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Social Media, Populism, and Militant Democracy: An Argument for a Change in First Amendment Doctrine

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Social Media, Populism, and Militant Democracy: An Argument for a Change in First Amendment Doctrine

*Arvid Kerschnitzki**

The First Amendment is often hailed as the cornerstone of American self-government, but the digital age has transformed the public discourse it was meant to protect. Social media platforms, once envisioned as a modern marketplace of ideas, now amplify misinformation, entrench echo chambers, and enable mass manipulation, threatening the democratic ideal of an informed citizenry.

While the current First Amendment doctrine rightly emphasizes the importance of public discourse, that discourse must be inclusive, rational, and reliable to serve its democratic function. Drawing on the concept of militant democracy, this Article argues that contemporary doctrine has lost sight of free speech's dual purpose—not only to protect individual liberty, but also to safeguard the democratic process—and that it must be reoriented to reflect this foundational balance.

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I. NEW CHALLENGES

The face of political propaganda has changed dramatically over the last twenty years. The internet, and social media in particular, have opened fundamentally new ways of influencing public opinion. Today's digital sphere is shaped by misinformation, rabble-rousing, and trolls.¹ This poses a tangible threat to democracy.² The link between social media and global democratic backsliding³ is well established,⁴ although its extent is up for debate.⁵ This Article will discuss how these new

¹ See *Lies, Bots, and Social Media: What Is Computational Propaganda and How Do We Defeat It?: Joint Hearing Before the Comm. on Sec. & Coop. in Eur.*, 115th Cong. 1–7 (2018) (statement of Mark Toner, State Department Senior Advisor, Commission on Security & Cooperation in Europe); see also *Rabble-Rousing*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/rabble-rousing> [<https://perma.cc/2F4A-6YYM>] (defining rabble-rousing as “encouragement that a person gives to a group of people to behave violently or aggressively, often for that person's own political advantage”) (last visited Apr. 27, 2025); *Troll*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/troll> [<https://perma.cc/RH4P-9ERB>] (defining a troll as “a person who posts derogatory or abusive messages on the internet”) (last visited Apr. 25, 2025).

² See Newton Minow & Martha Minow, *Social Media Companies Should Pursue Serious Self-Supervision — Soon: Response to Professors Douek and Kadri*, 136 HARV. L. REV. F. 428, 438 (2023) (“Current and former social media executives warn that their industry harms civil discourse essential to democracy and amplifies misinformation, social divisions, and risks of violence.”).

³ See Thomas Carothers & Benjamin Press, *Understanding and Responding to Global Democratic Backsliding* 4–6 (Oct. 20, 2022) (working paper) (on file with the Carnegie Endowment for International Peace), https://carnegie-production-assets.s3.amazonaws.com/static/files/Carothers_Press_Democratic_Backsliding_v3_1.pdf [<https://perma.cc/33PM-SVZD>]; see also RALPH SCHROEDER, *SOCIAL THEORY AFTER THE INTERNET* 60–81 (2018).

⁴ See, e.g., Jonathan Haidt, *Yes, Social Media Really Is Undermining Democracy*, THE ATLANTIC (July 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/social-media-harm-facebook-meta-response/670975/> [<https://perma.cc/M8C7-B4YK>]; Guy Schleffer & Benjamin Miller, *The Political Effects of Social Media Platforms on Different Regime Types*, 4 TEX. NAT'L SEC. REV. 77, 78 (2021) (finding that social media weakens strong democratic regimes and radicalizes weak democratic regimes); Yphtach Lelkes et al., *The Hostile Audience: The Effect of Access to Broadband Internet on Partisan Affect*, 61 AM. J. POL. SCI. 5, 17 (2017) (concluding that “the new media environment has contributed to increased partisan animus and that greater exposure to biased news sources is the likely cause”).

⁵ See, e.g., Jan-Werner Müller, *The Myth of Social Media and Populism*, FOREIGN POL'Y (Jan. 3, 2024, 12:20 AM), <https://foreignpolicy.com/2024/01/03/2024-elections-social-media-technology-democracy/> [<https://perma.cc/9BXH-TDMS>] (expressing skepticism with respect to the extent of social media's role in this crisis). The rise of populism is surely, above all, a problem of a shift in mentality, and not merely one of the law. See, e.g., András Sajó, *Militant Constitutionalism*, in *MILITANT DEMOCRACY AND ITS CRITICS: POPULISM, PARTIES, EXTREMISM* 187, 187–89 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019). However, this shift of mentality is heavily influenced by populist actors using sophisticated methods of propaganda and manipulation. Some claim that polarization today works in a top-down manner, meaning that polarization in the political sphere does not mirror the polarization of the society, but rather that political actors

technologies and methods of influencing the electorate via social media threaten democracy (Part I) and how these threats are not being addressed by the current First Amendment doctrine (Part II). Acknowledging that a shift in First Amendment doctrine is overdue, this Article will introduce the concept of militant democracy⁶ (Section III.A) and conduct a textual and historical analysis of the U.S. Constitution to examine whether First Amendment doctrine is receptive to militant democracy-type arguments (Section III.B). At this point, it should be made clear that this Article does not claim—nor does it intend—to solve all of the problems of First Amendment doctrine and social media. Rather, it simply advocates for the use of the argumentative figure of militant democracy in the First Amendment debate.

A. New Technology, New Actors, New Methods

Social media has not only drastically changed private communication, but it has also become a major source of news for a large part of the population.⁷ The public exchange of political opinions has also largely shifted from analog forums to social media platforms.⁸ This paradigm shift has long been seen as a huge democracy booster, enabling unprecedented levels of

actively work towards the latter for their own political profit. *See, e.g.*, YOCHAI BENKLER ET AL., NETWORK PROPAGANDA 305 (2018); *Political Polarization*, EUR. CTR. FOR POPULISM STUD., <https://www.populismstudies.org/vocabulary/political-polarization/> [<https://perma.cc/K4WQ-E4XY>] (last visited Apr. 4, 2025); Hubert Tworzecki, *Poland: A Case of Top-Down Polarization*, 681 ANNALS AM. ACAD. POL. & SOC. SCI. 97, 100 (2019); STEFFEN MAU ET AL., TRIGGERPUNKTE: KONSENS UND KONFLIKT IN DER GEGENWARTSGESELLSCHAFT 322–33 (2023) (discussing this phenomenon in Germany and the United States). *But see* Daniel J. Hopkins et al., *From Many Divides, One? The Polarization and Nationalization of American State Party Platforms, 1918–2017*, 36 STUD. AM. POL. DEV. 1, 20 (2022) (finding that the evidence of polarization in fact “undercut[s] claims that [the] phenomenon is principally a top-down process”). Still, populists’ main medium for such manipulation is social media. So, the question of how to combat propaganda and manipulation via social media goes hand in hand with the question of how to combat this shift in mentality.

⁶ This is sometimes also called “Defensive Democracy.” *See* Jon Smibert, *Defensive Rule of Law*, 73 EMORY L.J. 1111, 1139 (2024).

⁷ *See, e.g.*, Nic Newman, *Overview and Key Findings of the 2023 Digital News Report*, REUTERS INST. (June 14, 2023), <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023/dnr-executive-summary> [<https://perma.cc/TJX6-29EC>]; *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Sept. 17, 2024), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/> [<https://perma.cc/9QJ3-BRT9>]; Andrew Hutchinson, *New Research Shows that 71% of Americans Now Get News Content via Social Platforms*, SOC. MEDIA TODAY (Jan. 12, 2021), <https://www.socialmediatoday.com/news/new-research-shows-that-71-of-americans-now-get-news-content-via-social-pl/593255/> [<https://perma.cc/P2DQ-VPJY>].

⁸ *See* *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017) (noting that social media is “the modern public square”).

democratic participation.⁹ But the very nature of social media has turned it into the opposite of what it promised: it has become a democratic Pandora's box.

As with all forms of communication, social media is used by a wide variety of actors to influence people.¹⁰ Before social media, these actors were mainly domestic politicians or, in some instances, foreign state actors. The landscape of public opinion was comparatively small. Social media opened up a whole new public sphere for anyone with access to the Internet to participate in the public debate. This was undoubtedly a victory for democratic participation.¹¹

However, it soon became apparent that this space offered an unprecedented potential for influencing public opinion. Among the plethora of new actors, foreign states use social media to spread propaganda¹² and influence elections,¹³ often through the use of bots. Foreign terrorist groups use social media to recruit followers and to incite terrorist attacks.¹⁴ Additionally, certain private actors—such as conspiracy theorists—suddenly have an audience of previously unknown size.¹⁵

⁹ Despite some evidence to the contrary, the fact that social media promotes participation remains true. See Joshua A. Tucker et al., *From Liberation to Turmoil: Social Media and Democracy*, 28 J. DEMOCRACY 46, 48–50 (2017) (noting that social media provides “new and expressive forms for participation in the political process,” including “mini-participation”).

¹⁰ See Nicola A. Boothe-Perry, *Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?*, 35 PACE L. REV. 72, 90 (2014) (discussing a Florida law that calls for automatic disqualification of a judge when they are friends on Facebook with a lawyer who is appearing before them, due to concerns of improper influence); see also NAT'L INTEL. COUNCIL, OFF. OF THE DIR. OF NAT'L INTEL., *Assessing Russian Activities and Intentions in Recent U.S. Elections*, at ii (2017) (“Moscow’s influence campaign followed a Russian messaging strategy that blends covert intelligence operations—such as cyber activity—with overt efforts by Russian Government agencies, state-funded media, third-party intermediaries, and paid social media users or ‘trolls.’”).

¹¹ But see Karen Kornbluh, *The Internet’s Lost Promise: And How America Can Restore It*, 97 FOREIGN AFFS. 33, 34–35 (2018) (finding that hope in the internet aiding democracy was misguided).

¹² This includes the sophisticated deployment of paid influencers to spread certain political messages, even with memes. See Samuel C. Woolley, *Digital Propaganda: The Power of Influencers*, 33 J. DEMOCRACY 115, 120 (2022).

¹³ See Kornbluh, *supra* note 11, at 36–37.

¹⁴ See Zachary Leibowitz, *Terror on Your Timeline: Criminalizing Terrorist Incitement on Social Media Through Doctrinal Shift*, 86 FORDHAM L. REV. 795, 810 (2017).

¹⁵ See Matteo Cinelli et al., *Conspiracy Theories and Social Media Platforms*, 47 CURRENT OP. PSYCH., Oct. 2022, at 1, 1, 4 (finding that “[c]onspiracy theories proliferate online” and attributing this phenomenon to increased polarization and echo chambers, but also possibly to “the role of recommendation algorithms and moderation policies”).

Furthermore, as privately owned companies, social media platforms are designed to maximize profits. They do this by promoting attention-grabbing posts and automatically pushing emotionally inflammatory content,¹⁶ since this type of content achieves the most user interactions.¹⁷ Such emotional, fast-spreading content often includes misinformation, hate speech, and rabble-rousing, which have been shown to generate extremely high levels of user engagement.¹⁸ To increase user engagement, social media platforms' algorithms also tend to provide users with posts that reflect their own points of view, creating so-called "echo chambers."¹⁹

Moreover, it turned out that the assumed equality of speakers in the virtual realm was a deception. Money could buy influence not only in traditional media, but also online. The new technologies opened up the possibility of influencing mass opinion in a much more subtle way.²⁰ The use of bots, for example, allows actors to create the impression of widespread support for an opinion and significantly increase the reach of a message.²¹ Spreading targeted dis- and misinformation,²² or just

¹⁶ See SAMUEL WOOLLEY, MANUFACTURING CONSENSUS: UNDERSTANDING PROPAGANDA IN THE ERA OF AUTOMATION AND ANONYMITY 120–22 (2023); see also Steve Rathje et al., *Out-Group Animosity Drives Engagement on Social Media*, PROC. NAT'L ACAD. SCI., June 23, 2021, at 1, 1, 7 (discussing the effect of online misinformation on political polarization).

¹⁷ This also explains why the social media posts of right-wing parties usually achieve the highest user engagement. See JUAN CARLOS MEDINA SERRANO ET AL., SOCIAL MEDIA REPORT: THE 2017 GERMAN FEDERAL ELECTIONS 36–37 (2018).

¹⁸ See, e.g., Steven Lee Myers, *How Social Media Amplifies Misinformation More than Information*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/technology/misinformation-integrity-institute-report.html> [<https://perma.cc/B9DZ-SHHA>]; Andrew Hutchinson, *New Study Shows that Misinformation Sees Significantly More Engagement than Real News on Facebook*, SOC. MEDIA TODAY (May 22, 2019), <https://www.socialmediatoday.com/news/new-study-shows-that-misinformation-sees-significantly-more-engagement-than/555286/> [<https://perma.cc/W5WY-E7CW>]; Gilad Edelman, *Fake News Gets More Engagement on Facebook—But Only if It's Right-Wing*, WIRED (Mar. 3, 2021, 8:00 AM), <https://www.wired.com/story/right-wing-fake-news-more-engagement-facebook/> [<https://perma.cc/2LDF-Q2FR>].

¹⁹ See Matteo Cinelli et al., *The Echo Chamber Effect on Social Media*, PROC. NAT'L ACAD. SCI., Mar. 2, 2021, at 1, 1–2, 5; Ludovic Terren & Rosa Borge, *Echo Chambers on Social Media: A Systematic Review of the Literature*, 9 REV. COMMUN. RSCH. 99, 100, 108–11 (2021).

²⁰ For a broad overview of virtual manipulation methods, see WOOLLEY, *supra* note 16, at 22–28.

²¹ See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548, 567 (2018); see also Robin Graber & Thomas Lindemann, *Neue Propaganda im Internet. Social Bots und das Prinzip Sozialer Bewährtheit als Instrumente der Propaganda, in FAKE NEWS, HASHTAGS & SOCIAL BOTS* 51, 57 (2018).

flooding the market with it,²³ became an easy and popular tool to confuse the public debate. Due to its sheer amount (and due to echo chambers), repeated exposure to false information increases the likelihood that users will perceive it as true.²⁴ Moreover, the aforementioned methods of hate speech and rabble-rousing have proven to be effective tools for emotionalizing public opinion and public discourse.²⁵

B. New Instability

History has shown that democracy is an inherently fragile system.²⁶ Social media amplifies this instability. Democracy builds on “broadly accepted, legitimate political authority, some basic consensus regarding how to distinguish truth from falsity, and a sense that even ardent political opponents are part of the same polity, bound by a common fate.”²⁷ Social media platforms “radically undermine those pillars.”²⁸ Authoritarian propaganda and ethno-nationalist extremism have become a permanent and defining part of social media.²⁹ The characteristics mentioned above and the functioning of social media, such as its tendency to create echo chambers, have a broad effect on driving polarization.³⁰ Due to social media, “groups of like-minded

²² See Neil Netanel, *Applying Militant Democracy to Defend Against Social Media Harms*, 45 CARDOZO L. REV. 489, 507 (2023). The difference between misinformation and disinformation is often described in the way that misinformation is simply false or inaccurate, whereas disinformation deliberately intends to mislead. *Misinformation and Disinformation*, AM. PSYCH. ASS'N, <https://www.apa.org/topics/journalism-facts/misinformation-disinformation> [https://perma.cc/5YNM-UYK8] (last visited Apr. 10, 2025). This Article will (with some hesitation) stick with the term “misinformation.”

²³ See Anya Schiffrin, *Disinformation and Democracy: The Internet Transformed Protest but Did Not Improve Democracy*, 71 J. INT'L AFFS. 117, 118 (2017); see also Sean Illing, “Flood the Zone with Shit”: How Misinformation Overwhelmed Our Democracy, VOX (Feb. 6, 2020, 6:27 AM), <https://www.vox.com/policy-and-politics/2020/1/16/20991816/impeachment-trial-trump-bannon-misinformation> [https://perma.cc/H5PF-8G3Y].

²⁴ See Lisa K. Fazio et al., *Repetition Increases Perceived Truth Equally for Plausible and Implausible Statements*, 26 PSYCHONOMIC BULL. & REV. 1705, 1709–10, 1709 fig.2 (2019).

²⁵ See Netanel, *supra* note 22, at 504.

²⁶ See Sajó, *supra* note 5, at 187 (“Democracy is one of the gravest threats to democracy.”).

²⁷ Netanel, *supra* note 22, at 492 (citing Robert Post, *The Unfortunate Consequences of a Misguided Free Speech Principle*, 153 DÆDALUS 135, 143 (2024)).

²⁸ *Id.*

²⁹ See *id.* at 495.

³⁰ Cass Sunstein calls this phenomenon “cyberpolarization.” CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 68 (rev. ed. 2018). Sunstein acknowledges, however, that traditional media has driven polarization before (even though not to such an extent). See *id.* at 61–62 (citing Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AM. ECON. REV. 2565,

people . . . will typically end up thinking the same thing that they thought before—but in a more extreme form.”³¹ Along with increasing polarization, social media intensifies the emotionalization and de-rationalization of public discourse.³² Social media’s heavy reliance on emotions creates an environment that leads to irrationally motivated political decisions.³³

Due to the flood of misinformation, it has become considerably more difficult for individual citizens to distinguish real from fabricated news.³⁴ Among this plethora of misinformation, users tend to select information that fits their pre-existing beliefs, thereby reinforcing those very beliefs—as they do in the analogous world.³⁵ The effects of misinformation on democracy are manifold, ranging from basic (at least attempted) manipulation of voters,³⁶ to spreading distrust in

2565 (2017) (examining how MSNBC and Fox News correlate with and influence polarization across the American public)); *see also* Netanel, *supra* note 22, at 504.

³¹ SUNSTEIN, *supra* note 30, at 68, 76–79.

³² *See* Brian E. Weeks & R. Kelly Garrett, *Emotional Characteristics of Social Media and Political Misperceptions*, in JOURNALISM AND TRUTH IN AN AGE OF SOCIAL MEDIA 236, 238–42 (James E. Katz & Kate K. Mays eds., 2019).

³³ *See* Philipp Lorenz-Spreen et al., *A Systematic Review of Worldwide Causal and Correlational Evidence on Digital Media and Democracy*, 7 NATURE HUM. BEHAV. 74, 85 (2023); *see also* Cameron Martel et al., *Reliance on Emotion Promotes Belief in Fake News*, COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS 15–20 (Oct. 7, 2020), <https://cognitiveresearchjournal.springeropen.com/counter/pdf/10.1186/s41235-020-00252-3.pdf> [<https://perma.cc/3JD5-49VC>] (exploring the connection between emotionalism and fake news); EVA ILLOUZ, *THE EMOTIONAL LIFE OF POPULISM* 162 (2023) (discussing the role of emotions in populist propaganda and identifying four main emotions that are exploited by right-wing populists).

³⁴ *See* Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM’NS L.J. 55, 79–85 (2018).

³⁵ *See* Nicole M. Krause et al., *Fake News: A New Obsession with an Old Phenomenon?*, in JOURNALISM AND TRUTH IN AN AGE OF SOCIAL MEDIA 58, 66–68 (2019).

³⁶ *See, e.g.*, Napoli, *supra* note 34, at 93–97 (discussing the role of fake news and echo chambers in the 2016 election); Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPS. 211, 211–12 (2017) (engaging in extensive discussions on the amount of misinformation in the election); Abigail Abrams, *Here’s What We Know So Far About Russia’s 2016 Meddling*, TIME (Apr. 18, 2019, 8:20 AM), <https://time.com/5565991/russia-influence-2016-election/> [<https://perma.cc/FJ5N-HQ4N>] (considering Russia’s involvement in this context); Brandy Zadrozny, *Disinformation Poses an Unprecedented Threat in 2024—and the U.S. Is Less Ready than Ever*, NBC NEWS (Jan. 18, 2024, 1:20 PM), <https://www.nbcnews.com/tech/misinformation/disinformation-unprecedented-threat-2024-election-rcna134290> [<https://perma.cc/M5AC-7SM6>] (contemplating the role of disinformation in the then-upcoming 2024 presidential election); Tiffany Hsu et al., *Elections and Disinformation Are Colliding like Never Before in 2024*, N.Y. TIMES, <https://www.nytimes.com/2024/01/09/business/media/election-disinformation-2024.html> [<https://perma.cc/5EU7-26BL>] (Jan. 11, 2024) (discussing this issue on a global scale).

democratic institutions³⁷ and eroding the public's confidence in democracy,³⁸ to election denialism³⁹ and playing a major role in the run-up to the January 6, 2021 storm on the Capitol.⁴⁰ Of course, not all social media phenomena that influence elections are problematic. However, a democracy must be aware of the power of social media to sway elections⁴¹ and how that power can be exploited—especially through misinformation.⁴²

In particular, populist parties (usually right-leaning) have long since realized the power of social media and begun to use it to their advantage. Due to the emotional content of their campaigns, which translates into their online activities, those parties are generally more successful on social media.⁴³ In addition, the use of

³⁷ See Carme Colomina et al., *The Impact of Disinformation on Democratic Processes and Human Rights in the World*, at 13–14, PE 653.635 (Apr. 2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO_STU\(2021\)653635_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO_STU(2021)653635_EN.pdf) [<https://perma.cc/6356-VLPV>].

³⁸ See Gabriel R. Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public's Confidence in Democracy*, BROOKINGS (July 26, 2022), <https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/> [<https://perma.cc/6BEX-2WAJ>].

³⁹ PAUL M. BARRETT, N.Y.U. STERN CTR. FOR BUS. & HUM. RTS., SPREADING THE BIG LIE: HOW SOCIAL MEDIA SITES HAVE AMPLIFIED FALSE CLAIMS OF U.S. ELECTION FRAUD 1 (2022), <https://bhr.stern.nyu.edu/tech-big-lie> [<https://perma.cc/W3NP-7M4G>].

⁴⁰ See SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663, at 213 (2022), <https://www.congress.gov/117/crpt/hrpt663/CRPT-117hrpt663.pdf> [<https://perma.cc/LY79-HLYP>]; see also Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN'S L. REV. 543, 546–47 (2022) (discussing the connection between the “Big Lie” and the storm on the Capitol).

⁴¹ This applies not only to long-term influence over social media, but also to short-term disruptions via social media. For example, YouTuber Rezo released a YouTube video shortly before the German federal elections, titled *Die Zerstörung der CDU* [*The Destruction of the CDU*], whereafter the Christian Democratic Union—the center-conservative party—plunged seven percent in the polls. See Rezo, *Die Zerstörung der CDU*, YOUTUBE (May 18, 2019), <https://www.youtube.com/watch?v=4Y1lZQsyuSQ> [<https://perma.cc/NC4Z-RJLP>]; see also Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CAL. L. REV. 2051, 2059–60 (2022); Peter Kuras, *German Politics Discovers YouTube*, FOREIGN POLY (June 4, 2019, 5:23 PM), <https://foreignpolicy.com/2019/06/04/german-politics-discovers-youtube/> [<https://perma.cc/63EK-JKFS>].

⁴² See Henricksen, *supra* note 40, at 554 (analyzing more tangible harms caused by disinformation).

⁴³ See *Why Right-Wing Populist Parties Have a Greater Reach*, KLIKSAFE (Mar. 11, 2024), <https://www.klicksafe.de/en/news/warum-rechtspopulisten-reichweitenstaerker-sind> [<https://perma.cc/9MW9-9PBC>]; see also Sandra González-Bailón et al., *The Advantage of the Right in Social Media News Sharing*, PNAS NEXUS, July 29, 2022, at 1, 1 (discussing the “asymmetries in the ideological slant . . . on social media, with a clear bias towards right-leaning domains”); SCHROEDER, *supra* note 3, at 79–81 (discussing populism and social media in the United States, Sweden, India, and China); Madelaine Pitt & Hans Pfeifer, *Far-Right AfD Is a Social Media Superpower*, DEUTSCHE WELLE

bots by right-wing and anti-establishment parties makes their supporters feel like they are part of a larger movement.⁴⁴ This sense of community normalizes previously morally or socially discredited language or ideas in the public discourse.⁴⁵

Adding hate speech to that equation, which heightens the emotionality even further, social media seems to be, at least in large areas, primarily composed of “uncivil, manipulative free-for-all zones.”⁴⁶ The mechanisms in place and the potential for abuse pose serious threats to democracy.⁴⁷ Many aspects of social media as it operates today fundamentally undermine democratic coexistence⁴⁸ and seem to be one of the reasons for the rising distrust in democracy and democratic institutions around the world.⁴⁹

(Aug. 27, 2021), <https://www.dw.com/en/german-election-far-right-afd-outperforms-competitors-on-social-media/a-59004003> [<https://perma.cc/K9GW-T9SH>] (referring to the Alternative for Germany political party, or AfD, as a “social media superpower”). One reason for its popularity is certainly the considerable extra effort that populist parties put into their social media campaigns.

⁴⁴ See Juan Carlos Medina Serrano et al., *The Rise of Germany's AfD: A Social Media Analysis*, in SMSOCIETY '19: PROCEEDINGS OF THE 10TH INTERNATIONAL CONFERENCE ON SOCIAL MEDIA AND SOCIETY 214, 216, 222 (2019) (finding that social media has become the AfD's main communication tool); see also JOHANNES HILLJE, DAS »WIR« DER AFD: KOMMUNIKATION UND KOLLEKTIVE IDENTITÄT IM RECHTSPOPULISMUS 64–65, 232 (2022) (noting that the AfD uses its social media posts to construct a collective identity, and identifying the characteristic elements of populism—specifically abbreviation, polarization, and emotionalization—as virality factors for social media content).

⁴⁵ See Mats Ekström et al., *The Normalization of the Populist Radical Right in News Interviews: A Study of Journalistic Reporting on the Swedish Democrats*, 30 SOC. SEMIOTICS 466, 466–68 (2020). In this context, Germans use the term of making this language “salonfähig” (meaning “socially acceptable”). James Angelos, *Germany's Far-Right 'Firewall' Cracks*, POLITICO (Oct. 4, 2023, 4:00 AM), <https://www.politico.eu/article/germany-firewall-afd-elections-thuringia/> [<https://perma.cc/8RH9-AYR9>].

⁴⁶ Netanel, *supra* note 22, at 500.

⁴⁷ See, e.g., Lorenz-Spreen et al., *supra* note 33, at 83; Jaeho Cho et al., *Do Search Algorithms Endanger Democracy? An Experimental Investigation of Algorithm Effects on Political Polarization*, 64 J. BROAD. & ELEC. MEDIA 150, 166–68 (2020) (explaining the effects of algorithms and polarization); Antoine Banks et al., *#PolarizedFeeds: Three Experiments on Polarization, Framing, and Social Media*, 26 INT'L J. PRESS/POL. 609, 630–31 (2021).

⁴⁸ For an extensive discussion on how social media destabilizes democracies, see Netanel, *supra* note 22, at 498. Later in his article, Netanel emphasizes that “social media undermine[s] the fundamental epistemic predicate of pluralist democracy.” *Id.* at 507. Additionally, there are other ways in which the First Amendment undermines democracy. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 119 (rev. ed. 1995). Sunstein already feared the dangers that would come with new technologies even before the rise of social media. *Id.* at 257–58.

⁴⁹ See Schleffer & Miller, *supra* note 4, at 85–86.

II. THE INSUFFICIENCY OF THE CURRENT DOCTRINE

In the United States, these threats are only half-heartedly addressed, if at all. There are several reasons for this failure—among the most important is the American technology-liberal and techno-utopian policy approach, which emphasizes minimal regulation of digital technologies and a strong belief in technological innovation as an inherently positive force for societal progress.⁵⁰ Yet, even if the political landscape and the policy-making approach were to change, current First Amendment doctrine will remain an insurmountable barrier to most policy changes.⁵¹

A. Origins: Holmes and Brandeis

To understand the current First Amendment doctrine, one must first understand the purpose of the Free Speech Clause of the U.S. Constitution. The purpose of freedom of speech in a liberal democracy is twofold. On the one hand, the right to free speech is an end—an expression that, by its mere utterance, reaffirms the Constitution’s guarantee of individual liberty.⁵² Yet free speech is also fundamentally a means—an essential step toward participating in democratic self-government. This dual function has been illuminated in particular by the perspectives of Supreme Court Justices Oliver Wendell Holmes, Jr., and Louis D. Brandeis.⁵³

Justice Brandeis believed that the First Amendment is “essential to effective democracy” and could be limited only when “the evil apprehended is relatively serious.”⁵⁴ His core belief was that the First Amendment serves democracy⁵⁵ because it enables the conditions necessary for democracy, such as an informed

⁵⁰ See Netanel, *supra* note 22, at 520, 525; see also Paul Starr, *How Neoliberal Policy Shaped the Internet—and What to Do About It Now*, AM. PROSPECT (Oct. 2, 2019), <https://prospect.org/api/content/e4fb9f4a-e460-11e9-9156-12f1225286c6/> [<https://perma.cc/Z9F2-ZEL5>] (discussing the history of neoliberal internet policy).

⁵¹ See Brittany Finnegan, Note, *The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?*, 75 U. MIA. L. REV. 572, 618–19 (2021).

⁵² For example, James Madison called the freedom of the press (and implicitly of speech) “one of the great bulwarks of liberty” in his version of the Free Speech and Press Clauses, which were defeated in the Senate. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

⁵³ See Netanel, *supra* note 22, at 529.

⁵⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1340 (1983).

⁵⁵ For a discussion of Justice Brandeis’ optimism in this regard, see PHILIPPA STRUM, *BRANDEIS ON DEMOCRACY* 208–10 (1995).

electorate and a battle of ideas. His overall optimistic view was based on his strong belief in counterspeech. He was convinced that counterspeech is an appropriate and effective remedy for harmful speech, and that this desirable battle of ideas would ultimately strengthen both “self-government and individual liberty.”⁵⁶

Less optimistic than Justice Brandeis was his counterpart, Justice Holmes. In the spirit of the “marketplace of ideas” approach, which is often attributed to him,⁵⁷ Holmes emphasized the individual liberty function of free speech rather than its role in democracy. He seemed convinced that freedom of speech is an end in itself, perhaps even a liberty that is more important than democracy itself. His opinion in *Gitlow v. New York* supports this claim: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”⁵⁸ This quotation demonstrates how Justice Holmes was generally not so much concerned with the tyranny of the majority,⁵⁹ but rather he believed that freedom of speech was primarily an objective, meant to promote individual liberty⁶⁰ and pose a balancing “counterweight . . . to illiberal attitudes.”⁶¹

Justice Holmes’ strong belief in the “free trade in ideas”⁶² came to shape the ultra-liberal First Amendment doctrine. Subsequent First Amendment jurisprudence, however, makes clear that the First Amendment and democracy are inextricably

⁵⁶ Netanel, *supra* note 22, at 529 (citing *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)).

⁵⁷ This theory was first mentioned as “competition of the market” in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For insight into Justice Holmes’ understanding, see Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2 (describing Holmes’ understanding as having “more to do with checking, character, and culture than with the implausible vision of a self-correcting, knowledge-maximizing, judgment-optimizing, consent-generating, and participation-enabling social mechanism”).

⁵⁸ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

⁵⁹ See Blasi, *supra* note 57, at 30–31. Interestingly, Justice Holmes’ philosophy differs greatly from that of John Stuart Mill. Mill, who is often seen as the precursor to the “marketplace of ideas” doctrine, feared that democracy would become a tyranny of the majority and thus lead to an oppression purportedly legitimated by democratic popular will. See JOHN STUART MILL, *ON LIBERTY* 10–11, 18–19 (Floating Press 2009) (1909).

⁶⁰ Meiklejohn later criticized Justice Holmes’ philosophy for being “one of excessive individualism.” ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 61 (1965).

⁶¹ Blasi, *supra* note 57, at 46.

⁶² For a discussion on the origin of this approach, see Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1523–27 (2019).

linked,⁶³ and that the First Amendment is a “guardian of our democracy.”⁶⁴ Illustrative here is the work of American philosopher Alexander Meiklejohn, who, in many ways clearly opposed Justice Holmes’ understanding of the First Amendment.⁶⁵ He strongly believed that the First Amendment is not an end in and of itself.⁶⁶ Instead, Meiklejohn was convinced that the “most significant purpose of the First Amendment” is to serve as the “intellectual basis of our plan of self-government.”⁶⁷ With this in mind, it was clear to him that freedom of speech is absolute only when it pertains to the public interest.⁶⁸ In his view, Justice Holmes’ “competitive individualism” ultimately “robs the [A]mendment of its essential meaning—the meaning of our common agreement that . . . we will be our own rulers.”⁶⁹

What has prevailed over all these philosophical disputes is the understanding that the First Amendment plays a vital role in American democracy. This may not be its sole purpose, but it is one of utmost importance.⁷⁰ Essential to that understanding has always been a strong belief in counterspeech: the belief that speech regulates itself. Whether one views counterspeech as a tool to arrive at “truth” in social discourse or as an alternative to government regulation,⁷¹ it is fundamental to the current understanding of free speech.

B. The Current Doctrine

Restrictions of speech have traditionally been permitted only in limited circumstances. And despite the wide variety of First Amendment doctrines, these restrictions all seem to have one

⁶³ See SUNSTEIN, *supra* note 30, at 212 (arguing that “the First Amendment in large part embodies a democratic ideal”).

⁶⁴ *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

⁶⁵ As discussed above, Meiklejohn did not tire of pointing out the “failure of Mr. Holmes to recognize the sane and solid moral principles which find expression in our national agreement that government shall be carried on only by consent of the governed.” MEIKLEJOHN, *supra* note 60, at 68.

⁶⁶ Meiklejohn was of the opinion that the “First Amendment . . . is not the guardian of unregulated talkativeness. . . . What is essential is . . . that everything worth saying shall be said.” *Id.* at 26.

⁶⁷ *Id.* at 30.

⁶⁸ *Id.* at 39. The public interest in speech sits in contradistinction to the private interest in speech, which is not essential to self-governance and thus may be abridged. *Id.* at 55.

⁶⁹ *Id.* at 75.

⁷⁰ See SUNSTEIN, *supra* note 30, at 212; see also OWEN M. FISS, *THE IRONY OF FREE SPEECH* 2–4 (1996).

⁷¹ G.S. Hans, *Changing Counterspeech*, 69 CLEVELAND STATE L. REV. 749, 774 (2021).

thing in common: the speech to be restricted must be expected to create some sort of imminent harm.⁷² In the words of Justice Holmes, “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”⁷³ This clear and present danger test was later incorporated into the incitement doctrine established in *Brandenburg v. Ohio*.⁷⁴

According to this philosophy, First Amendment doctrine focuses on the fact that speech can only be restricted if the potential danger materializes very soon.⁷⁵ All other speech, no matter how repugnant, is considered awful but lawful.

Furthermore, based on case law, the First Amendment does not seem to require any kind of fairness in the public sphere. Although the Supreme Court ruled in *Red Lion Broadcasting Co. v. FCC* that the Federal Communications Commission’s “fairness doctrine” was constitutional because it enhanced each individual’s freedom of speech,⁷⁶ it did not hold in that case or declare in any subsequent jurisprudence that such fairness is generally required by the First Amendment. The Court’s main holding in *Red Lion* was that radio frequencies are a limited resource and therefore must be fairly allocated.⁷⁷ This could lead to the conclusion that the *Red Lion* doctrine does not apply to social media because social media eliminates the scarcity of communication channels.⁷⁸ The Supreme Court has also explicitly stated that the First Amendment does not recognize

⁷² See *Brandenburg v. Ohio*, 395 U.S. 444, 452–53 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942) (fighting words); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (false statements of facts); *Ginsberg v. New York*, 390 U.S. 629, 641 (1968) (obscenity regarding minors).

⁷³ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁷⁴ See generally Chester James Antieau, *Clear and Present Danger—Its Meaning and Significance*, 25 NOTRE DAME L. REV. 603, 643–45 (1950) (displaying uncertainty about the subjectivity of this test). See also MEIKLEJOHN, *supra* note 60, at 47–49 (criticizing the test for its lack of objectivity).

⁷⁵ Restriction is also permitted where the infliction of harm is inherent in the production of this sort of speech. See *New York v. Ferber*, 458 U.S. 747, 747–48, 757–59 (1982) (illustrating the doctrine as applied to child sexual abuse material). In fact, in *Ashcroft*, the Court held that the government may not prohibit speech because it increases the chance that an unlawful act will be committed at some indefinite time in the future. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253–54 (2002).

⁷⁶ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

⁷⁷ *Id.* at 383, 388–89, 394.

⁷⁸ See Wu, *supra* note 21, at 577–78 (believing that the holding of *Red Lion* is inapplicable and that imposing a fairness doctrine on social media would be constitutional).

political equality or the erosion of public debate as grounds for restricting speech.⁷⁹ In its 2024 case, *Moody v. Netchoice, LLC*, the Supreme Court indicated its approval of content moderation as part of the platform's editorial choice and thereby strengthened the editorial rights of the speech distributors.⁸⁰ Again, the fundamental right perspective prevails.

In addition, social media has been compared to a public forum, which leads to even higher standards of protection.⁸¹ Concerning the threatened TikTok ban,⁸² it remains to be seen whether the denial of complete access to a platform for everyone destroys an established public forum, and whether it will be considered consistent with the First Amendment.⁸³

C. The Misfit

This approach to the First Amendment is inadequate to deal with the new challenges posed by social media.⁸⁴ There are huge differences between traditional mass media and social media, the latter of which poses unique threats to democracy.⁸⁵ A “business-as-usual” approach does not work.⁸⁶

The premise of the current First Amendment doctrine, a self-regulating marketplace of ideas, is out of balance.⁸⁷ Due to new

⁷⁹ See *Citizens United v. FEC*, 558 U.S. 310, 349–50 (2010).

⁸⁰ *Moody v. Netchoice, LLC*, 603 U.S. 707, 708, 710–11 (2024).

⁸¹ The public forum doctrine is often traced back to Justice Roberts' opinion in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515–17 (1939).

⁸² See Bobby Allyn, *Trump Extends TikTok's Sell-by Deadline Again*, NPR (Apr. 4, 2025, 2:07 PM), <https://www.npr.org/2025/04/04/nx-s1-5347418/trump-tiktok-second-ban-delay> [https://perma.cc/Q53M-96RC].

⁸³ The American Civil Liberties Union considers this bill to be in violation of the First Amendment. See *ACLU Slams House for Latest Plan to Ban TikTok and Stifle Free Speech*, ACLU (Mar. 5, 2024, 6:00 PM), <https://www.aclu.org/press-releases/aclu-slams-house-for-latest-plan-to-ban-tiktok-and-stifle-free-speech> [https://perma.cc/MD34-BE3Y]. See generally Scott Bomboy, *A National TikTok Ban and the First Amendment*, NAT'L CONST. CTR. (Mar. 22, 2024), <https://constitutioncenter.org/blog/a-national-tiktok-ban-and-the-first-amendment> [https://perma.cc/5NCP-F8U5] (describing the controversies in lower courts).

⁸⁴ See Nunziato, *supra* note 62, at 1527 (discussing the unique problems social media poses to the marketplace of ideas doctrine).

⁸⁵ See Robert C. Post, *Democracy and the Internet*, BALKINIZATION (Jan. 28, 2023, 9:30 AM), <https://balkin.blogspot.com/2023/01/democracy-and-internet.html> [https://perma.cc/MW7S-KYLL].

⁸⁶ See Lee C. Bollinger & Geoffrey R. Stone, *Concluding Statement*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* 327, 328 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (advocating for a system of government oversight that forbids censorship but enables government regulation to protect the public interest).

⁸⁷ Tim Wu identifies different assumptions about the First Amendment and argues that informational scarcity, the listeners' abundant time and interest, and the

technologies and the resulting new means of manipulation, the digital marketplace of ideas is broken.⁸⁸

Filter bubbles place an almost insurmountable burden on counterspeech: truth does not win in an exchange of ideas and opinions, but misinformation remains unchallenged.⁸⁹ The idea that more speech is the appropriate remedy for bad speech does not work if that speech does not reach the original speaker or only reinforces their views.⁹⁰ The U.S. government's efforts to engage in counterspeech through the Global Engagement Center have proven to be mostly ineffective.⁹¹ The failure of counterspeech in the digital realm can also be attributed to the highly emotional nature of social media. Constitutional democracy can only speak rationally, which is unlikely to address emotional claims.⁹² "[E]motionalism is inherent in democracy, but democracy, especially in the form of representative government, was designed as a characteristically non-emotional

government's use of criminal law or other coercive means are the main threats to the First Amendment. Wu, *supra* note 21, at 553–54. However, he also argues that all three of these things became obsolete due to the latest changes in communication technologies. *Id.* at 554.

⁸⁸ Some argue that the First Amendment is way too "Lochnerian" in the first place, meaning that it misbalances all involved interests too much in favor of the speaker. *See, e.g.,* JOHN RAWLS, *POLITICAL LIBERALISM* 362–63 (1993). *But see* Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1241 (2020) (criticizing the focus of the widespread academic criticism on its economic aspects); *see also* William French, *This Isn't Lochner, It's the First Amendment: Reorienting the Right to Contract and Commercial Speech*, 114 NW. U.L. REV. 469, 472–74, 490–501 (2019) (addressing the blurred boundaries of the First Amendment and Lochnerianism).

⁸⁹ *See* Anna Rhoads, *Incitement and Social Media-Algorithmic Speech: Redefining Brandenburg for a Different Kind of Speech*, 64 WM. & MARY L. REV. 525, 544 (2022); *see also* Napoli, *supra* note 34, at 77–79 (addressing the failure of social media to provide counterspeech due to echo chambers).

⁹⁰ *Cf.* SUNSTEIN, *supra* note 30, at 88.

⁹¹ *See, e.g.,* Neill Perry, *The Global Engagement Center's Response to the Coronavirus Infodemic*, CYBER DEF. REV., Spring 2022, at 131, 132 (stating that the Global Engagement Center is "ill-suited for disinformation intended for American audiences"); OFF. OF INSPECTOR GEN., *INSPECTION OF THE GLOBAL ENGAGEMENT CENTER* 7–9 (2022) (finding that the Global Engagement Center's effectiveness was limited).

⁹² *See* Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 428 (1937); *see also* Sajó, *supra* note 5, at 202; András Sajó, *Militant Democracy and Emotional Politics*, 19 CONSTELLATIONS 562, 569 (2012). An attempt to meet populist emotionalism is sometimes seen in the concept of *Verfassungspatriotismus*, or constitutional patriotism. For more on this topic, *see* SVETLANA TYULKINA, *MILITANT DEMOCRACY: UNDEMOCRATIC POLITICAL PARTIES AND BEYOND* (2015).

institution.”⁹³ Therefore, the concept of counterspeech can only be applied in a limited way to inherently emotional social media.⁹⁴

As a result of misinformation, the former marketplace is now being (often intentionally) flooded with false information for the sole purpose of confusing public opinion. The question that is being rightly asked here is to what extent misinformation is contributing to the marketplace of ideas.⁹⁵ It becomes virtually impossible to distinguish between true and false information.⁹⁶ This makes it easy for people with more resources to manipulate the online marketplace of ideas.⁹⁷ The need to counter misinformation is also reflected in the international arena.⁹⁸

Due to bots, certain speech seems far more persuasive because of the perceived mass of its followers.⁹⁹ Hate speech can lead to the targeted silencing of vulnerable individuals and have a chilling effect on the greater public.¹⁰⁰ In response, social media platforms are imposing restrictions to tackle the issue of hate speech.¹⁰¹ This raises many First Amendment issues.¹⁰²

The clear and present danger test is not fit to address these threats.¹⁰³ The physical and temporal remoteness that the

⁹³ Sajó, *supra* note 92, at 563.

⁹⁴ See David A. Strauss, *Social Media and First Amendment Fault Lines*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* 3, 15 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

⁹⁵ Therefore, the type of disinformation that Henricksen calls “fraudulent” speech should not be protected by the First Amendment. See Henricksen, *supra* note 40, at 556, 558.

⁹⁶ See Napoli, *supra* note 34.

⁹⁷ See Netanel, *supra* note 22, at 507–10. This, of course, is no unique feature of the social media sphere. However, the characterizing technologies at play allow for a far more powerful manipulation of the marketplace of ideas than would be possible in the analog world.

⁹⁸ See, e.g., *Reykjavík Declaration*, COUNCIL OF EUR. 16 (May 17, 2023), https://coebank.org/documents/1373/4th_CoE_Summit_Reykjavik_Declaration.pdf [<https://perma.cc/Q32V-5S8J>] (highlighting the belief of the Council of Europe that disinformation and misinformation pose a threat to democracy that must be countered).

⁹⁹ See SUNSTEIN, *supra* note 30, at 74–75 (discussing the phenomenon of group polarization and “the effects of social media platforms on which people’s views end up being constantly reaffirmed by like-minded types”).

¹⁰⁰ See Netanel, *supra* note 22, at 506–10; Wu, *supra* note 21, at 564–65 (noting examples of such); see also FISS, *supra* note 70, at 15–18 (proposing that we ought not to think about freedom of speech without considering the equality of the different speakers).

¹⁰¹ See Nunziato, *supra* note 62, at 1538–54 (detailing what Facebook and X (formerly Twitter) are doing to regulate speech).

¹⁰² Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 *BERKELEY TECH. L.J.* 1115, 1170–71 (2005) (criticizing the privatization of the digital world and the accompanying erosion of First Amendment values).

¹⁰³ See Amélie Heldt, *Terror-Propaganda Online: Die Schranken der Meinungsfreiheit in Deutschland und den USA*, 2017 *NEUE JURISTISCHE ONLINE-ZEITSCHRIFT* 1458, 1460–61 (comparing the *Brandenburg* doctrine with the German doctrine).

internet creates, as the feed sometimes displays posts long after they are posted, makes it difficult to meet the imminence requirement.¹⁰⁴ Moreover, many of the aforementioned threats to democracy are simply too abstract to be addressed by the clear and present danger test.¹⁰⁵ Throwing one's hands in the air and letting the platforms self-police cannot be the solution.¹⁰⁶

Considering all these factors, it becomes apparent that there is no marketplace of ideas on social media, at least none of the kind envisioned by the First Amendment.¹⁰⁷ Thus, the vaunted marketplace is experiencing a "market failure" on social media.¹⁰⁸

III. MILITANT DEMOCRACY FOR THE FIRST AMENDMENT?

Many recognize that a shift in First Amendment doctrine is needed.¹⁰⁹ The concept of militant democracy provides an

¹⁰⁴ See Rhoads, *supra* note 89, at 543. On the other hand, some argue that the clear and present danger test protects too little speech. See David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL RTS. J. 733, 733 (1998) (asserting that "evil words do not always lead to evil acts"). Interestingly, Meiklejohn has already doubted the "present" requirement of the clear and present danger test because he considers it to be arbitrary and exploitable. See MEIKLEJOHN, *supra* note 60, at 47–49.

¹⁰⁵ Meiklejohn strongly criticized the clear and present danger test as unfitting for American democracy, saying that the effect of this doctrine "upon our understanding of self-government has been one of disaster." MEIKLEJOHN, *supra* note 60, at 33.

¹⁰⁶ Skeptical about the adequacy of *Brandenburg* as it pertains to social media, Connie Hassett-Walker appears to trust the self-policing of online platforms. Connie Hassett-Walker, *Does Brandenburg v. Ohio Still Hold in the Social Media Era? Racist (and Other) Online Hate Speech and the First Amendment*, 8 COGENT SOC. SCIS., Feb. 18, 2022, at 1, 14–15.

¹⁰⁷ Interestingly, Meiklejohn was already "bitterly disappointed" by how the radio—a new form of communication at the time—was not a free space for such an exchange of ideas and that it was instead more engaged in making money. MEIKLEJOHN, *supra* note 60, at 87. Meiklejohn saw this as a danger for democracy, noting that this new form of media was "not cultivating those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends." *Id.* However, he also noted, "On the contrary, it is a mighty force for breaking them down." *Id.*

¹⁰⁸ Napoli, *supra* note 34, at 88–93.

¹⁰⁹ See, e.g., Bollinger & Stone, *supra* note 86, at 328–29; Larry Kramer, *A Deliberate Leap in the Opposite Direction: The Need to Rethink Free Speech*, in SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY 17, 20 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022); Mark S. Kende, *Social Media, the First Amendment, and Democratic Dysfunction in the Trump Era*, 68 DRAKE L. REV. 273, 274–75 (2020); Wu, *supra* note 21, at 581; Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CONST. L. 81, 167–70 (2019) (arguing that the current doctrine poses a national security risk); Kenneth Propp, *Speech Moderation and Militant Democracy: Should the United States Regulate like Europe Does?*, ATL. COUNCIL (Feb. 1, 2021), <https://www.atlanticcouncil.org/blogs/new-atlanticist/speech-moderation-and-militant-democracy-should-the-united-states-regulate-like-europe-does/> [<https://perma.cc/B8T3-FBJT>] (calling "adjustments at the margins . . . desirable" from a foreign affairs perspective).

alternative line of argument for defending democratic institutions against the harms of social media,¹¹⁰ and it has a chance of addressing those new challenges and challengers.¹¹¹

The following section will introduce militant democracy into the discussion as a solution for a change in First Amendment doctrine.¹¹²

A. The Concept

1. Origins

“[M]ilitant democracy can be defined as the capacity of liberal democracies to defend themselves against challenges to their continued existence by taking pre-emptive action against those who want to overturn or destroy democracy by abusing democratic institutions and procedures.”¹¹³ The basic ideas for the political concept of militant democracy were developed by Karl Loewenstein and Karl Mannheim, scholars who both fled Germany during the Nazi era.¹¹⁴

In 1937, Loewenstein developed the model of militant democracy against the background of his experiences with National Socialism (the ideology of Hitler’s Nazi regime).¹¹⁵ The trigger for Loewenstein’s work was the new use of emotionalism in politics. He feared that “[t]he technical devices for mobilizing emotionalism” would lead to a more emotional public debate.¹¹⁶ He saw firsthand how fascism and populism “exploit the tolerant confidence of democratic ideology that in the long run truth is stronger than falsehood.”¹¹⁷ Because of this experience, he was

¹¹⁰ Netanel, *supra* note 22, at 494.

¹¹¹ Angela K. Bourne & Bastiaan Rijpkema, *Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges*, 18 EUR. CONST. L. REV. 375, 378–79 (2022) (examining both the structural change that Militant Democracy itself must endure due to new challenges, and whether Militant Democracy is a good fit to combat populist actors with huge support).

¹¹² For an introduction of Militant Democracy already meeting social media harms, see Aziz Z. Huq, *Militant Democracy Comes to the Metaverse?*, 72 EMORY L.J. 1105, 1124–26, 1135–37 (2023); Netanel, *supra* note 22, at 557–59; see also Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 L. & SOC. INQUIRY 314, 332 (2023).

¹¹³ TYULKINA, *supra* note 92, at 15.

¹¹⁴ See Loewenstein, *supra* note 92, at 421, 423–24, 428–29; KARL MANNHEIM, *DIAGNOSIS OF OUR TIME: WARTIME ESSAYS OF A SOCIOLOGIST* 4–8 (1943). For a discussion on how the idea of defending democracy against its potential enemies traces back much further than the 1930s, see TYULKINA, *supra* note 92, at 14.

¹¹⁵ Loewenstein, *supra* note 92, at 417.

¹¹⁶ *Id.* at 418.

¹¹⁷ *Id.* at 424.

convinced that legislative countermeasures should meet the emotional technique.¹¹⁸

Loewenstein is often associated with the call for party bans.¹¹⁹ Although party bans are part of militant democracy in many countries,¹²⁰ they are highly controversial due to the danger of misuse and the position of parties at the heart of a representative democracy.¹²¹ But Loewenstein's understanding of militant democracy goes much further. It predominantly focuses on preventing fascists from undermining democracy by disrupting democratic discourse.¹²² This can be achieved through party bans, but also by a variety of other means.

Karl Mannheim's thoughts on militant democracy were influenced by his experiences with Nazi Germany as well. He saw militant democracy as a third option between laissez-faire liberalism and totalitarian dictatorship,¹²³ which is "said to be the manifestation of his standpoint as a defender of freedom and democracy against fascism and totalitarianism."¹²⁴ Although their understanding of democracy is sometimes described as elitist¹²⁵ and undemocratic,¹²⁶ these two thinkers were

¹¹⁸ *Id.* at 431.

¹¹⁹ See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638, 646–48 (1937). For an extensive analysis of and critical remarks on the party ban practice in Europe, see generally Angela K. Bourne & Fernando Casal Bértoa, *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945-2015)*, 13 EUR. CONST. L. REV. 221, 221–25 (2017).

¹²⁰ See, e.g., *Proceedings for the Prohibition of a Political Party*, BUNDESVERFASSUNGSGERICHT FED. CONST. CT., https://www.bundesverfassungsgericht.de/EN/TheFederalConstitutionalCourt/TypesOfProceedings/ProceedingsForTheProhibitionOfAPoliticalParty/proceedingsforthe prohibition of a political party_node.html [<https://perma.cc/W5TY-AKJW>] (last visited Apr. 9, 2025) (explaining the proceedings for party bans in Germany's Federal Constitutional Court).

¹²¹ See Peter Stone, *Democratic Equality and Militant Democracy*, in MILITANT DEMOCRACY AND ITS CRITICS 38, 45 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019).

¹²² See Loewenstein, *supra* note 119, at 651–53. For an overview of creative, "softer" militant democracy measures, see TYULKINA, *supra* note 92, at 110–19.

¹²³ MANNHEIM, *supra* note 114, at 7.

¹²⁴ Ryusaku Yamada, *Mannheim, Mass Society and Democratic Theory*, in THE ANTHEM COMPANION TO KARL MANNHEIM 51, 58 (David Kettler & Volker Meja eds., 2018).

¹²⁵ See *id.* at 52. On the legitimacy problem of Militant Democracy, see Cristóbal Rovira Kaltwasser, *Militant Democracy Versus Populism*, in MILITANT DEMOCRACY AND ITS CRITICS 72, 85–86 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019).

¹²⁶ This is particularly due to Mannheim's emphasis on the role of science and expertise, as well as his distrust of the electorate. See Martyn Hammersley, *Karl Mannheim on Fascism: Sociological Lessons About Populism and Democracy Today?*, 28 SOCIO. RSCH. ONLINE 320, 327 (2023) (citing FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944)). Mannheim has been described as "neither liberal nor democratic," and is accused of not trusting the people as the true sovereign in a democracy. *Id.*

undoubtedly right to recognize that the greatest dangers to democracy come from within. The recognition that democracy must be protected from destructive forces from within is important and rightly still influential today.¹²⁷

The fact that this approach contains formally anti-democratic elements does not necessarily constitute a problem within a constitutional democracy. Constitutional safeguards often appear anti-democratic and counter-majoritarian in the short term, while realistically they are designed to protect constitutional democracy in the long run.¹²⁸ Because of their effect, populists often characterize constitutional safeguards as elitist and illegitimate obstacles to popular power.

2. Militant Democracy in Germany and Europe

To understand what militant democracy can look like, it is helpful to examine its specific forms and implementations in the European and German legal systems.¹²⁹ A variety of examples will be provided below, but the focus will be on examples related to freedom of opinion.

Germany is a paradigmatic case of militant democracy, largely because this principle is in many ways reflected in the German constitution, the Basic Law. The obvious background for this strong emphasis on the importance of a self-protecting

¹²⁷ Later, many other thinkers introduced their understandings of Militant Democracy. One of the most influential was Max Lerner. On the differences between Loewenstein's and Lerner's doctrines, see Graham Maddox, *Karl Loewenstein, Max Lerner, and Militant Democracy: An Appeal to 'Strong Democracy'*, 54 AUSTL. J. POL. SCI. 490, 491–96 (2019).

¹²⁸ An obvious example is the two-term limit for the presidency in the Twenty-Second Amendment to the Constitution. U.S. CONST. amend. XXII, § 1. This limitation, sparked by worries of executive tyranny, is clearly intended to secure democracy in the long term and to prevent despotism. See, e.g., Mark Satta, *Why Does the U.S. Have Presidential Term Limits? The History of the 22nd Amendment*, PBS NEWS (Apr. 5, 2025, 2:30 PM), <https://www.pbs.org/newshour/politics/why-does-the-u-s-have-presidential-term-limits-the-history-of-the-22nd-amendment> [https://perma.cc/HF3B-AR2X]. Nevertheless, it is formally undemocratic, denying voters and potential candidates the chance to align with the popular will by electing a president for a third term. The same is true for many forms of minority protection. The idea that the minority has the ability to become the majority in the long run is deeply important for democracy. Yet, enacting protections to ensure there is a possibility of this result is formally antidemocratic in the first place. This dichotomy is inherent in every constitutional democracy.

¹²⁹ In the United States, Militant Democracy is often perceived as a European or German concept. It is frequently accompanied by the opinion that there is limited freedom of speech in Europe and especially in Germany. See, e.g., Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1597 (2004).

democracy is, of course, the failure of the Weimar Republic. Germany has experienced firsthand how easily a democracy can abolish itself. The Nazis made no secret of their plan to defeat democracy with their own weapons. Joseph Goebbels, the Nazi Party's chief propagandist and Reich Minister of Propaganda, famously wrote:

We enter the Reichstag to arm ourselves with democracy's weapons. If democracy is foolish enough to give us free railway passes and salaries, that is its problem. It does not concern us. Any way of bringing about the revolution is fine by us. . . . We are coming neither as friends or neutrals. We come as enemies! As the wolf attacks the sheep, so come we.¹³⁰

Based on this experience, the framers of the Basic Law sought to prevent history from repeating itself.¹³¹ Famously, the German Federal Constitutional Court stated that the "Basic Law can be largely interpreted as an antithesis to the totalitarianism of the National Socialist regime, and . . . seeks to learn from historical experience and to rule out a repeat of such injustice once and for all."¹³² Prominent examples of this militant constitutionalism are the party ban procedure¹³³ and the withdrawal of basic (political) rights.¹³⁴ These measures are probably the most severe manifestations of militant democracy in the Basic Law. However, they have been used only sparingly or

¹³⁰ JOSEPH GOEBBELS, DER ANGRIFF: AUFSÄTZE AUS DER KAMPFZEIT 71–73 (1936), translated in Randall Bytwerk, *Why Do We Want to Join the Reichstag?*, CALVIN U., <https://research.calvin.edu/german-propaganda-archive/angrif06.htm> [<https://perma.cc/4VCK-452N>].

¹³¹ For an extensive discussion on the various interpretations of the "Never Again" doctrine in German constitutional law, see Daniel Wolff, *Zeit und Verfassung – Konstitutionelle Reaktionen auf den Zeitregimewechsel* (Deutsche Forschungsgemeinschaft, Project Identification No. 558486849, 2024).

¹³² BVerfG, 1 BvR 2150/08, Nov. 4, 2009, para. 42, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html [<https://perma.cc/Z7PM-N4L8>] (Ger.).

¹³³ "Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional." Grundgesetz [GG] [Basic Law], art. 21, para. 2, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [<https://perma.cc/V6Z5-W7F7>] (Ger.). The German Constitutional Court must determine the unconstitutionality in each individual case. *Id.* para. 4.

¹³⁴ Grundgesetz [GG] [Basic Law], art. 18, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [<https://perma.cc/4CEE-V6RH>] (Ger.). Article 18 provides that anyone who abuses certain political rights to fight against the free democratic basic order forfeits those rights. *Id.*

not at all.¹³⁵ More relevant in practice is the general hierarchy in the Basic Law, which is established above all by the Perpetuity Clause.¹³⁶ This clause prevents the most important principles from being changed through constitutional amendment, including human dignity,¹³⁷ democracy, and the rule of law, among others.¹³⁸ This hierarchy plays a major role in legal interpretation.

In Germany, as in the United States, the role of free speech is seen as twofold, balancing individual freedom with its role in democracy.¹³⁹ However, the link between democracy and free speech is more established in German constitutional doctrine than in the United States. In German constitutional law, fundamental rights do not merely have a defensive, liberal character, but can also represent an objective set of values or establish duties for the state to protect the constitutionally guaranteed freedoms.¹⁴⁰ This is underscored by a strong belief that an informed public is important and even essential for democracy.¹⁴¹ Related to this understanding is the conviction that communication spaces must be inclusive and deliberative, even in the digital space, because only widespread participation in the political debate—which is based on undisputed facts as a common ground—can counteract the fragmentation and polarization of society.¹⁴² True to this philosophy, speech that

¹³⁵ So far there have been two party bans—one in 1952 against the Socialist Reich Party, which drew on the legacy of the National Socialist regime, and another in 1956 against the Communist Party of Germany—but there has been no withdrawal of basic rights. See *Banning Political Parties*, FED. MINISTRY OF THE INTERIOR, <https://www.bmi.bund.de/EN/topics/constitution/law-political-parties/banning-pol-parties/banning-pol-parties-node.html> [<https://perma.cc/Y7ZM-T9QG>] (last visited May 8, 2025).

¹³⁶ Grundgesetz [GG] [Basic Law], art. 79, para. 3, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [<https://perma.cc/4CEE-V6RH>] (Ger.).

¹³⁷ *Id.* art. I.

¹³⁸ *Id.* art. 20, para. 1.

¹³⁹ See VIKTOR VOLKMANN, MEINUNGSFREIHEIT FÜR DIE FEINDE DER FREIHEIT? 275 (2019).

¹⁴⁰ For one of the most famous cases of the German Federal Constitutional Court on this issue, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (Ger.).

¹⁴¹ For example, the German Federal Constitutional Court calls *Rundfunkgebühren* (the public broadcasting fee) a *Demokratieabgabe* (levy on democracy). BVerfG, 1 BvR 1675/16, July 18, 2018, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/07/rs20180718_1bvr167516en [<https://perma.cc/QVN5-424G>]. On the applicability of this decision to social media, see Michael Fehling & Matthias Leymann, *Der Neue Strukturwandel der Öffentlichkeit: Wie Lassen Sich die Sozialen Medien Regulieren?*, 51 AFP 110, 111 (2020).

¹⁴² Cf. Cristina Lafont, *Deliberative Demokratie Nach der Digitalen Transformation*, BPB (Oct. 20, 2023), <https://www.bpb.de/shop/zeitschriften/apuz/diskurskultur->

contributes to public democratic discourse is most strongly protected. The conscious statement of false facts is not protected because it does not contribute to the formation of an opinion on an accurate factual basis. There is a strong belief that democracy must guarantee the conditions for democratic participation.¹⁴³ The goal is not to eradicate bad ideas, but simply to ensure that they are not presented in a historically false or misleading way.¹⁴⁴

Because of the rise of the political far right in Germany, some might criticize the German system of militant democracy as a failure.¹⁴⁵ To a certain extent, this argument is fair. However, it fails to recognize that the global trend of democratic backsliding is, at least for now, less dramatic in Germany than in many other democracies.

A similar pattern can be observed recently at the level of the European Union (EU).¹⁴⁶ The EU is highly dependent on its states being democratic.¹⁴⁷ With the European Commission's 2020 European Democracy Action Plan, the EU is demonstrating

2023/541846/deliberative-demokratie-nach-der-digitalen-transformation/
[<https://perma.cc/EPJ3-V7UR>].

¹⁴³ On the inherent difficulty of the liberal, secularized state to guarantee its own prerequisites, see Ernst-Wolfgang Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation*, in *SÄKULARISATION UND UTOPIE* 75, 75–78 (Sergius Buve ed., 1967). The former judge of the German Constitutional Court, Ernst-Wolfgang Böckenförde, established that “[t]he liberal, secularized state is sustained by conditions it cannot itself guarantee.” Mirjam Künkler & Tine Stein, *Böckenförde on the Secular State and Secular Law*, in 2 *RELIGION, LAW, AND DEMOCRACY* 138, 139 (Mirjam Künkler & Tine Stein eds., 2020) (citation omitted). Therefore, the liberal state which abolished absolutism and established the sovereignty of the people could not impose norms like the notion of loyalty to liberty and democracy on the population without in itself being absolutist again. See *id.* at 139–45.

¹⁴⁴ For a discussion on the issue of falsifying history in the United States, see Henricksen, *supra* note 40, at 570–72. On Germany's fight against misinformation and hate speech on social media with a special focus on the Network Enforcement Act (in German, *Netzwerkdurchsetzungsgesetz*, or NetzDG for short), see Nunziato, *supra* note 62, at 1532–38; see also Finnegan, *supra* note 51, at 612 (explaining that the NetzDG would not pass First Amendment scrutiny).

¹⁴⁵ See Krotoszynski, *supra* note 129, at 1598–99.

¹⁴⁶ Ruti Teitel argues that today's acceptance “of a robust conception of the rule of law” has allowed for a more nuanced approach “to the balance of values” in the European arena. Ruti Teitel, *Militating Democracy: Comparative Constitutional Perspectives*, 29 *MICH. J. INT'L. L.* 49, 70 (2007).

¹⁴⁷ Cf. Tore Vincents Olsen, *Liberal Democratic Sanctions in the EU*, in *MILITANT DEMOCRACY AND ITS CRITICS* 150, 151–55 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019). In addition, not only the EU, but many international organizations are highly dependent on a certain level of democracy and law-abiding behavior of their member states. See Constanze Stelzenmüller, *Democracy: Transatlantic Action Plan*, DGAP (Jan. 19, 2021), <https://dgap.org/en/research/publications/democracy> [<https://perma.cc/DR54-QW4X>] (discussing NATO's reliance on member states' commitment to democracy).

militant democracy at the intergovernmental level.¹⁴⁸ At the same time, the Digital Services Act (DSA) provides an example on what militant democracy could look like online, in this instance by imposing regulations on social media platforms.¹⁴⁹ The DSA would arguably fail First Amendment scrutiny.¹⁵⁰ However, some hope that the DSA will have a serious impact on the social media landscape in the United States due to the “Brussels Effect”—the phenomenon whereby EU regulations influence global business practices because international companies adopt them to maintain access to the European market—and that even if the neoliberal U.S. policy approach does not change, it could push social media in the United States to become a more reasoned and fact-based public sphere.¹⁵¹ It is also worth noting that there seems to be a hesitant tendency to reflect the concept of militant democracy in public international law.¹⁵² Militant democracy is not only shaping national but also supranational and transnational government frameworks in response to the evolving challenges of the digital age.

¹⁴⁸ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On the European Democracy Action Plan*, at 1, COM (2020) 790 final (Dec. 3, 2020). For an analysis of the related enforcement mechanisms, see Olsen, *supra* note 147, at 157–66; see also Netanel, *supra* note 22, at 496.

¹⁴⁹ See Netanel, *supra* note 22, at 559–61.

¹⁵⁰ *Id.* at 575.

¹⁵¹ See *id.* at 496–97. That said, this hope seems to show an abandonment of any chance to resolve this issue through domestic legislation. See *id.* at 493, 496.

¹⁵² See TYULKINA, *supra* note 92, at 51–54; see also Netanel, *supra* note 22, at 552–55. The Council of Europe itself could be seen as the embodiment of Militant Democracy on an international level, trying to secure an international democratic community to protect human rights. Cf. Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 4, 1950, 213 U.N.T.S. 221.

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend. . . .

Id. However, conflicts frequently occur between the European Convention on Human Rights (ECHR) and domestic Militant Democracy efforts. See TYULKINA, *supra* note 92, at 95–102. Still, the ECHR seems to recognize Militant Democracy’s international legality. See Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT’L J. CONST. L. 488, 516 (2006). For insight into the internationalization of Militant Democracy in connection with international human rights law, see generally Christian Walter, *Interactions Between International and National Norms: Towards an Internationalized Concept of Militant Democracy*, in MILITANT DEMOCRACY—POLITICAL SCIENCE, LAW AND PHILOSOPHY 79, 79–94 (Afshin Ellian & Bastiaan Rijpkema eds., 2018). Finally, on the problems that come with international or supranational forms of democracy protection, see Jan-Werner Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 ANN. REV. POL. SCI. 249, 263 (2016).

B. Applicability to the United States

Having established what militant democracy can look like, it is now time to turn to the question of whether the U.S. Constitution is compatible with a militant democracy-type approach. But what is the appropriate judging metric? Given that U.S. constitutional law is currently dominated by originalism and textualism, it seems sensible to look to the text and history of the U.S. Constitution, as well as to general constitutional philosophy and doctrine, for sources of constitutional self-defense.

1. Militant Democracy and the U.S. Constitution

In trying to answer how a constitution can be militant,¹⁵³ one should consider whether it is concerned with its survival. This Article will try to identify such a concern by looking at whether the text and history of the U.S. Constitution indicate that the Founders were indeed afraid that this form of democratic government might pose a threat to itself and whether they put in place certain safeguards.

Without even looking at the U.S. Constitution, it could be argued that any constitutional democracy that seeks to preserve itself and prevent despotism is, at least on an abstract level, already inherently *militant*.¹⁵⁴ Many of the democratic institutions could be seen as preventive per se and are, on an abstract level, again protected by constitutional limitations on the government's ability to change these institutions.¹⁵⁵

Such indicators can be found in the U.S. Constitution as well, from the system of checks and balances to the two-term limit on the presidency to the protections of the Bill of Rights. More concrete examples are: (1) the high procedural requirements for constitutional amendments;¹⁵⁶ (2) term limits;¹⁵⁷ (3) a fundamental skepticism of direct democracy,¹⁵⁸ which is more susceptible to populism,¹⁵⁹ and therefore limited in

¹⁵³ On the issue of militant constitutions, see generally Sajó, *supra* note 5, at 187–203.

¹⁵⁴ See Sajó, *supra* note 5, at 188; see also Svetlana Tyulkina, *Militant Democracy as an Inherent Democratic Quality*, in *MILITANT DEMOCRACY AND ITS CRITICS* 207, 207 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019).

¹⁵⁵ See Sajó, *supra* note 5, at 188.

¹⁵⁶ On this requirement as well as on its weak points, see *id.* at 195–96.

¹⁵⁷ *Id.* at 196.

¹⁵⁸ See, e.g., THE FEDERALIST NO. 10 (James Madison).

¹⁵⁹ On the danger of populism, see *id.*

its role;¹⁶⁰ (4) the multi-layered sovereignty represented by federalism; and (5) the delegation of power to international organizations.¹⁶¹ Ultimately, the whole concept of protecting minorities to prevent a tyranny of the majority is inherently preventive.¹⁶² One could even argue that the very purpose of any constitutional institution and of any constitution itself is not only to establish the government but also to limit popular power.¹⁶³ The U.S. Supreme Court recognized as early as *Marbury v. Madison* that the judiciary must check executive and legislative power out of sheer logical necessity.¹⁶⁴ Therefore, “[p]reventive constitutionalism *can* be justified within liberal constitutional theory as self-preservation.”¹⁶⁵

However, there are two forms of militant constitutionalism. While the first seeks to limit the possibility of enemies of democracy coming into power, the second intends to build institutional resilience for the time after they have taken power.¹⁶⁶ Most of the aforementioned examples fall under the latter form of Institutional militant constitutionalism,¹⁶⁷ as they aim to build institutional resilience, especially in the rule of law.¹⁶⁸ But to determine whether militant democracy can be used as an argument for a change in First Amendment doctrine, the question is not one of institutional defensiveness, but one of preventiveness.¹⁶⁹ One must therefore move away from abstract

¹⁶⁰ See Sajó, *supra* note 5, at 197.

¹⁶¹ This is sometimes referred to as a vertical separation of powers. For a discussion on the EU as a barrier to illiberalism, see *id.* at 198.

¹⁶² On the question of whether a populist, “shallow,” and illiberal democracy is to be considered an illegitimate form of government, see *id.* at 189–93.

¹⁶³ As the prime example of this concept, see THE FEDERALIST NO. 51 (James Madison). See also Sajó, *supra* note 5, at 194–95.

¹⁶⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

¹⁶⁵ Sajó, *supra* note 5, at 203.

¹⁶⁶ See *id.* at 193–94. Another way to categorize different models of Militant Democracy is to distinguish between militant, procedural, and social self-defense. Anthoula Malkopoulou & Ludvig Norman, *Three Models of Democratic Self-Defence*, in MILITANT DEMOCRACY AND ITS CRITICS 92, 92–93 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019).

¹⁶⁷ For examples on different “institutional instruments” of Militant Democracy, see Tom van der Meer & Bastiaan Rijpkema, *Militant Democracy and the Minority to Majority Effect: On the Importance of Electoral System Design*, 18 EUR. CONST. L. REV. 511, 512–513 (2022) (analyzing the role of proportional representation of the population in the electorate).

¹⁶⁸ A new frame for a part of this institutional militant democracy can be seen in the call for a “militant rule of law.” András Sajó, *Militant Rule of Law*, VERFASSUNGSBLOG (Dec. 20, 2023), <https://verfassungsblog.de/militant-rule-of-law/> [<https://perma.cc/YKK5-QQG6>].

¹⁶⁹ The term “preventive constitutionalism” is also used by András Sajó. Sajó, *supra* note 5, at 193, 198.

considerations and take a closer look at the text and history of the U.S. Constitution to examine whether the Founders recognized the dangers to democracy from within, and whether they saw the need to establish certain preventative safeguards.

a. Reconstruction Era

The Reconstruction era from 1863 to 1877 is perhaps the most obvious example of preventiveness in the history of the U.S. Constitution. In fact, Professor Alexander S. Kirshner calls Reconstruction a “Paradigmatic Case of Militant Democracy.”¹⁷⁰ Reconstruction aimed to protect the Union from being undermined by former Confederates who still posed a major threat to its existence. Fearful of losing to the Union’s declared enemies in Congress after finally winning the war, former Confederate members of the House and Senate were politically excluded.¹⁷¹ But more importantly, the Fourteenth Amendment of the U.S. Constitution, with its Insurrection Clause in Section 3, was adopted.¹⁷² The Insurrection Clause is designed to block enemies of the United States from coming to power. The entire Reconstruction era, and especially its enduring manifestation in the Fourteenth Amendment, was clearly intended to protect democracy from actors who would use democracy to attack and destroy it. Kirshner understands Reconstruction as “an indispensable model for the self-limiting defense of democracy.”¹⁷³ Intending to secure democracy, the Reconstructionist approach “was realistically aimed at securing a polity that was both reasonably democratic and legitimate.”¹⁷⁴ Kirshner compares non-democratic players to a chess player who does not abide by the rules and thus excludes himself.¹⁷⁵ This concept of “democratically conditional exclusion”¹⁷⁶ thus appears to be represented in the Constitution. Whoever wants to play a

¹⁷⁰ ALEXANDER S. KIRSHNER, A THEORY OF MILITANT DEMOCRACY: THE ETHICS OF COMBATING POLITICAL EXTREMISM 144 (2014).

¹⁷¹ *Id.* at 142.

¹⁷² See Keck, *supra* note 112, at 334 (arguing that the Insurrection Clause is an early manifestation of Militant Democracy-like ideas); see also Mark A. Graber, *Who’s Afraid of Militant Democracy, U.S. Style*, VERFASSUNGSBLOG (Feb. 20, 2024), <https://verfassungsblog.de/whos-afraid-of-militant-democracy-u-s-style/> [https://perma.cc/MMW2-RCJ6].

¹⁷³ KIRSHNER, *supra* note 170, at 143.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 155–56.

¹⁷⁶ *Id.* at 152.

role in the political game must not be an enemy of the game itself and must not pose a major threat to the game.¹⁷⁷

While considering the Insurrection Clause, one must note that its actual relevance seems to be limited. First, extremists no longer conspire in large numbers for open revolution or insurrection. After their failed overthrow attempts in the twentieth century, they have learned that it is easier to destroy a democracy from within.¹⁷⁸ Second, the recent decision of *Trump v. Anderson*, which requires legislation to enforce Section 3, seems to tragically diminish the practical role of the Insurrection Clause.¹⁷⁹ Unfortunately, the majority in *Trump* does not address the democracy-preserving function of the insurrection clause at all. Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson, however, recognize its “important . . . role in our democracy”¹⁸⁰ and criticize the majority for disregarding this purpose of the Insurrection Clause, arguing that it would “insulate all alleged insurrectionists from future challenges to their holding federal office.”¹⁸¹

b. Not a Suicide Pact

The belief that more speech leads to more freedom and democracy dominates the First Amendment doctrine. True to this notion, the number of opinions expressed correlates with the functioning of democratic discourse; the more views expressed, the better they interact in the marketplace of ideas and promote democracy. This strong sense of inseparability of democracy and freedom of speech has led to First Amendment absolutism.

Such absolutism, however, has risen to extreme formalism and has forgotten its roots. Alexander Meiklejohn already warned that an overly formalistic approach to new forms of

¹⁷⁷ John Rawls also supported the idea that the “liberal state will not concede the space of politics to those who want to use that space to destroy it.” David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AM. POLIT. SCI. REV. 121, 121 (1997). Rawls was convinced that if the Constitution is not secure, there may be a reason to deny certain freedoms to the intolerant. See JOHN RAWLS, A THEORY OF JUSTICE 337 (rev. ed. 1999). In this context, some scholars call to abridge the absoluteness which dominates First Amendment doctrine. See SUNSTEIN, *supra* note 30, at 200–02.

¹⁷⁸ See Loewenstein, *supra* note 119, at 645 (listing insurrection attempts in the twentieth century and drawing the conclusion that “fascist strategists have grown particularly careful not to commit any overt act of rebellion until the subtler and studiously lawful methods of undermining the state and establishing the atmosphere of double legality warrant the ultimate seizure of power by *coup d'état*”).

¹⁷⁹ See *Trump v. Anderson*, 601 U.S. 100, 109–10, 115 (2024).

¹⁸⁰ *Id.* at 123 (Sotomayor, J., concurring).

¹⁸¹ *Id.* at 122.

media would reveal “how hollow . . . the victories of the freedom of speech” may be.¹⁸² A primary purpose of the First Amendment, at least according to Meiklejohn and Justice Brandeis,¹⁸³ is to serve democracy. This does not mean, of course, that only purely democratic views can be expressed. Its purpose is to allow the widest possible expression of diverse views. But what if this marketplace becomes distorted? What if the different views are not represented equally or fairly, but instead are influenced by powerful individuals?¹⁸⁴ And what if this development threatens democracy itself?

It has long been established that the Bill of Rights is not a suicide pact. This idea goes back in part to Thomas Jefferson, who expressed that the importance of saving the country “when in danger . . . [was the] higher obligation.”¹⁸⁵ Later, Abraham Lincoln, the great Reconstructionist, expressed his understanding of certain exceptions in extreme cases when justifying the disregard of habeas corpus provisions in the Constitution.¹⁸⁶

Finally, in his dissent in *Terminiello v. City of Chicago*, Justice Robert H. Jackson coined the phrase that “the constitutional Bill of Rights . . . [is not] a suicide pact.”¹⁸⁷ It would later be echoed by many, including Justice Arthur Joseph Goldberg¹⁸⁸ and American legal philosopher, jurist, and scholar Ronald Dworkin.¹⁸⁹ This idea has always been closely associated with foreign affairs, especially in the aftermath of the 9/11 terror attacks, after which it has been used almost exclusively in the context of traditional security concerns.¹⁹⁰ It was within this

¹⁸² MEIKLEJOHN, *supra* note 60, at 87.

¹⁸³ See *supra* Section II.A.

¹⁸⁴ Meiklejohn also believed that while the suppression of freedoms is generally impermissible, the suppression of abuses of freedoms is generally permissible. See Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 474 (1953).

¹⁸⁵ 5 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 542 (H.A. Washington ed., 2016) (ebook).

¹⁸⁶ See 18 AM. HIST. LEAFLETS, LINCOLN’S INAUGURAL AND FIRST MESSAGE TO CONGRESS, 1861, at 16–18 (Albert Bushnell Hart & Edward Channing eds., 1912).

¹⁸⁷ *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

¹⁸⁸ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

¹⁸⁹ See Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. (Feb. 28, 2002), <https://www.nybooks.com/articles/2002/02/28/the-threat-to-patriotism/> [<https://perma.cc/LRZ4-CVQB>].

¹⁹⁰ See *id.*; see also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 1–3 (2006).

context when American legal scholar, Richard A. Posner, argued that even content-based restrictions could be constitutional.¹⁹¹

While the justification for restricting constitutional protections seems to be strongly tied to enemies from outside of the United States, there appears to be no good reason why it should not apply internally as well. The idea that the Bill of Rights should not contribute to its destruction remains the same. Abraham Lincoln himself recognized that the greatest threat to American democracy comes from within.¹⁹² Lincoln's expression—"[A]re all the laws but one to go unexecuted, and the government itself go to pieces lest that one be violated?"¹⁹³—is similar to Loewenstein's statement: "If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles."¹⁹⁴ Both believed that when the survival of democracy is at stake, certain civil rights can be restricted.¹⁹⁵

Some fear that embracing this principle will lead to a different hierarchy of values.¹⁹⁶ But such a hierarchy is only logical if one truly believes in the sovereignty of the people, as expressed in the first three words of the Preamble to the U.S. Constitution.¹⁹⁷ If "We the People" is to be taken seriously, the preservation of this sovereignty as the only means to self-government must have a special value.¹⁹⁸

c. What About the Founding Fathers?

One could argue that the text of the U.S. Constitution sought to find the perfect balance between defensiveness and democratic liberty and that the Founding Fathers wanted to limit the defensive aspects to those exclusively mentioned in the text of

¹⁹¹ See *id.* at 125.

¹⁹² Abraham Lincoln, *The Perpetuation of Our Political Institutions (Address by Abraham Lincoln Before the Young Men's Lyceum of Springfield, January 27, 1838)*, 6 J. ABRAHAM LINCOLN ASS'N 6, 7 (1984).

¹⁹³ AM. HIST. LEAFLETS, *supra* note 186, at 18.

¹⁹⁴ Loewenstein, *supra* note 92, at 432.

¹⁹⁵ On the similarities between the philosophies of Loewenstein and Lincoln, see MARK CHOU, DEMOCRACY AGAINST ITSELF: SUSTAINING AN UNSUSTAINABLE IDEA 70 (2014).

¹⁹⁶ See, e.g., Krotoszynski, *supra* note 129, at 1552.

¹⁹⁷ MEIKLEJOHN, *supra* note 60, at 18.

¹⁹⁸ *Id.* at 18–19 (explaining this logical hierarchy and that "[t]o that fundamental enactment [of self-government] all other provisions of the Constitution . . . are subsidiary and dependent").

the Constitution. Interpreting an overarching principle of militancy to affect other non-militant institutions would be disrespectful to the will of the Founders. On a merely textual basis, this argument is persuasive. But it fails to consider the two established functions of the First Amendment. Even though one main purpose of freedom of speech is to promote individual liberty, it also plays a vital role in preserving democracy.¹⁹⁹ The exact balance of these two purposes is certainly up to debate.²⁰⁰ But it should be undisputed that there must be some sort of balance. However, when the liberal function of the First Amendment doctrine becomes so dominant that it completely undermines its function as a “cornerstone” of democratic self-government, then it has lost its balance.²⁰¹

One could even argue that such an imbalance ignores the will of the Founders. Many of the Founding Fathers repeatedly expressed concern about the fragility of democracy. Despite the significant threats to the young democracy from the outside, the Founding Fathers already seemed to be more anxious about the threat from within. Thomas Jefferson worried that American democracy might degenerate into a form of “elective despotism.”²⁰² Fearing the same, Alexander Hamilton recognized that the presiding president possessed an unparalleled ability to create disunity among people.²⁰³ James Madison was concerned about the power of too mighty factions in democracy.²⁰⁴ Similarly, George Washington’s disdain of parties was fueled by his fear of polarization.²⁰⁵ And Benjamin Franklin’s famous statement—“A republic, if you can keep it”—can be interpreted as expressing Franklin’s recognition that sometimes “the people” themselves are the greatest threat to their self-government.²⁰⁶

These expressions of concern by the Founders about the self-destructive tendencies of democracies, as well as constitutional history, and to some extent constitutional doctrine, point to the conclusion that U.S. constitutional law

¹⁹⁹ See *supra* Section II.A.

²⁰⁰ See *supra* Section II.A.

²⁰¹ Meiklejohn, *supra* note 60, at 55–56.

²⁰² THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 128–29 (1853).

²⁰³ See THE FEDERALIST NO. 68, at 342–43 (Alexander Hamilton) (Gideon ed., 2001).

²⁰⁴ See THE FEDERALIST NO. 10, *supra* note 158.

²⁰⁵ See George Washington, *Farewell Address* (Sept. 17, 1796), in GEORGE WASHINGTON PAPERS, SERIES 2, LETTERBOOKS 1754–1799.

²⁰⁶ See *September 17, 1787: A Republic, if You Can Keep It*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/constitutionalconvention-september17.htm> [<https://perma.cc/LT79-LX9A>] (Sept. 22, 2023).

could be susceptible to a militant democracy-type argument. Of course, some parts of the text, history, and doctrine are ambiguous. And yet there is a strong body of evidence showing that American constitutional history is marked by fears for its future and the survival of its democracy.

2. Danger of Militant Democracy and Populism

Even if constitutional doctrine is receptive toward militant democracy, there are political arguments to be made against its deployment. Some contend that militant democracy threatens democracy more than it secures it by providing authoritarian leaders with the very tools they need to abolish certain fundamental freedoms.²⁰⁷ This is undoubtedly true. Still, it oversimplifies the problem. Of course, militant democracy has its inherent risks, but the failure to act may in many cases pose a risk just as great. Also, the dual nature of militant democracy is intended to minimize these inherent risks. As discussed above, on the one hand, preventive militant democracy seeks to prevent the enemies of democracy from coming to power. Thus, when applied consciously and as proposed in this Article, it aims to create a democracy-friendly environment that fosters a functioning and inclusive space for public discourse.²⁰⁸ On the other hand, Institutional militant democracy places a check on this power by ensuring the independence of institutions, such as the courts. The combination of these two principles results in a self-limiting institutional democratic resilience that is backed by a democratic population and is therefore less vulnerable to abuse. Nevertheless, militant democracy measures must always be used with caution because of the inherent risk of abuse.²⁰⁹

One might ask how *Militant Democracy* addresses one of the biggest issues raised by social media: populism. Populists are not necessarily overt enemies of constitutional democracy, and they “do not come to power unfairly.”²¹⁰ The threat to democracy posed by populism is more subtle. The emotional populist narrative undermines rational public debate under the guise of being the

²⁰⁷ See Carlo Invernizzi Accetti & Ian Zuckerman, *What's Wrong with Militant Democracy?*, 65 POL. STUD. 182, 183 (2017).

²⁰⁸ See Wu, *supra* note 21, at 568 (arguing for protecting and promoting a “healthy political speech environment”).

²⁰⁹ See Stone, *supra* note 121, at 38–39. This view also prevails in Germany. See VOLKMANN, *supra* note 139, at 281 (arguing that too much defensiveness “must be prevented at all costs in order to protect the democratic process”).

²¹⁰ Sajó, *supra* note 5, at 194.

“voice of the people” and enforcing the true “will of the people.”²¹¹ But democracy is built on rational public discourse,²¹² which is essential to any self-government.²¹³ Loewenstein’s fear of emotionalism is even more relevant in today’s world, where social media makes emotional manipulation considerably easier. He was convinced that “[p]reventing dangerous emotionalism and the consolidation of anti-liberal, authoritarian and substantively anti-democratic attitudes is a major task for those who would like to protect constitutional democracy.”²¹⁴

The populist motivation to enforce the true will of the people often leads to the diminution of minority rights²¹⁵ and the strengthening of centralized power,²¹⁶ which in turn is more prone to abuse of power and ultimately to despotism. At the same time, the emotional rhetoric dilutes democracy, establishing a superficial democracy. Additionally, the success of populists is usually based on manipulation instead of carefully considered political decisions. This can hardly be called real self-government of the people.²¹⁷

These frequently voiced criticisms, while justified, should not stand in the way of considering militant democracy-influenced measures. They can be an effective tool against the increasing emotionalization of public discourse by populism. Furthermore, their misuse poses a risk that is substantially smaller than the risk posed by rising populism.²¹⁸

3. Implications

It has been established that U.S. constitutional law could be sympathetic to militant democracy. But what follows from this

²¹¹ On this vox populi narrative with a focus on the German AfD, see Oliver Schmidtke, *The ‘Will of the People’: The Populist Challenge to Democracy in the Name of Popular Sovereignty*, 32 SOC. & LEGAL STUD. 911, 912, 916, 922, 926 (2023).

²¹² Lincoln, *supra* note 192, at 13 (“Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence.”). On the role of the Establishment Clause in keeping politics rational, see Sajó, *supra* note 92, at 567.

²¹³ On the differences and difficulties of self-government compared to alien government, and on the importance of the former in American culture and history, see MEIKLEJOHN, *supra* note 60, at 11–12.

²¹⁴ Sajó, *supra* note 5, at 201.

²¹⁵ *The Dangerous Rise of Populism*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2017/country-chapters/global-4> [<https://perma.cc/K3UB-L8T6>] (last visited Apr. 26, 2025); see also TAKIS S. PAPPAS, POPULISM AND LIBERAL DEMOCRACY 189, 204 (2019).

²¹⁶ See PAPPAS, *supra* note 215, at 190–204.

²¹⁷ On the legitimacy problems of a populist government, see Sajó, *supra* note 5, at 189–92.

²¹⁸ See Huq, *supra* note 112, at 1141 (arguing that this “highly imperfect approach . . . may well be better than anything now available in light of the failure to act earlier”).

recognition? It is again important to note that this Article does not claim to, nor does it intend to, solve all the problems of the online marketplace of ideas. Rather, it simply hopes to bring the argumentative figure of militant democracy to the center of the First Amendment debate. How and to what extent this figure can and will be used, this Article does not presume to judge. However, there are a vast number of possible applications of militant democracy regarding social media.

For one, militant democracy could be used strategically to enable the government to regulate social media²¹⁹ and promote independent, reliable media.²²⁰ It could help to oblige platforms to change their algorithms to work in a more balanced and less emotional way, or to label or remove false information,²²¹ and, in general, to change the role and accountability of social media platforms, which bear a huge responsibility in this crisis of weakening democratic principles.²²² The European Democracy Action Plan could serve as an example in this regard.²²³

Additionally, it may help to introduce a “fairness doctrine” into the digital discourse to promote a balanced presentation of views.²²⁴ On the issue of terrorist propaganda, militant democracy could be a viable argument to loosen the imminence requirement of *Brandenburg*’s imminent danger test.²²⁵ And it might find an application in any upcoming proceedings regarding the TikTok ban.

²¹⁹ See Jörg Ukrow, *Wehrhafte Demokratie 4.0—Grundwerte, Grundrechte und Social Media-Exzesse*, 24 ZEITSCHRIFT FÜR EUR. STUD. 65, 75 (2021).

²²⁰ On the importance of public service broadcasting, see *Recommendation No. R (96) 10 of the Committee of Ministers to Member States on the Guarantee of the Independence of Public Service Broadcasting*, COUNCIL OF EUR. 50–51 (Sept. 11, 1996), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168050c770> [<https://perma.cc/8VT9-8XXA>]; see also Sajó, *supra* note 5, at 202.

²²¹ See *Murthy v. Missouri*, 603 U.S. 43, 50 (2024); Cass R. Sunstein, *A Framework for Regulating Falsehoods*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* 53, 58, 61–62 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (discussing the regulation of falsehoods and introducing a possible framework).

²²² Netanel, *supra* note 22, at 510 (“[B]y propagating disinformation, platforms’ recommender systems and the third-party tools that exploit them greatly magnify the force of democracy-destabilizing speech.”).

²²³ See *id.* at 557 (applying Militant Democracy to social media with a focus on the European Democracy Action Plan).

²²⁴ SUNSTEIN, *supra* note 30, at 84–85 (arguing for a fairness doctrine in the digital realm).

²²⁵ See TYULKINA, *supra* note 92 (arguing that Militant Democracy could give anti-terrorism measures more legitimacy).

IV. BACK TO THE MARKETPLACE

The First Amendment is “the cornerstone of the structure of self-government.”²²⁶ But social media is no longer the marketplace of ideas that Justice Holmes or the Founders envisioned. It is broken; it favors the powerful and is used as a tool to manipulate the people. Misinformation does not contribute qualitatively to a free market of ideas.²²⁷ Echo chambers prevent counterspeech on a significant scale. The culmination of these factors poses a major threat to democracy.

The current First Amendment doctrine is rightfully based on the idea that the political public sphere and public discourse are “the rock on which our government stands.”²²⁸ But that sphere and discourse must be inclusive, rational, and reliable to enable citizens to make their own considered judgments and form fact-based political views.

The concept of militant democracy is partly reflected in the U.S. Constitution and can be used both as an argument for a change in First Amendment doctrine and to improve the digital communicative sphere in general. This could be a first step in reviving the real marketplace of ideas in the digital realm.

²²⁶ MEIKLEJOHN, *supra* note 60, at 55.

²²⁷ When it comes to misinformation, the marketplace tends to fail. Instead of furthering truth, its dynamics tend to increase the credibility of falsehoods. See Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 387, 393–95 (2020).

²²⁸ MEIKLEJOHN, *supra* note 60, at 77.