more than 100 million active users globally from “deplatforming” candidates for public office¹⁷⁷ and imposes restrictive conditions on when they can “censor” or “shadow ban” users.¹⁷⁸ In September 2021, Texas enacted House Bill 20, which imposes a number of disclosure requirements on social media platforms with more than fifty million active users in the United States, requires them to establish complaint review procedures for content moderation decisions, and prohibits them from “block[ing], ban[ning], remov[ing], deplatform[ing], demonetiz[ing], de-boost[ing], restrict[ing] . . . [or] deny[ing] equal access or visibility to or otherwise discriminat[ing] against” a user’s expression on the basis of the user’s viewpoint or the viewpoint represented in their expression.¹⁷⁹

Other efforts to regulate speech on social media platforms have come from the opposite side of the political spectrum. Following a 2022 mass shooting in Buffalo, the New York State Assembly enacted the ‘Hateful Conduct Law,’ which requires all social media networks that conduct business in New York to “maintain a clear and easily accessible mechanism for individual users to report incidents of hateful conduct,” which means “the use of a social media network to vilify, humiliate, or incite violence against a group or a class of persons on the basis of race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression.”¹⁸⁰

Many commentators expected all of these statutes to be struck down by federal courts as an infringement on the free speech rights of social media platforms to edit and curate the content that their users post.¹⁸¹ Indeed, the Eleventh Circuit held in

(Jan. 7, 2021, 8:05 AM), <https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/> [<https://perma.cc/EU27-66E8>].

¹⁷⁴ See Issie Lapowsky, *Jan. 6 Launched a Wave of Anti-Content Moderation Bills in America*, PROTOCOL (Jan. 6, 2022), <https://web.archive.org/web/20230608082015/https://www.protocol.com/bulletins/anti-content-moderation-bills>.

¹⁷⁵ News Release, Ron DeSantis, 46th Governor of Florida, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech> [<https://perma.cc/SQK3-CVZ8>] (quoting Gov. Ron DeSantis).

¹⁷⁶ *Id.* (quoting Lt. Gov. Jeanette Nuñez).

¹⁷⁷ FLA. STAT. § 106.072(2).

¹⁷⁸ FLA. STAT. § 501.2041.

¹⁷⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 143A.001 (2023); TEX. BUS. & COM. CODE ANN. § 120 (2023). See generally 2021 Tex. Sess. Law Serv. 1 (West).

¹⁸⁰ N.Y. GEN. BUS. CORP. LAW § 394-ccc(1)(a)–(2) (LexisNexis 2023); see 2022 Sess. Law News of N.Y. Ch. 204 (A. 7865-A) (McKinney).

¹⁸¹ See, e.g., Gilad Edelman, *Florida’s New Social Media Law Will Be Laughed Out of*

May 2022 that almost all provisions of S.B. 7072 unconstitutionally burden the free speech rights of social media platforms.¹⁸² Similarly, in February 2023, the Southern District of New York, citing the Eleventh Circuit's opinion striking down S.B. 7072, granted a preliminary injunction prohibiting enforcement of New York's Hateful Conduct Law.¹⁸³ However, in a surprise to many commentators, the Fifth Circuit *upheld* H.B. 20 against the facial First Amendment challenge brought by social media platforms.¹⁸⁴ In an opinion drawing heavily on *Pruneyard Shopping Center v. Robins*¹⁸⁵ and *Rumsfeld v. FAIR*,¹⁸⁶ the Fifth Circuit held that just as a state can create a right to distribute leaflets at privately owned shopping malls, so too can a state create a right for speakers to air their opinions on platforms like Facebook, Twitter, and YouTube.¹⁸⁷

The Fifth Circuit's opinion has been subject to extensive criticism,¹⁸⁸ including from commentators largely sympathetic to some of the objectives of H.B. 20. For instance, the Fifth Circuit's opinion has been criticized on the grounds that it would

Court, WIRED (May 24, 2021, 6:20 PM), <https://www.wired.com/story/florida-new-social-media-law-laughed-out-of-court> [<https://perma.cc/DYX6-5VF3>].

¹⁸² *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1203, 1231 (11th Cir. 2022), *cert. granted*, 144 S. Ct. 478 (2023) (mem.).

¹⁸³ *Volokh v. James*, 656 F. Supp. 3d 431, 442, 447 (S.D.N.Y. 2023).

¹⁸⁴ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022), *cert. granted*, 144 S. Ct. 477 (2023) (mem.); see Alan Z. Rozenshtein, *The Fifth Circuit's Social Media Decision: A Dangerous Example of First Amendment Absolutism*, LAWFARE (Sept. 20, 2022, 12:52 PM), <https://www.lawfareblog.com/fifth-circuits-social-media-decision-dangerous-example-first-amendment-absolutism> [<https://perma.cc/9N5C-KKJC>].

¹⁸⁵ 447 U.S. 74 (1980).

¹⁸⁶ 547 U.S. 47 (2006).

¹⁸⁷ *NetChoice*, 49 F.4th at 455, 458–59.

¹⁸⁸ See James B. Speta, *Can Common Carrier Principles Control Internet Platform Dominance?*, 2022 Robert F. Boden Lecture, Marquette University School of Law (Sept. 22, 2022), <https://ssrn.com/abstract=4228208> [<https://perma.cc/YSN9-GDRC>] (commenting that the Fifth Circuit's decision in *NetChoice* is "just wrong"); Charlie Warzel, *Is This the Beginning of the End of the Internet?*, THE ATLANTIC (Sept. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/netchoice-paxton-first-amendment-social-media-content-moderation/671574> [<https://perma.cc/834F-SBKC>]; Genevieve Lakier (@GLakier), X (Sept. 20, 2022, 6:58 AM), <https://twitter.com/glakier/status/1572223690863149058> [<https://perma.cc/UN5P-RJK2>]; Mike Masnick, *5th Circuit Rewrites A Century Of 1st Amendment Law To Argue Internet Companies Have No Right To Moderate*, TECHDIRT (Sept. 16, 2022, 4:43 PM), <https://www.techdirt.com/2022/09/16/5th-circuit-rewrites-a-century-of-1st-amendment-law-to-argue-internet-companies-have-no-right-to-moderate> [<https://perma.cc/Q25W-DHFB>]; Ian Millhiser, *Two Republican Judges Just Let Texas Seize Control of Twitter and Facebook*, VOX (Sept. 19, 2022, 5:20 PM), <https://www.vox.com/policy-and-politics/2022/9/19/23361050/supreme-court-texas-twitter-facebook-youtube-social-media-fifth-circuit-netchoice-paxton> [<https://perma.cc/2GZF-YVGG>]; Scott Shackford, *Federal Judges Uphold Texas Law Regulating What Social Media Platforms May Censor*, REASON (Sept. 19, 2022, 2:45 PM), <https://reason.com/2022/09/19/federal-judges-uphold-texas-law-regulating-what-social-media-platforms-may-censor> [<https://perma.cc/9S95-ZKWE>].

force Twitter, Facebook, and YouTube to host massive amounts of “pro-Nazi speech, terrorist propaganda, and Holocaust denial[s]”¹⁸⁹ and that it leaves social media platforms with virtually no First Amendment protection of their editorial discretion.¹⁹⁰ On the other hand, the opinion has received relatively muted academic support from scholars who regard social media platforms as common carriers for First Amendment purposes.¹⁹¹ The Supreme Court has granted review of both cases and is expected to rule on them this term.¹⁹² How might cultural democracy approach the constitutional dispute over H.B. 20?

First, we can consider what cultural democracy theory tells us about the procedures for making speech rules on the platforms regulated by H.B. 20. Users of very large social media platforms like Facebook, Twitter, and YouTube have extremely disparate interests that make it difficult for them to operate as a community to decide what the speech rules for their interactions with one another should be. As discussed above, markets for social media platforms do little to allow for the democratic formation of speech rules because they allow those who happen to have more wealth to exert more influence than others, and, at an extreme, enable extraordinarily wealthy individuals to unilaterally decide what the speech rules should be for a platform. Considering the thinness of users’ shared interests and the international reach of large platforms, democratic user control of platforms might provide the best and most democratic means of forging speech rules. But in the absence of such a mechanism, national and subnational political institutions that can represent the interests of their members are likely to provide the most democratic mechanism for deciding on a framework for speech rules for large social media platforms.

If local legislative bodies are moderately democratic, a system of governance that denies localized democratic institutions the authority to shape these rules is likely to be less democratic than a system that empowers them to do so. So, the first part of cultural democracy’s analysis of H.B. 20 suggests that federal judicial intervention to prevent Texas from establishing speech rules for large social media platforms on First Amendment grounds would undermine rather than promote cultural democracy. This is only one piece of the story since cultural democracy

¹⁸⁹ See Rozenshtein, *supra* note 184; Warzel, *supra* note 188; Motion for Leave to File as Amici Curiae and Brief of Chamber of Progress et al. as Amici Curiae in Support of Emergency Application to Vacate Stay of Preliminary Injunction at 5, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-A720), 2022 WL 2358470 [hereinafter *Amicus Brief of Chamber of Progress et al.*] (“[E]ven if there were a way to comply with HB20’s requirements, its provisions would result in platforms being deluged with oppressive, offensive, and flatly false propaganda . . .”).

¹⁹⁰ See Lakier, *supra* note 188.

¹⁹¹ See Eugene Volokh, *Another Commentary on the Fifth Circuit’s Texas Social Media Law Decision*, THE VOLOKH CONSPIRACY (Sept. 23, 2022, 9:17 AM), <https://reason.com/volokh/2022/09/23/another-commentary-on-the-fifth-circuits-texas-social-media-law-decision> [<https://perma.cc/DW7G-28D8>].

¹⁹² See *NetChoice, LLC v. Paxton*, 144 S. Ct. 477 (2023) (mem.) (granting certiorari); *Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023) (mem.) (granting certiorari).

theory must also concern itself with the substance of the speech rules at issue to fully assess the democratic or anti-democratic effects of H.B. 20.

Moving on from questions about what institutions should have the competence to formulate speech rules for social media platforms, we can also ask whether the regulations provided by H.B. 20 are a good set of speech rules for large social media platforms. Evaluating the democratic or anti-democratic effects of H.B. 20 from the standpoint of cultural democracy depends on answers to the wide range of empirical questions mentioned above, which makes it difficult to conclude in a theoretical register whether the speech rules that H.B. 20 would impose on large platforms would promote or undermine cultural democracy.¹⁹³ For this reason, the following analysis is speculative and is best understood as an illustration of the sort of inquiry that cultural democracy theory calls for to evaluate the democratic or anti-democratic effects of a speech regime. To begin this analysis, we can ask: What *will* happen to large social media platforms operating in Texas if H.B. 20 takes effect? Consider Section 7 of the statute, which states: “A social media platform may not [block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against] a user, a user’s expression, or a user’s ability to receive the expression of another person based on [the user’s viewpoint, the viewpoint represented, or geographic location].”¹⁹⁴

One possibility is that social media platforms will become so filled with unwanted and hateful content that many or most users will abandon large social media platforms.¹⁹⁵ Whether this would be good or bad from the standpoint of cultural democracy depends on further questions about how people would most likely communicate if they abandoned large social media platforms. Would they communicate using smaller social media platforms? Would they abandon social media altogether in favor of other electronic or even non-electronic forms of communication? This outcome does not seem particularly likely, since other communication platforms, that in practice transmit all lawful content like email providers and messaging services like WhatsApp, have found mechanisms to address the proliferation of unwanted messages.¹⁹⁶

¹⁹³ Compare *NetChoice, LLC v. Paxton*, 49 F.4th 439, 452 (5th Cir. 2022) (describing the possibility of Nazi and terrorist speech on social media platforms if H.B. 20 were to take effect as an “extreme hypothetical”), *with id.* at 506 (Southwick, J., dissenting) (suggesting that H.B. 20 would force platforms to publish “pro-Nazi expression, while monetizing, recommending, and giving equal treatment to such content as might be given to anti-Nazi expression”).

¹⁹⁴ *Id.* at 505 (Southwick, J., dissenting) (quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 143A.001–002 (2023)).

¹⁹⁵ See Motion for Leave to File Brief Amicus Curiae and Brief of the Cato Institute in Support of Applicants’ Emergency Application to Vacate Stay of Preliminary Injunction at 2, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-A720), 2022 WL 2376291 (“[M]ost users do not want to see animal abuse, terrorist recruitment material, or racial slurs when they go on Facebook . . .”).

¹⁹⁶ I am grateful to Robert Leider for discussion of this point.

Another possibility is that social media might become more like email, in that a great deal of unwanted material will be transmitted over social media platforms, but automated services will develop to sort these unwanted materials into a “spam” folder that most users never look at.¹⁹⁷ This seems to be the outcome anticipated by Section 7, since it does not “prohibit or restrict a social media platform from authorizing or facilitating a user’s ability to censor specific expression on the user’s platform or page at the request of that user.”¹⁹⁸ One strong possibility is that, if H.B. 20 were implemented, social media platforms would, for the vast majority of users, remain unchanged. Facebook might ask users whether they would like to “request” a curated feed of posts from people they follow or else to view an un-curated deluge of spam. It is not clear that H.B. 20 would prohibit Facebook from offering this option, and if it did so, all but a tiny handful of its users would presumably choose the “curated” feeds that they view now.

A third possible outcome of H.B. 20 is that it might change the speech environment of social media platforms in such a way that people are more likely to encounter expression from people who do not already share their views. For instance, it is possible that as a result of H.B. 20, Twitter, Facebook, and YouTube will abandon their current speech policies in favor of speech policies more directly modeled on the First Amendment. Perhaps, as a consequence, they will host some racist speech that is more extreme than what they host now, but most users will regard this as extreme and dismiss it, while other material that is sometimes deleted under the platforms’ current rules, like speech by sex workers,¹⁹⁹ erotic content,²⁰⁰ some speech alleging that the 2020 presidential election was “stolen,”²⁰¹ and speech by Black Lives Matter organizers²⁰² will provide occasions for lively democratic engagement.

¹⁹⁷ See Mansoor Raza et al., *A Comprehensive Review on Email Spam Classification using Machine Learning Algorithms*, 2021 INT’L CONF. ON INFO. NETWORKING 327, 327 (describing the importance of automated management of spam to the functioning to today’s email systems).

¹⁹⁸ TEX. CIV. PRAC. & REMEDIES CODE § 143A.006(b) (2023).

¹⁹⁹ See Danielle Blunt et al., *Posting into the Void: Studying the Impact of Shadowbanning on Sex Workers and Activists*, HACKING//HUSTLING 1, 35–44 (2020), <https://hackinghustling.org/posting-into-the-void-content-moderation> [<https://perma.cc/WV9E-C4V6>] (reporting on widespread shadowbanning of sex workers from Facebook, Instagram, and Twitter); Gabriel Nicholas, *Shadowbanning Is Big Tech’s Big Problem*, THE ATLANTIC (Apr. 28, 2022), <https://www.theatlantic.com/technology/archive/2022/04/social-media-shadowbans-tiktok-twitter/629702> [<https://perma.cc/KS9M-3TJS>] (discussing the widespread belief of sex workers that “platforms hide their content from hashtags, disable their ability to post comments, and prevent their posts from appearing in feeds”). I am grateful to Yvette Butler for drawing my attention to this phenomenon.

²⁰⁰ See Jonathan Peters, *Sexual Content and Social Media Moderation*, 59 WASHBURN L.J. 469, 469–72 (2020).

²⁰¹ See Dawn Carla Nunziato, *The Varieties of Counterspeech and Censorship on Social Media*, 54 U.C. DAVIS L. REV. 2491, 2504–37 (2021).

²⁰² See Jessica Guynn, *Facebook While Black: Users Call It Getting ‘Zucked,’ Say Talking About Racism Is Censored as Hate Speech*, USA TODAY (July 9, 2020, 6:17 PM), <https://>

This may be an overoptimistic assessment of H.B. 20's likely effects because so much of the polarization on social media platforms results from users' self-sorting,²⁰³ but ruling it out would require answering a variety of empirical questions.

A fourth possible outcome is that H.B. 20 will result in dramatic changes to the speech environment on social media platforms along those imagined by some of the critics of H.B. 20, leading to social media feeds that are full of (First Amendment-protected) extremist white supremacist content.²⁰⁴ As a result, perhaps more people will end up adopting white supremacist beliefs. This may be an over-pessimistic assessment of H.B. 20's effects, because this sort of transformation of social media platforms might simply cause most users to abandon them,²⁰⁵ but, again, ruling it out would require answering a range of empirical questions.

Finally, a possible outcome of H.B. 20 is that social media platforms might create independent subsidiaries to operate in Texas, hived off from the remainder of their networks. Section 7 "applies only to expression that is shared or received in" Texas,²⁰⁶ so this approach would enable large platforms to continue operating their main platform without subjecting it to Texas's restrictions on social media platforms. If this happened, any of the above-mentioned consequences might come about in the Texas versions of social media platforms but not on their wider networks. This outcome might enhance the possibility of localized democratic control over social media,²⁰⁷ but would do so at the cost of severely undercutting the network effects that make social media platforms attractive to their users. The likelihood of an outcome such as this might increase if platforms are subject to regulations in other jurisdictions that direct them to act contrary to the requirements of H.B. 20.²⁰⁸

Where does this leave cultural democracy and H.B. 20? Mostly, I have laid out the sorts of questions that need to be addressed to understand whether H.B. 20 would enhance the ideal of cultural democracy. Completing this analysis would

www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002 [<https://perma.cc/S7WC-XZBP>] (reporting on incidents in which black users' discussions of racism have been taken down as "hate speech" by Facebook under its existing speech rules).

²⁰³ See SUNSTEIN, *supra* note 169, at 123.

²⁰⁴ See Amicus Brief of Chamber of Progress et al., *supra* note 189, at 13–19; see also Petition for Writ of Certiorari at 1, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 22-555), 2022 WL 17821208 (arguing that allowing the 5th Circuit's decision to stand "threaten[s] to transform speech on the Internet as we know it today").

²⁰⁵ See *supra* note 195 and accompanying text.

²⁰⁶ TEX. CIV. PRAC. & REM. CODE § 143A.004(b) (2023).

²⁰⁷ See SHIFFRIN, *DEMOCRATIC LAW*, *supra* note 8, at 67 ("Some democratic legal aims are better realized when the community is powerful enough to develop a distinctive voice yet small enough to generate a distinctive identity and camaraderie between citizens.").

²⁰⁸ See, e.g., Citron, *supra* note 169, at 1049–61 (discussing effects of E.U. regulations on platforms' speech rules).

require addressing empirical questions that are beyond the scope of this jurisprudential inquiry, but we have some preliminary indications of why H.B. 20 might or might not be democracy-promoting. H.B. 20 might promote cultural democracy if it leads users of social media platforms to encounter a more diverse range of speech than what they presently encounter in “filter bubbles” that social media platforms have constructed. While H.B. 20 is unlikely to dramatically transform most users’ experiences of large social media platforms, H.B. 20 might promote marginally more exposure to a diverse range of speech than users see under platforms’ current speech rules.

Setting aside empirical questions about H.B. 20’s effects on cultural democracy, cultural democracy theory still has something to say about the First Amendment litigation concerning H.B. 20. In general, cultural democracy calls for more control over social media platforms by institutions that equalize decision-making rights for all participants. Elections are one of the primary institutions that provide this sort of equalization in formal political institutions, and so exercising control over platforms through elections and representative legislatures is a step toward a more democratic system of social media.

We should be skeptical of constitutional prohibitions on democratic state institutions inserting themselves into the design of speech rules on social media platforms. Relying on the interests of capital to set speech rules in widely used speech fora is dangerous, because we have no reason to think that the interests of capital will coincide with democratic interests. Provided that they work reasonably well from the perspective of democratic representation, it is better from a democratic standpoint for legislatures to make these decisions than unelected courts or property owners.

None of the foregoing analysis denies that H.B. 20 might, as an empirical matter, also have anti-democratic effects. For instance, the proliferation of hate speech on platforms might undermine the possibility of democratic rule by preventing targeted groups and individuals from participating in the discussions necessary for democratic self-rule.²⁰⁹ In the face of this sort of invective, many speakers and listeners might simply withdraw from engaging in speech on social media platforms.²¹⁰ H.B. 20 might itself lessen the degree to which cultural democracy is realized, but at the same time striking down H.B. 20 on constitutional grounds might undermine the processes of democratic governance.

Cultural democracy does not provide an answer in the abstract to how such conflicts should be resolved. In some situations, like “representation reinforcing” situations where majoritarian action might undermine the conditions for democracy

²⁰⁹ See Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 501 (2009) (“Hate speech is a threatening form of communication that is contrary to democratic principles. It . . . aims to prevent segments of the population from participating in deliberative decision making.”).

²¹⁰ See Simpson, *supra* note 17, at 2.

in the first place,²¹¹ the best way to advance cultural democracy might be for federal courts to strike down a democratically enacted statute on First Amendment grounds. But cultural democracy counsels that we should see this outcome as a democratic defect which, insofar as we are attached to the cultural democratic ideal, we should hope to avoid.

Deliberative electoral democracy focuses on speech that people use to persuade one another about matters of public interest to be decided on by formal political institutions. In contrast, cultural democracy places emphasis on non-political speech as well. As a result, cultural democracy generates an analysis that is friendlier to H.B. 20 than the analysis of many deliberative electoral democrats, since much of the speech that H.B. 20 affects is unlikely to concern questions of formal politics. Political ethos democracy might be sympathetic to H.B. 20 if and insofar as it enhances citizens' abilities to engage one another in rational debate or to communicate their recognition of one another as equals. But cultural democracy produces an analysis that may also be more sympathetic to H.B. 20 than the analysis of political ethos democracy, since cultural democracy allows that democracy might be advanced, at least in part, through encounters in which people are not engaged in rational persuasion and not actively manifesting mutual respect: culture that allows people to democratically vibe. Cultural democracy thus produces an analysis of H.B. 20 that—while far from a ringing endorsement of the legislation—views the involvement of state legislatures in regulating large platforms' speech rules more favorably than most existing democratic theories of free speech and the First Amendment.

This analysis of H.B. 20 does not directly answer any doctrinal questions about the First Amendment. Despite these limitations, cultural democracy can inform our understanding of the democratic consequences of legislation like H.B. 20 and of a constitutional jurisprudence that allows federal courts to strike down such legislation. Insofar as the First Amendment is best understood as implementing a democratic ideal of free speech, this analysis can inform the construction of “normatively attractive First Amendment doctrine.”²¹²

IV. AN OBJECTION TO CULTURAL DEMOCRACY: EDITORIAL JUDGMENT

Having developed an account of cultural democracy and presented an initial analysis of H.B. 20 and *NetChoice v. Paxton* from the standpoint of cultural democracy, this Part considers and replies to one of the most challenging objections that might be raised against the theory of cultural democracy and its application to the regulation of speech on social media platforms.

This objection concerns the speech rights of the social media platforms subject to the speech regulations enacted by Texas and emerges from First Amendment

²¹¹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101 (1980).

²¹² See Gingerich, *Is Spotify Bad?*, *supra* note 9, at 311.

doctrine. The platforms which would be subject to the regulations of H.B. 20 and S.B. 7072 have argued that social media platforms have a robust free speech interest in the ability to exercise “editorial discretion.”²¹³ Drawing on *Miami Herald v. Tornillo*, the platforms argue that as much as protecting the editorial judgment of newspapers from state interference promotes free speech values, so too does protecting the editorial discretion of less traditional publishers, like social media platforms.²¹⁴ Much as newspapers must exercise discretion in deciding which letters to the editor to publish, the argument goes, “[i]n light of the sheer volume and breadth of the material that users constantly upload, providers must unceasingly exercise editorial discretion in deciding what content to present and how to present it.”²¹⁵ Although much of the editorial control exercised by platforms comes in the form of removing material after users have posted it, rather than deciding whether to publish it in advance, the platforms argue that “[r]emoval of content *ex post* is just as much an editorial choice as refusing to publish content in the first place.”²¹⁶ This exercise of editorial judgment by newspapers and social media platforms is a “core publication freedom[.]” because the platforms’ decisions to remove, for example, Nazi propaganda, are “editorial choices [that] are expressive, reflect platforms’ values, and convey a message about the platforms and the communities they hope to foster.”²¹⁷

From the standpoint of both deliberative electoral democracy and cultural democracy, a speech culture in which many different actors can develop and sharpen distinctive points of view provides an important support for democratic governance. The speech that large publishers engage in when exercising editorial judgment allows for a different sort of development of ideas and arguments than can happen with the speech of individual authors, since the editorial decisions of publishers can put communities of thinkers in conversation with one another and foster intellectual movements and points of view that transcend individual speech.²¹⁸ This sort of editorial expression, together with the intellectual and aesthetic movements and communities that it enables, can provide a substantial opportunity for direct and spontaneous engagement with diverse expressive materials.

²¹³ See Brief of Appellees at 13, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 1046833 (“HB20 Section 7’s broad prohibition on viewpoint-based editorial discretion violates the First Amendment.”); see also Brief for Appellees at 7–8, *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022) (No. 21-12355), 2021 WL 5238982 (“S.B. 7072 . . . would strip covered providers of their First Amendment right to exercise editorial discretion over content posted on their own sites . . .”).

²¹⁴ See generally 418 U.S. 241 (1974).

²¹⁵ Brief of Appellees at 14–15, *NetChoice, LLC*, 49 F.4th 439 (No. 21-51178).

²¹⁶ *Id.* at 25.

²¹⁷ Brief for Appellees at 6, 15, *NetChoice, LLC*, 34 F.4th 1196 (No. 21-12355).

²¹⁸ Cf. Xuxu Song, A Study of the *Athenaeum* as the Early Romantic Work of Art 24 (2022) (Ph.D. dissertation, University of California, Irvine) (on file with U.C. Irvine) (discussing the role of the *Athenaeum*, a journal established by August Wilhelm and Karl Wilhelm Friedrich Schlegel in 1798, in creating the first movement of German Romanticism).

However, although this sort of speech is important for democratic culture, it is not clear that large social media platforms presently contribute this sort of speech to democratic communities. As the Fifth Circuit argued, “[p]latforms permit any user who agrees to their boilerplate terms of service to communicate on any topic, at any time, and for any reason” and “virtually none of this content is meaningfully reviewed or edited in any way.”²¹⁹ There may be many groups and users on large platforms who develop and articulate distinctive points of view, but it is difficult to see how the platforms themselves advance a distinctive perspective.²²⁰ When platforms have no particularly distinctive speech message aside from whatever speech will foster the sort of user engagement that will make them as much money as possible, regulating their speech rules is unlikely to undermine the democracy-promoting features of the speech environment those platforms afford.²²¹

In contrast to large platforms that aim to serve, if possible, most of the Earth’s population,²²² it is more important from the standpoint of cultural democracy to protect the speech interests of smaller platforms that serve subcultural groupings.²²³ Rules that prevented a social media platform specifically designed for, say, Joanna Newsom fans (or a Facebook group or subreddit for Joanna Newsom fans) from deleting posts that flatly deny the appeal of Newsom’s songs would undermine the ability of these smaller communities to engage in editorial speech that contributes a distinctive point of view that expands the diversity of expression available for citizens to engage with. By contrast, when there are no sources of commonality among a group of users more fine-grained than shared membership in a political community, regulating the editorial discretion of large platforms to prevent them from deleting users’ legally permissible speech is unlikely to reduce the tendency of platforms to produce distinctive points of view and unlikely to undermine cultural democracy.²²⁴

For these reasons, at least as far as the value of democracy is concerned, cultural democracy theory is unlikely to view the objection that regulations like H.B. 20

²¹⁹ *NetChoice, LLC*, 49 F.4th at 461. The Fifth Circuit’s point is complicated by the possibility that, even if most editorial control happens post hoc, the existence of post hoc control might shape what sort of speech users are likely to attempt to post in the first place. (It might not be worth the trouble to post something that Facebook will take down right away.) So, much social media speech happens, so to speak, “in the shadow of the moderator.”

²²⁰ See Erin Miller, *Quasi-State Agents in First Amendment Doctrine 4–5* (Nov. 5, 2023) (unpublished manuscript), https://papers.ssm.com/sol3/papers.cfm?abstract_id=4606250 [<https://perma.cc/X8SY-J2EG>].

²²¹ Thus, from the standpoint of cultural democracy, the speech contribution of a newspaper or publication that caters to the broadest possible audience and imposes as little thematic or stylistic unity as possible on the speech it publishes is likely to be less democratically valuable than the speech contribution of a publication that cultivates a more distinctive viewpoint or style, like the *Athenaeum*. See generally Song, *supra* note 218.

²²² See Dixon, *supra* note 154.

²²³ See Miller, *supra* note 220, at 19.

²²⁴ See, e.g., RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 5 (describing cohesiveness between members of a society).

interfere with editorial discretion as a persuasive reason to forgo otherwise democracy-promoting regulation of platforms' speech rules.²²⁵

CONCLUSION: LESSONS FOR DEMOCRATIC CONCEPTIONS OF FREE SPEECH

In closing, this Part will step back from cultural democracy's analysis of H.B. 20 to consider some lessons for democratic conceptions of free speech more generally that have emerged from the foregoing discussion.

As we saw in Part I, for deliberative electoral theories of democracy, free speech provides a foundation on which democracy can be built (and without which democracy cannot be achieved). The ideal speech situation, for these views, is one that provides whatever conditions will best allow democratic procedures to develop and flourish.²²⁶ An important strain of deliberative electoral democracy theory maintains that speech rules should be grounded directly on some objective normative principle.

In contrast, according to cultural democracy theory, there is no single ideal speech situation (or ideal set of equilibrium speech situations). What is of foundational value, in this view, is not particular types of speech situations, but the principle of democratic rule itself. For cultural democracy theory, democratic institutions form a web and, increasing democracy in some ways might involve decreasing it in others. Cultural democracy theory holds that the question of which speech situations are best is, itself, up for democratic decision-making. This conclusion follows from the general idea that how we live together should be something that we decide on together. Of course, cultural democracy theory also maintains that when we decide, together, how to live, we should decide in a way that is itself democracy-promoting. But cultural democracy theory denies that philosophers or judges should decide for the whole people what rules or policies would best promote our shared interest in democracy.

From the perspective of cultural democracy theory, something is democratically defective about (relatively) non-democratic courts restricting the ability of (relatively) democratic legislatures to impose regulations on the speech rules of large social media platforms. There is also, more straightforwardly, something democratically defective about leaving it to the market and to property owners to decide what speech rules platforms should adopt, with those decisions guided by the interest of capitalists in maximizing their return on capital or simply by the idiosyncratic preferences of oligarchs.

²²⁵ This is not necessarily to suggest that courts' rulings in First Amendment cases about regulations like H.B. 20 or S.B. 7072 should reach conclusions different from those of the Eleventh Circuit in *NetChoice, LLC v. Attorney General, Florida*, which relied on *Miami Herald* to strike down much of S.B. 7072. See 34 F.4th 1196, 1210 (11th Cir. 2022). This is because the normative analysis provided by cultural democracy does not encompass other considerations that might enter judicial First Amendment decision-making, including considerations about the role of precedent.

²²⁶ See RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 92.

Regulations like H.B. 20 might ultimately undermine cultural democracy in some notable respects. If, as critics of H.B. 20 argue, letting H.B. 20 go into effect would transform speech platforms in a way that leads to a tremendous proliferation of Nazi propaganda, H.B. 20 would quite possibly result in a speech environment in which many people are less likely to encounter and spontaneously engage with a diverse range of cultural materials. It might even turn out that, on balance, the best thing that could happen with respect to H.B. 20 to advance a thriving cultural democracy would be for the Supreme Court to overturn the Fifth Circuit's decision in *NetChoice v. Paxton*.

However, if Nazi propaganda is indeed sufficiently destructive of democracy that it should be removed from the public square, then it would be better—at least as far as cultural democracy is concerned—to arrive at a new interpretation of the First Amendment that provides less protection for Nazi speech than to hope that capitalists will magnanimously choose to restrict Nazi propaganda in the manner that is best for democracy. Cultural democracy thus provides a qualified endorsement of the project of democratically legislating speech rules for large social media platforms, even if it does not fully endorse the regulations enacted in H.B. 20.