

# The Video and the Algorithm: Democracy, Antitheatricity, and Paranoia in the Age of Streaming Media

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Abstract: As debates about “digital democracy” remind us, democracy is one of our central political keywords, but its meaning is difficult to pin down. It can point to any one of a wide variety of political norms, act rhetorically to buttress a set of contradictory claims, or sometimes merely gesture vaguely toward the general political good. This essay looks at democracy not as a set of normative claims but as an idea that takes shape in the spatial-visual imaginary. Exploring democracy as a set of images, I argue that two persistent “models” have helped us to envision it, models I describe as “the performing polis” and “the dispersed demos.” These models often appear in idealized form, but they also appear as corrupt Doppelgängers of the idealized versions: in antitheatrical images of the “evil teatrocracy”; in paranoid renderings of invisible networks of marauding automatons and invisible agents. I offer a compressed history of these models, which show up in both their utopian and dystopian forms in a variety of texts: ancient Greek philosophy, Early Modern and Enlightenment political treatises, modern and postmodern political and media theory.

I then turn to two cases recently decided by the Supreme Court: *Twitter v. Taamneh* and *Gonzalez v. Google*. While these cases are formally about the liability of internet platforms for their users’ incendiary posts, they are also about democracy in the digital age. I look at how the two models of democracy I have identified inform them, appearing in the cases in both their utopian and dystopian forms. At the heart of the visions of democracy

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these cases proffer are the figures of the video and the algorithm: vehicles of democracy and its nightmare antitheses; synecdoches for its promises and pathologies; the central forces of our digital future.

#### INTRODUCTION

This essay is the product of two invitations: the first, to participate in a panel on democracy in the wake of recent Supreme Court decisions; the second, to participate in a conference on tech law and the humanities. I at first thought I should decline, on the grounds of my near-total ignorance on these topics. I was writing on something that seemed entirely unrelated: a YouTube genre, the Know-Your-Rights video, in which activists with cameras provoke confrontations with police officers, insist upon their constitutional rights (with a torrent of case law citations), and—when an officer makes a grab for the camera—shout with delight, *you’ve just violated the First, Fourth, and Fourteenth Amendments! you are so fired!* This was resistance to police misconduct gone viral: spreading across the country through videos with hundreds of millions of viewers. It was legal democracy in action, standing up against racial profiling, unlawful searches and seizures, police brutality! It was also, it turned out, libertarian populism in action, standing up for gun rights, confederate flags, and white supremacist militias. Were these forms of social media democratizing? Could law control their more nefarious effects? It seemed I was, without quite realizing it, already pondering tech law, democracy, and their convergence.

The YouTube Know-Your-Rights video is the subject of another essay. My essay here serves, in a sense, as the prologue to that one. It addresses a question that must be answered before one can begin to think about the relationship between social media and democracy: what do we mean by “democracy” in the digital age? Two cases against Google and Twitter, recently decided by the Supreme Court, serve as my gateway to exploring that question.<sup>1</sup> These cases technically turn on statutory interpretation. But they are really about the First Amendment and its limits and, by extension, about democracy, which is so intimately bound up with freedom of expression. Freedom of expression is the *sine qua non* of democracy and democracy the justification for freedom of expression. No freedom of expression: no democracy. In these cases, one can find a wide-ranging set of claims about the relationship between streaming media and democracy. Behind these claims, I argue, lies a pair of antithetical but symbiotic historical models of democracy. This essay offers a mini-history of these two models (which I hope to expand on elsewhere) and considers how they

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1. Twitter, Inc. v. Taamneh, 143 S.Ct. 1206 (2023); Gonzalez v. Google LLC, 143 S.Ct. 1191 (2023). The cases also named Facebook.

inform the recent cases. It looks especially closely at the video and the algorithm as key figures in these cases, with an eye to their potential significance for “digital democracy” generally.

“Democracy” is, of course, a political and legal keyword, one that has produced entire libraries of political theory. But in ordinary usage, its tenets appear contradictory at best and sometimes so murky as to defy the imagination. People on both sides of a conflict tend to claim that it is *their* position that represents democracy, not the other side’s.<sup>2</sup> Judicial opinions, op-eds, and other genres of public discourse routinely invoke “democracy” as a kind of moral absolute that nevertheless stands for wholly contradictory propositions, sometimes uttered by a single speaker in the space of mere days. On June 23, 2022, Justice Kavanaugh joined the concurrence in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, in which the Court declared that “it is *not* deference” to “the determinations of legislatures” that our democratic “Constitution demands.” (“Fortunately, the Founders created a Constitution—and a Second Amendment— ‘intended to endure for ages to come.’”)<sup>3</sup> The very next day, in *Dobbs v. Jackson Women’s Health Org.*, he declared: “[t]he nine unelected Members of this Court do not possess the constitutional authority to override the democratic process.”<sup>4</sup> While the rhetoric of democracy here serves to prop up a set of nakedly political decisions, it also illustrates the more general proposition that is a premise of this essay: when people cite democracy, they are rarely describing a particular object, an empirical fact, or even a clearly defined set of normative principles. The word “democracy” may sometimes reference specific, concrete, measurable effects (sometimes valuable and important ones). But it is primarily a rhetorical device, a political demand, a slogan, a form of advocacy.

## I. TWO MODELS OF DEMOCRACY AND THEIR DYSTOPIAN OTHERS

Historically, when people have tried to describe democracy, they have often proffered an image: democracy is a body (as in “the body politic”), a ship, a form of music, a machine, a network. Such metaphors do not answer to the possibility of envisioning democracy but to its impossibility. One cannot see democracy. It “[e]scap[es] the imaginary totalizations produced by the eye” (to quote Michel de Certeau). When we try to imagine it, it

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2. For a parallel discussion, see e.g. Emily Bazelon, *How Much Power Should the Courts Have?* N.Y. TIMES, Apr. 14, 2023, <https://www.nytimes.com/2023/04/14/magazine/courts-power-government.html> (last visited Apr. 29, 2023).

3. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct. 2111, 2131-2 (2022) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)) (emphasis added).

4. *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2305 (2022) (a surprising statement, given that the Court’s primary function is to challenge legislation produced by majority-elected legislatures on constitutional grounds).

“does not surface” but only faintly “outlin[es] itself against the visible.”<sup>5</sup> There is, of course, a long tradition of trying to understand forms of governance and hierarchies of power by representing them through visual or spatial models: the medieval ladder, wheel, or great chain of being; the beehive (the classic figure for the Church); the tree, standing for monarchy, with the monarch as the roots. But a monarch or tyrant or oligarchic council are fairly concrete things. Democracy is different: a thing with so many parts and so many people that it strains representation.

Nevertheless, if one looks long enough, two basic historical models come into focus. For shorthand (and perhaps with an excess of alliteration), I have named these models “the performing polis” and “the dispersed demos.” They persist as paired leitmotifs in the history of democracy as idea, referencing two different ways of envisioning democracy, —of imagining it in visual, auditory, spatial, and temporal terms.

In the performing polis, democracy takes form as a scene of oratory in the agora or forum: a theatre, of sorts, with the entire people gathered as spectators and participants. It is a place of assembly: noisy, crowded, agonistic, dramatic, with emotions there sometimes rising to histrionic intensity. It depends on presence: it is located in space and time (imagined as a few hours), visible and audible, an object of the immediate human sensorium. The people are at once *in* the polis and *are* the polis: it is they who produce it through their presence and action there. In the dispersed demos, on the other hand, democracy appears not as a scene but as a set of relationships for conveying ideas: ideas that move across space and time but also seem to float free of them.<sup>6</sup> In this model, democracy is diffuse and scattered, distended, interconnected only indirectly, realized only through absence, temporally unmarked. The dispersed demos is a disembodied demos: incorporeal, invisible, almost spectral. It cannot be captured pictorially (as the performing polis can): only graphically through maps or diagrams or associatively through metaphor or metonymy. Like many similarly abstract social, discursive, and object relations, it seems to *require* metaphor, generating a profusion of figuration, resisting reduction to a schema or taxonomy. It may appear as body, ship, music, machine, network, or as a set of vectors or circles or circuits, a branching tree, a rhizomatic growth, atomistic particles, oceanic or commercial flows.

My use of the word “model” points to two elements of my discussion.

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5. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 93 (Steven F. Rendall trans., 1984). I have lifted De Certeau’s comment from a rather different context: his discussion of the experience of the everyday for the city walker.

6. PAUL A. KOTTMAN, *A POLITICS OF THE SCENE* (2008) makes a similar distinction between “a politics of the scene” and a politics of disembodied contemplation (represented by Plato: see my discussion below). The two models I present differ in significant ways from the opposition in his work, which implicitly relies on a historiography of epistemic rupture. But I am nevertheless indebted to his brilliant and illuminating work.

First, it points to the fact that I have reduced a multitude of images somewhat artificially to only two types. This reduction to a dyad is not merely a heuristic division but reflects a fundamental divide in conceptions of democracy. This divide may be visible in the two models' alignment with some of the classic binaries of democratic theory: the performing polis may sometimes appear as a direct democracy, participatory, dominated by majorities; the dispersed demos may sometimes appear as an indirect democracy, representative, not dominated by majorities and therefore capable of securing liberal rights. But my models cannot be reduced to these binaries, for they map onto them only imperfectly and represent a far wider range of effects. Second, my use of the word "model" points to the fact that these are historical projections, products of the imagination, constructed through myriad exclusions and fantasies.

The two models often appear as opposites. But they also share much. Both are attempts to represent politics as a thing that is never static but in a state of perpetual motion, —a thing that is communal, participatory, and dynamic. Both are also attempts to understand the mysterious relationship between democracy and freedom of expression: between expression as process and democracy as end product. Both models offer visual-spatial imagery in lieu of explanation of that relationship, envisioning a scene or set of pathways from expression to realization, without quite arriving at an image of democracy realized.

#### A. *The Performing Polis*

David Marshall has remarked that "the rhetorical institutions of antiquity remain some of the most beguiling images in the history of political thought."<sup>7</sup> In those "beguiling images"—perhaps as much mythology as reality but with a relationship to real practices—we can find the performing polis in its primal form. In these mythic images, democracy first came into being in the Athenian Agora, the Theatre of Dionysus, or the hill of the Areopagus: that hill to which Athena points with a magisterial indexical in Aeschylus's *Oresteia*. ("Here is the Hill of Ares. Here . . . [n]o anarchy, no rule of a single master. Thus I advise my citizens to govern[!]"<sup>8</sup>) It took form in both the assembly and criminal trials, with their hundreds (and sometimes thousands) of jurors and spectators. There, the demos routinely interrupted orators with cheers, laughter, catcalls, hissing, following the performance with a vote, sometimes by show of hands (*cheirotomia*).<sup>9</sup> The

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7. DAVID L. MARSHALL, VICO AND THE TRANSFORMATION OF RHETORIC IN EARLY MODERN EUROPE 8 (2010).

8. AESCHYLUS, AESCHYLUS II: THE ORESTEIA, AGAMEMNON, THE LIBATION BEARERS, THE EUMENIDES 253-54 (Mark Griffith and Glenn W. Most eds., 2013) [*Eumenides* II. 685-697].

9. Mogens Herman Hansen, *The Nature of Athenian Democracy*, in BRILL'S COMPANION TO THE RECEPTION OF ATHENIAN DEMOCRACY: FROM THE LATE MIDDLE AGES TO THE CONTEMPORARY ERA 32 (Dino Piovani and Giovanni Giordani eds., 2021) (citing Demosthenes, Aeschines, and Aristotle); and

Roman Republic may have been a representative rather than direct democracy, but it continued to deploy what David Marshall has called “the institutional relics of the city-state”: among these, the Roman Forum, an agora of sorts where ancient traditions of public political and legal oratory continued to thrive.<sup>10</sup> The Athenian Agora and the Roman Forum became for later political thinkers the emblematic arenas of democratic legal and political discourse. The words “agora” and “forum” came to figure public political debate (“forum” so commonly that it has been linguistically naturalized and no longer appears as metaphor).

Here, if democracy is the polis, the polis is both a population of citizens and a place. As Aristotle explains in the *Politics*,

of the magnitude of a city there is a certain measure, . . . neither overly small nor too excessively large. . . . For who will be the general of its excessively large multitude, and who, unless he has the voice of Stentor, will serve as its crier?<sup>11</sup>

It is a space defined by the human senses, bounded by the performers’ and audience’s capacity to see and hear: small enough for everyone to hear the crier and (writes Aristotle) for the citizens to be “easily surveyed as a whole.”<sup>12</sup> It is also defined by human bodily time, by human endurance and the need for rest. In this, it is not just a performance space but one that is very like theatre: a public space in which conflict plays out through live action before a crowd of spectators. Throughout the history of political thought, the polis—situated imaginatively in the agora and forum—is in fact associated with theatre. “The theatre was the offspring of the agora and the forum,” wrote Ernest Renan in 1866.<sup>13</sup> In the agora and forum, the audience expresses itself not only through its voice but also through its sheer presence: the masses quite literally massed; the demos “easily surveyed as a whole” but also demonstrating its power as a whole. In its ideal form, it offers a theatrical expression of “the power of the people.”<sup>14</sup>

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*see my discussion in JULIE STONE PETERS, LAW AS PERFORMANCE: THEATRICALITY, SPECTATORSHIP, AND THE MAKING OF LAW IN ANCIENT, MEDIEVAL, AND EARLY MODERN EUROPE 32 (2022).*

10. MARSHALL, *supra* note 7, at 10, citing FERGUS MILLAR, *THE ROMAN REPUBLIC IN POLITICAL THOUGHT 2* (2002). Millar argues that the Republic was actually a direct democracy because, while those outside of Rome could not vote directly, all men—including freed slaves—could vote in the city of Rome itself. *See also* FERGUS MILLAR, *THE CROWD IN ROME IN THE LATE REPUBLIC* (1998). Marshall notes that even those skeptical of Millar’s view recognize “the crucial role of spaces like the Forum in Roman political life” (see MARSHALL, *supra* note 7, at 10, citing ROBERT MORSTEIN-MARX, *MASS ORATORY AND POLITICAL POWER IN THE LATE ROMAN REPUBLIC* (2004)).

11. ARISTOTLE, *POLITICS: A NEW TRANSLATION* 165 (David Reeve trans., 2017) [7.4.1326b].

12. *Id.*

13. ERNEST RENAN, *APOSTLES* 262 (1866).

14. JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE* (1989).

*B. Theatrocracy (The Antitheatrical Position)*

In its ideal form. However, there is an antithetical tradition, a tradition of political antitheatricality (related to the tradition of legal antitheatricality I trace elsewhere) in which the pathologies of the democratic polis lie precisely in its theatricality.<sup>15</sup> The paradigmatic text is Plato's tirade in the *Laws* against "*theatrokratia*": "theatrocracy"; the rule not of the philosopher-king or even of the demos but of theatre. Here we find a dystopian deformation of the idealized performing polis: the performing polis as political perversion. Although Plato notes that theatrocracy is not democracy, it looks very like a caricature of such democratic institutions as the assembly or the law courts, and later critics have understood it as such. "Theatrocracy [*la théâtrocratie*]," writes Jacques Rancière (taking up Plato's discussion), "is the mother of democracy."<sup>16</sup>

Formerly (explains Plato), those who knew right from wrong ruled. The crowd generally listened "in silence." The "boys, their attendants, and the rabble at large" occasionally grew disorderly, but "there was the discipline of the official's rod to enforce order." Unfortunately, "a frantic and unhallowed lust for pleasure" has "possessed" the polis, "contaminat[ing]" all. Popular leaders "ignorant of what is right and legitimate" have given "once silent audiences . . . a voice." They have "inspired the multitude with contempt of . . . law," "license [has] set in" (a "reckless excess of liberty"), and "the catcalls and discordant outcries of the crowd [and] the clapping of applauders" now "pass verdicts." The "old 'sovereignty of the best' . . . has given way to an evil 'sovereignty of the audience' [*theatrocracy*]."

[T]he next stage of the journey toward liberty will be refusal to submit to magistrates, and on this will follow [the] effort to escape obedience to the law. . . . The spectacle of the Titanic nature of which our old legends speak is re-enacted; man returns to the old condition of a hell of unending misery.<sup>17</sup>

Plato's theatrocracy—where "the catcalls and discordant outcries of the crowd [and] the clapping of applauders" rule—looks very like the primal scene of democracy that later political theorists describe: noisy, histrionic, pleasure-driven, emotional to the point of hysteria, subject to the volatile mood of the crowd and the lure of momentary appearances.<sup>18</sup> We can hear

15. PETERS, *supra* note 9 (and 36-7 for my more extended discussion of Plato's theatrocracy).

16. JACQUES RANCIÈRE, *THE PHILOSOPHER AND HIS POOR* 45 (John Drury, Corinne Oster, and Andrew Parker trans., 2003). Distinguishing theatrocracy from democracy, Plato writes that, if the consequence of theatrocracy had been democracy, "no great harm would have been done, so long as the democracy was confined to art, and composed of free men." PLATO, *THE COLLECTED DIALOGUES OF PLATO* 1294 (Edith Hamilton and Huntington Cairns eds., 1961) [*Laws*, 701a].

17. PLATO, *THE COLLECTED DIALOGUES OF PLATO* 1294-5 (Edith Hamilton and Huntington Cairns eds., 1961) [*Laws*, 700c-701c]. Plato starts with an account of the decay of musical judgment but quickly moves on to law and politics.

18. Perhaps Aristotle envisions democracy as sometimes akin to theatrocracy when he describes

echoes of it in the fifteenth-century humanist Giovanni Pico della Mirandola's complaint about "theatrical, applause-provoking" rhetoric that "accommodat[es] [itself] to the judgment of the multitude" or the sixteenth-century humanist Juan Luis Vives's description of the "wanton and debauched" ancient oratory that spectators "gathered in the forum and the tribunals" to watch "as if they were being entertained in the theatre."<sup>19</sup> The philosopher Francesco Patrizi offers a sixteenth-century description of democracy-as-theatrocracy, in which tyrants come to power through incendiary oratory that at once captures the majority and rouses it to frenzy.

[T]he majority [is] a wild beast with many heads that are always barking and that completely deafen its spirit, dazing it so that it cannot see the light or discern the truth. . . . And the master orator always has the power to awaken that beast and to make it bark from whichever one of its heads he pleases.<sup>20</sup>

### C. *The Dispersed Demos*

Fortunately, there is an alternative: democracy not as theatrocratic performing polis but as dispersed and disembodied demos. This alternative appears in various forms in later visions of democracy, often drawing on certain features of Plato's "archipolitics": the fundamental hierarchical political architecture of his republic.<sup>21</sup> Among these is his image of the state as a body, a "body politic" that seems to replace the presence of actual bodies in agonistic face-to-face in the agora or forum with an abstract body-as-concept that transcends place and time.<sup>22</sup> The body-as-concept turns the polis into a cosmopolis: not bounded by the human senses. The Stoic Zeno's lost "Republic" (*Politeia*)—heavily influenced by Plato but with decidedly democratic commitments—famously re-envisioned the polis as just such a dispersed cosmopolis, in which citizenship is not grounded in the spatial relations of the city-state but in a transnational community.<sup>23</sup> The second-

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the sort of democracy "[w]here the laws are not in control" and thus "popular leaders arise. . . . As a result flatterers are held in esteem and a democracy of this sort is the analogue of tyranny." ARISTOTLE, *POLITICS*, *supra* note 11, at 90 [4.4.1292a].

19. Giovanni Pico della Mirandola, *A Ermolao Barbaro* [3 June 1485] in *RENAISSANCE DEBATES ON RHETORIC* 57, 61 (Wayne A. Rebhorn ed., 2000). JUAN LUIS VIVES, *DE RATIONE DICENDI: CRITICAL EDITION WITH INTRODUCTION, TRANSLATION, AND NOTES* 459 (David Walker ed. and trans. 2018) [Appendix: "On the Causes of the Corruption of the Arts"].

20. Francesco Patrizi, *Della retorica*, in *RENAISSANCE DEBATES ON RHETORIC*, *supra* note 19, at 183, 199.

21. On Plato's "archipolitics," see e.g. JACQUES RANCIÈRE, *DISAGREEMENT: POLITICS AND PHILOSOPHY* 61-93 (Julie Rose trans., 1999). Plato has in fact sometimes been viewed as having quasi-democratic sympathies. See e.g. DEMETRA KASIMIS, *THE PERPETUAL IMMIGRANT AND THE LIMITS OF ATHENIAN DEMOCRACY* (2018).

22. On the history of the concept of the "body politic," see DAVID GEORGE HALE, *THE BODY POLITIC: A POLITICAL METAPHOR IN RENAISSANCE ENGLISH LITERATURE* (1971); and (for a political critique of the concept) ARNOLD D. HARVEY, *BODY POLITIC: POLITICAL METAPHOR AND POLITICAL VIOLENCE* (2007).

23. I am indebted here to DANIEL S. RICHTER, *COSMOPOLIS: IMAGINING COMMUNITY IN LATE*



century Stoic Hierocles, influenced in his turn by Zeno, offers a diagrammatic image of the cosmopolis he envisions: “[e]ach one of us is entirely circumscribed as if by many circles, some are smaller and some larger, the latter enclosing the former.” The smallest circle is one’s own body and consciousness, the next circles comprehend one’s immediate family, extended family, kin, “fellow demesmen and tribesmen,” “fellow citizens,” and “people from the neighboring towns and those of the same *ethnos*.” The “last and the greatest of the circles encompasses all the other circles—this is the circle of the entire *genos* of mankind.”<sup>24</sup>

Such ideas filtered into modern democratic theory through Early Modern theories of the commonwealth or republic. In his *Tree of Commonwealth* (1510), Edmund Dudley explains that the commonwealth:

may be resembled to a faier and might[i]e tree growing in a faier field or pasture, under the . . . shade wherof all beastes , both fatt and leane, are protectyd and comforyd from heate and cold as the tyme requireth.<sup>25</sup>

Other Early Modern political theorists draw on Plato’s image of the state as ship, an image that takes on new meaning in the age of the expansion of trade-capitalism and empire. For Thomas Starkey (writing c.1531), the commonwealth is:

even lyke as a schype then is wel governyd when both the mastur & rular of the st[e]rme [i]s wyse & experte, . . . & every man also in the schype doth h[i]s offyce & duty appoyntyd to hym.<sup>26</sup>

James Harrington’s *Commonwealth of Oceana* (1656) represents the commonwealth as the sea: the people may be scattered like drops of water across its distances, but they come together in a single body of water, where the laws are the fluid of the state.<sup>27</sup> For Hobbes, the “*Matter [and] Form . . . of [the] Common-Wealth*” is that of the “*Leviathan*”: a great oceanic creature that rules over the stormy sea of the state.<sup>28</sup>

In Abraham Bosse’s famous frontispiece for *The Leviathan* (fig. 1), we can find a visual rendering that translates the performing polis into the dispersed demos, attempting to represent political connection across the

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CLASSICAL ATHENS AND THE EARLY ROMAN EMPIRE (2011) (especially 55-86 but throughout). For discussions of Zeno’s republic and Stoic political philosophy generally, see MALCOLM SCHOFIELD, *THE STOIC IDEA OF THE CITY* (1999); and KATJA MARIA VOGT, *LAW, REASON, AND THE COSMIC CITY: POLITICAL PHILOSOPHY IN THE EARLY STOA* (2008).

24. Quoted in RICHTER, *supra* note 23, at 79.

25. Early Modern Research Group, *Commonwealth: The Social, Cultural, and Conceptual Contexts of an Early Modern Keyword*, 54 *HISTORICAL J.*, 659, 673 (2011) (quoting EDMUND DUDLEY, *THE TREE OF COMMONWEALTH* 31-2 (D. M. Brodie ed., 1948)).

26. *Id.* at 674 (quoting THOMAS STARKEY: A DIALOGUE BETWEEN POLE AND LUPSET 39 (Thomas F. Mayer ed., 1989)); See also *id.* at 674-5 (discussing the Early Modern metaphor of the body politic).

27. JAMES HARRINGTON, *COMMONWEALTH OF OCEANA* (1656).

28. THOMAS HOBBS, *LEVIATHAN, OR, THE MATTER, FORM, AND POWER OF A COMMON-WEALTH* (1651).

vast spaces of the commonwealth. The frontispiece offers us a quite literal body politic. It shows the Sovereign rising up from behind a vast countryside that dwarfs the polis (a small and insignificant London). His body is made up of the countless bodies of the citizens. They are looking away from the polis, which they can no longer see. It is sometimes said that they are looking toward the Sovereign, but they appear so integral to his body that they seem not so much to *see* him as to *be* him, absorbed into his imposing torso. At first glance it appears that the Sovereign is merely wearing a kind of scaly armor, like that of a sea creature: only when one looks closely can one see that what appears to be scales is in fact a crowd of citizens, a citizenry that has disappeared into the Sovereign's body.

*D. "Invisible Agents" (The Paranoid Position)*

Plato's attack on the theatrocracy might tempt us to think of him as a champion of its opposite: a disembodied demos not subject to "the catcalls and discordant outcries of the crowd." In the work of Paul Kottman, Plato in fact appears not merely as an enemy of theatre but as the originator of a counter-theatrical politics in which the body disappears into the pure idea. Exploring the often-noted etymological and ontological relationship between theory (*theoria*) and theatre (*theatron*)—both of which originate in beholding (*theasthai*, *theoria*) and wonder (*thaumazein*)—Kottman argues that Plato replaces an originary conception of politics as scenic representation with a conception based in otherworldly, disembodied Ideas,—that he transforms sight (*thea*) "into the contemplation of noetic objects (*theoria*)," wrenching politics from its theatrical origins and leaving it a place of "solitary thought, order, knowledge." In so doing, Kottman argues, he eliminates what is most essential about politics: plurality (*plethos*), action (*praxis*), and a scene of interaction.<sup>29</sup>

There is much to be said for this view. And yet, as many have pointed out, Plato also views the state as a kind of theatre for the enactment of the laws: controlled and contained rather than dominated by the theatrocratic crowd but nevertheless necessarily expressing itself through performance. The Magnesian magistrates in the *Laws* explain that their "whole polity has been constructed as a dramatization of a noble and perfect life." They are "actors . . . in the finest of all dramas, one which indeed can be produced only by a code of true law."<sup>30</sup> As I have argued elsewhere, we should not think of "drama" here as mere metaphor: in the immediately preceding discussion, Plato stresses that the youth of Magnesia must engage in dances and choral performances that are representations of the "noble and perfect

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29. KOTTMAN, *supra* note 6, at 34-5. Kottman argues that theatre does not completely disappear from Plato's political thought, but there (and in the work of his heirs, including Hobbes), it appears only in the form of a return of the repressed.

30. PLATO, *supra* note 16, at 1387 [*Laws*, 817b].

life” that the laws mandate.<sup>31</sup>

If the youth must act, effectively, as a kind of performing polis, the citizens must act as spectators: at choral performances, at political events, and in the law courts. True, the law courts must not be like theatres: it is only in the worst kinds of courts that, instead of “listen[ing] to the case in silence,” those present “make the walls ring with the voice of their applause or censure of the alternate speakers, like the audience at a play.” But neither must the courts be “inarticulate” or “their members . . . reach their verdict by a secret vote.” The presence of well-behaved citizen-spectators is essential: “all citizens who have necessary leisure shall be present and give attentive hearing to the pleadings.”<sup>32</sup>

Presence is essential because it is only through presence that one can perform the laws, but also because remote communication cannot be trusted, as Plato’s famous discussion of writing and painting in the *Phaedrus* suggests. There, he worries about the dangers of disembodiment or absence: the kind that results from the separation of the speaker or image-maker from the product of expression. Both writing and painting have a “strange quality,” Socrates tells Phaedrus:

[t]he creatures of painting stand before us . . . like living beings, but if you question them, they [remain] silen[t]. It is the same with written words; they seem to talk to you as though they had intelligence, but if you ask them anything, . . . they go on telling you just the same thing forever. And once a thing is put in writing, [it] drifts all over the place, getting into the hands not only of those who understand it, but equally of those who [do not]; it doesn’t know how to address the right people, and not address the wrong.<sup>33</sup>

For Socrates, words and images detached from their producers have a “strange quality.” They mislead those who do not understand them and become dangerous tools in the hands of those who may turn them to evil purposes: they do not “know how to address the right people, and not address the wrong.” They behave “as though they had intelligence” but they are more like “creatures” or automatons than “like living beings” because they cannot adjust to circumstance as humans do. Instead, they “go on telling you just the same thing forever,” mechanically marching forward even if their message leads to disaster.

Although Plato is not explicitly talking about politics here, his discussion resonates with some of the concerns of later political theory. There, the dispersed demos—while it may solve the problem of political extension—

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31. *Id.* at 1387 [*Laws*, 814d-816e]. And see PETERS, *supra* note 9, at 40-42.

32. PLATO, *supra* note 16, at 1435, 1416 [*Laws*, 876a-b, 855d].

33. *Id.* at 521 [*Phaedrus*, 275d-e]; translation modified, drawing on PLATO, PLATO IN TWELVE VOLUMES I: EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS 565-7 (Harold N. Fowler trans., 1927).

presents a number of interrelated dangers: variants on those Plato names. The problem is not merely that people in the dispersed demos may send words and images into the world without (literally) standing behind them, ready to explain what they mean and what they don't. It is also that if you cannot see and hear the speakers, you cannot hold them accountable for incendiary messages: messages that may issue in violence. Such absence and invisibility tend to foster clandestine networks of unseen agents who threaten harm to the state: harm that is all the more terrifying for its obscurity. These networks are too scattered for capture: they do not merely resist being "easily surveyed as a whole" (like Aristotle's overgrown polis); they cannot be surveilled at all.

Demetra Kasimis sees in Plato's *Republic* the kind of paranoia afoot during the Peloponnesian War, when the fear of plots "consumed an eroding Athenian democracy." In Socrates's nocturnal councils, he and other men plotted an alternative to the democracy (to all appearances, "the initiation of a potential 'coup'"). For Kasimis, these councils literally represent such clandestine meetings, but also instance the "*topos* of conspiracy" that expressed *anxiety* about clandestine plots.<sup>34</sup> Paranoia of this sort appears even more prominently in Early Modern and Enlightenment political theory, where the danger of secret cabals and clandestine meetings is a constant theme. One can see it, for instance, in Hobbes's discussion of "Anxiety" in *The Leviathan*: technically a passage explaining the rise of superstition, but also a political allegory. The "causes of good and evil . . . for the most part are invisible," Hobbes explains. So "when [Man] cannot assure himselfe of the[ir] true causes, . . . his own fancy suggesteth [causes]." It "is impossible for a man, who continually endeavoureth to secure himselfe against the evill he feares, and procure the good he desireth, not to be in a perpetuall solicitude of the time to come," that is, in a constant state of "Anxiety." Hobbes draws a parallel to the experience of Prometheus. Just as Prometheus's liver was devoured by an eagle every day, "[s]o that man . . . hath his heart all the day long, gnawed on by feare [of] calamity; and has no repose, nor pause of his anxiety, but in sleep."

This perpetuall feare, alwayes accompanying mankind in the ignorance of causes, as it were in the Dark, must needs have for object something. And therefore when there is nothing to be seen, there is nothing to accuse . . . but some *Power*, or Agent *Invisible*.<sup>35</sup>

A man may sometimes "trus[t] [others], such as he thinks to be his friends," but to do so is dangerous, for we live in a world of "Invisible Agents."<sup>36</sup>

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34. Demetra Kasimis, *The Play of Conspiracy and Democratic Erosion in Plato's Republic*, 65 AM. J. POL. SCI. 926, 926 (2021).

35. THOMAS HOBBS, *LEVIATHAN* 76 (Richard Tuck ed., 1996) [Part 1, Ch 12].

36. *Id.* at 76-77 [Part 1, Ch 12].

*E. From the Social Contract to the Media Theatrocracy*

One can track these two models, in both their affirmative and negative guises, into the age of modern democracy and beyond. Rousseau praised the festivals that brought the dispersed polis together to perform the republic with “martial spirit” and “patriotic charm” (a prototype for the festivals of the French Revolution).<sup>37</sup> But—thinking of the “social contract” as a thing that binds together a dispersed “body politic” (the “artificial person, in which the state consists,” which is “an abstract being”)—he also insisted that the citizens deliberate alone in monadic solitude, “without any communication between [the] members” of that corporate body.<sup>38</sup> When Thomas Paine declared, “What Athens was in miniature, America will be in magnitude,” he was seeking to solve the same problem of scale that someone like Zeno was: striving to transform the image of the Athenian polis into one appropriate to a scattered nation (with a sly swipe at a popular reverence for the “miniature” polis that was Athens).<sup>39</sup> Writing in 1787, James Madison expressed his distrust of the kind of democracy represented by the theatrocratic Athenian polis, which was subject to the “confusion and intemperance of a multitude.” “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob” because “[i]n all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason.”<sup>40</sup> In fact, “pure . . . democracies have ever been spectacles of turbulence and contention, . . . and have in general been as short in their lives as they have been violent in their deaths.”<sup>41</sup> At the same time, calling on one of his favorite metaphors for the republic, he recognized “the danger to the Confederacy from multiplying the parts of the machine” through westward expansion.<sup>42</sup> The “machine will be enlarged, but the fewer and often the more secret, will be the springs by which its motions are directed,” such clandestine cabals ultimately leading “to public convulsions and the ruin of popular governments.”<sup>43</sup>

It is perhaps not an accident that the double vision of performing polis and dispersed demos lies behind the phrase that became, in the twentieth century, the crucial metaphor not only for freedom of expression but for

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37. JEAN-JACQUES ROUSSEAU, LETTER TO D’ALEMBERT AND WRITINGS FOR THE THEATER 351 (Allan Bloom, Charles Butterworth, & Christopher Kelly eds. & trans., 2004) [Letter to D’Alembert]. On the French revolutionary festivals, see MONA OZOUF, FESTIVALS AND THE FRENCH REVOLUTION (Alan Sheridan trans., 1988).

38. JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT 58, 66-67 (Christopher Betts trans., 1994) [*Social Contract*, Bk 2, Ch 3].

39. THOMAS PAINE, RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS 233 (Mark Philp ed., 1998).

40. THE FEDERALIST No. 55, at 275 (James Madison) (Lawrence Goldman ed., 2008).

41. THE FEDERALIST No. 10, at 52 (James Madison) (Lawrence Goldman ed., 2008).

42. Letter from James Madison to Thomas Jefferson (Aug. 20, 1784), in LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 61 (1995).

43. THE FEDERALIST No. 59, at 290-91 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

democracy: the “marketplace of ideas.” This “marketplace” is at once a populated agora or forum (like the ancient marketplaces where the polis gathered) and a place of disembodied ideas, which seem to float freely across the great commercial networks of modernity.<sup>44</sup> Hannah Arendt tries to reconcile these two visions in her account of “the space of appearance” as the foundation of politics. She imagines this space on the model of the Athenian polis. “The polis [is] the organization of the people as it arises out of acting and speaking together,” she writes. “The space of appearance comes into being wherever men are together in the manner of speech and action.” This is why theatre is “the political art par excellence”; just as “drama comes fully to life only when it is enacted in the theatre,” so politics comes fully to life only when it is enacted on the political stage.<sup>45</sup> At the same time, Arendt insists that this theatrical “acting and speaking together” need not happen in a specific locale. “The polis, properly speaking, is not the city-state in its physical location. . . . [I]ts true space lies between people, . . . no matter where they happen to be.” Quoting Pericles, she addresses her audience, “Wherever you go, you will be a polis.” No matter how dispersed, “action and speech create a space between the participants which can find its proper location almost any time and anywhere,” in “the space of appearance in the widest sense of the word.”<sup>46</sup>

Perhaps Arendt feels the need to specify that “appearance” must be understood in “the widest sense of the word” because she recognizes that, in the modern polis, people do not generally gather physically, and “appearance” takes place primarily in the “space” of audiovisual mass media. Certainly, for her Frankfurt School contemporaries and their heirs, the space of audiovisual appearances, however political, is not a polis in the ancient sense, and, far from conducive to democracy, it is the handmaiden of totalitarianism. For Theodor Adorno and Max Horkheimer, “The Culture Industry” offers “Enlightenment as Mass Deception.”<sup>47</sup> Mesmerizing us, mass media have become a vehicle of mass identity, a delivery device for ideology, machinery for the production of desire necessary to capitalism. They have transformed the democratic “culture debating” public into “a culture consuming public,” as Jürgen Habermas writes. They offer a “travesty” of the democratic public sphere.<sup>48</sup> A society of political actors

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44. *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (using the phrase “market place of ideas”); *see also* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing “free trade in ideas”). *See generally* Morgan N. Weiland, *First Amendment Metaphors: The Death of the “Marketplace of Ideas” and the Rise of the Post-Truth “Free Flow of Information,”* 33 *YALE J.L. & HUMAN.* 366 (2022) (arguing that the metaphor of “the free flow of information” has been quietly replacing the marketplace metaphor).

45. HANNAH ARENDT, *THE HUMAN CONDITION* 198-99, 187 (2d ed. 2018).

46. *Id.* at 198.

47. THEODOR W. ADORNO & MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS* 94-136 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002).

48. JÜRGEN HABERMAS, *STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY*

engaged in debate has become a “society of the spectacle” (to quote the title of Guy Debord’s famous manifesto).<sup>49</sup> For Jean Baudrillard, what remains is only “simulacra and simulation.”<sup>50</sup>

In such work, mass media appear as a deformation of democracy, turning the performing polis into a spectacle and the dispersed demos into an infinitude of monads tied “libidinally and aggressively to the commodity form” (in the words of Herbert Marcuse).<sup>51</sup> Perhaps the most forceful articulation of such views in more recent theory can be found in the work of Samuel Weber. In Weber’s portrayal, theatricality—in its late modern “*multimedia*” iterations—“introduc[es] an irreducible and unpredictable heterogeneity, a multiplicity of perspectives and a cacophony of voices.”<sup>52</sup> Representing “more than one kind [of body], and above all, more than one way of construing those bodies,” such “theatricality calls into question one of the chief axioms of Western modernity: that of the immanence of subject, object, and the world they are held to constitute.”<sup>53</sup> “[A]ssociated with the dissolution of universally valid laws and, with them, of the social space that those laws both presuppose and help maintain,” media theatricality “unsettl[es] . . . all institutional stability.”<sup>54</sup> Instead of producing certainty, it “is marked by a resurgence of a *thauma*, a wonder that draws one’s gaze irresistibly.”<sup>55</sup> The “multiplicity of perspectives” and “cacophony of voices” that teatrocracy makes visible and audible, its “dissolution of universally valid laws [and of] the social space that those laws . . . help maintain,” might initially appear as the heralds of democracy.<sup>56</sup> But teatrocracy is not “democratic”: not for Plato, and still less so today.<sup>57</sup> For “digitalization” has undermined “precisely th[o]se notions of unity and wholeness” on which democracy depends: “[h]ow can a people ‘rule,’ be

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INTO A CATEGORY OF BOURGEOIS SOCIETY 159, 161 (Thomas Burger & Frederick Lawrence trans., 1992).

49. GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* (Donald Nicholson-Smith trans., 1994).

50. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (Sheila Faria Glaser trans., 1994).

51. HERBERT MARCUSE, *AN ESSAY ON LIBERATION* 11 (1969). In a counter-tradition, one might perhaps see an attempt to recuperate a politics of the performing polis in Judith Butler’s *Notes Toward a Performative Theory of Assembly* or Jacques Rancière’s accounts of the “staging [of] the people” and “the emancipated spectator” (a kind of counter-Platonic celebration of teatrocracy). See generally JUDITH BUTLER, *NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY* (2015); JACQUES RANCIÈRE, *STAGING THE PEOPLE: THE PROLETARIAN AND HIS DOUBLE* (David Fernbach trans., 2011); JACQUES RANCIÈRE, *THE INTELLECTUAL AND HIS PEOPLE: STAGING THE PEOPLE, VOLUME 2* (David Fernbach trans., 2012); JACQUES RANCIÈRE, *THE EMANCIPATED SPECTATOR* (Gregory Elliott trans., 2009).

52. Samuel Weber, *Replacing the Body: An Approach to the Question of Digital Democracy*, in *PUBLIC SPACE AND DEMOCRACY* 172, 174, 175-56 (Marcel Hénaff & Tracy B. Strong eds., 2001). I draw here primarily on this essay, to which all in-text citations in this paragraph refer, but also generally on SAMUEL WEBER, *THEATRICALITY AS MEDIUM* (2004).

53. *Id.* at 184.

54. *Id.* at 175.

55. *Id.*

56. *Id.* at 175-76.

57. *Id.*

democratic, it if is not in principle unified and whole?”<sup>58</sup> The “theatocratic usurpation of the rule of law,” “driven by desire and fear as much as by the search for pleasure,” produces only a “sinister parody of the assemblage of citizens in the forum.”<sup>59</sup>

## II. TWITTER V. TAAMNEH AND GONZALEZ V. GOOGLE

It is to recent visions of “digitalization”—its dreams of democracy as well as its “sinister parody” of the performing polis and “travesty” of the dispersed public sphere—that I now turn.

In 2015, a series of ISIS terrorist attacks in Paris killed one hundred and thirty people, including an American student, Nohemi Gonzalez. Another in 2017 at the Reina nightclub in Istanbul killed thirty-nine people, including a Jordanian citizen, Nawras Alassad. Members of Gonzalez’s family and Alassad’s (the Taamnehs) sued Google, Twitter, and Facebook under the Antiterrorism Act (ATA) of 1997. That act and a 2016 supplement, the Justice Against Sponsors of Terrorism Act (JASTA), provide that U.S. nationals injured in an act of international terrorism or their estates may recover damages from any entity or person who “provides material support” for terrorism, who “aids and abets” an act of international terrorism “by knowingly providing substantial assistance,” or “who conspires with the person who committed” that act.<sup>60</sup> Both families, with slight variations, alleged that Twitter, Google (through its subsidiary YouTube), and Facebook aided and abetted the attacks in at least three ways: by failing to block videos and other posts that ISIS used to organize, recruit members, and incite violence; by allowing algorithms to recommend ISIS content; and by sharing advertising revenue with ISIS.<sup>61</sup>

The question initially at issue—if framed in the broadest possible terms—is the same in both cases: can platforms such as Twitter, Facebook, Google, and YouTube be held liable for violence produced by user-generated content on their sites? The defendant platforms argue that there is little-to-no evidence that the videos and other posts inspired the attacks, that in any case they cannot be held liable for their users’ posts (let alone “knowingly”), and that therefore the plaintiffs’ charge that they “aid[ed] and abett[ed]” the attacks cannot stand. Even if there were such evidence, the defendants argue, they are shielded from liability by § 230(c)(1) of the 1996

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58. *Id.* at 186.

59. *Id.* at 174, 177.

60. *Gonzalez v. Google LLC*, 2 F.4th 871, 880, 884-85 (9th Cir. 2021); 18 U.S.C. § 2333(a); Pub. L. No. 144-222, 130 Stat. 852.

61. Verified Complaint & Jury Trial Demanded, *Gonzalez v. Twitter Inc., Google Inc., and Facebook, Inc.*, 335 F. Supp. 3d 1156 (N.D. Cal. 2016) (No. 4:16-cv-03282); Third Amended Complaint, *Gonzalez v. Twitter Inc., Google Inc., and Facebook, Inc.*, 335 F. Supp. 3d 1156 (N.D. Cal. 2016) (No. 4:16-cv-03282). The original *Gonzalez* complaint also named Twitter and Facebook, but the complaint was later amended to name only Google.



Communications Decency Act, which specifies that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>62</sup> These were, as many have said, “the twenty-six words that created the internet.”<sup>63</sup> The act declares that platforms are not publishers (which actively solicit and select what they publish): platforms merely offer spaces where others may publish. Platforms are thus not liable for harm that may arise from content on their sites. For the platforms, this principle—enshrined in § 230—stands not only as a birthright but as a guarantee of freedom of expression, protecting them from attempts to censor their speech through tort claims.

The plaintiff victims argue, on the other hand, that Google and Twitter not only give terrorists a “platform”: they collude and collaborate with terrorists. They replicate their videos, amplify their messages, and—through algorithms that “recommend” terrorist videos, offer relevant hyperlinks, generate notifications, and place ads—augment those messages with their own message: “watch this video!” Such collusion and augmentation, the plaintiffs argue, go far beyond what the framers of § 230 envisioned, falling outside the bounds of its protections. Algorithmic recommendations in fact do more than amplify dangerous posts: they constitute a separate message, —an independent call to terror.

In 2021, a panel of Ninth Circuit judges issued a single opinion on the two cases and a similar case, *Clayborn v. Twitter*.<sup>64</sup> The majority held that Gonzalez did not have a valid aiding-and-abetting claim and in any case § 230 protected Google from liability.<sup>65</sup> However, it held that Taamneh did have a valid aiding-and-abetting claim, largely because Twitter had ignored ongoing media coverage of ISIS’s use of its site to launch terrorist attacks.<sup>66</sup>

Gonzalez and Twitter appealed to the Supreme Court, which issued two separate opinions on May 18th, 2023.<sup>67</sup> Both opinions are unanimous and

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62. 47 U.S.C. § 230(c)(1).

63. Brief of the Knight First Amendment Institute at Columbia University as Amicus Curiae in Support of Respondent at 16, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (No. 21-1333) [hereinafter Knight First Amendment Institute]; see JEFF KOSSEFF, *THE TWENTY SIX WORDS THAT CREATED THE INTERNET* (2019).

64. *Gonzalez*, 2 F.4th at 871.

65. The panel did look closely at whether Google’s ad-sharing scheme, which effectively involved “giving ISIS money,” was still entitled to § 230 immunity, but ultimately concluded that the revenue was not substantial enough to compromise Google’s immunity. *Id.* at 898, 906-07.

66. Since the district court did not consider § 230 immunity in *Taamneh*, the majority remanded the case to the trial court on that question. In *Clayborn*, the panel found that the plaintiffs failed to satisfy the initial necessary prong: evidence of ties between ISIS and the attackers. *Clayborn* also appealed only the aiding-and-abetting question, but since the court affirmed the dismissal of *Clayborn*’s aiding-and-abetting claim, there was no need to remand on the § 230 immunity issue. *Id.* at 880, 910-12. Reading the opinion, it becomes apparent that the issues and most of the facts are so similar in the cases that it is tempting to conclude that the reason *Taamneh* won and *Gonzalez* lost on the ATA question is that *Taamneh* simply had better lawyers.

67. *Twitter, Inc. v. Tamneh*, 598 U.S. 471 (2023); *Gonzalez*, 598 U.S. 617 (2023). As the opinion

extremely short: astonishingly so, given the complexity of issues they address and the overwhelming importance of the phenomena whose basic operations they challenge.<sup>68</sup> In *Twitter*, in an opinion written by Clarence Thomas, the Court reversed the Ninth Circuit, holding that Taamneh had failed to show that the “operator of [the] video-sharing website” had “consciously and culpably participated” in the Istanbul attack “so as to help make it succeed” (a requirement for liability).<sup>69</sup> In its brief *per curiam* opinion in *Gonzalez*, the Court asserted that the issues were “materially identical” to those in *Twitter*, and therefore Gonzalez had also failed to state a claim.<sup>70</sup> In short, in both decisions, the Court ruled in favor of big media and against those allegedly harmed by it.

However, in both decisions, the Court’s holdings are narrow, leaving the issues the cases raise largely unresolved.<sup>71</sup> It is virtually certain that similar cases with different fact patterns will arise in the lower courts. As Justice Jackson writes in her *Twitter* concurrence, “[o]ther cases presenting different allegations and different records may lead to different conclusions.”<sup>72</sup> Even if this were not so, the opinions leave a host of questions unanswered. Among the most central are the following. Are platforms never responsible for their users’ posts, never required to suppress those that are inflammatory or dangerous?<sup>73</sup> And are they ever prohibited from producing algorithms that may amplify dangerous posts? These cases ask law to look closely at when and how expression instigates violence, at the power of algorithms, and much more. While they are officially about statutory liability (the ATA) and statutory protection from liability (§ 230), they raise fundamental constitutional issues, demanding address to the

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notes, Twitter has in the meanwhile become “X Corp,” Facebook has become “Meta Platforms,” and Google is now a subsidiary of “Alphabet, Inc.” *Twitter*, 598 U.S. at 478 n. 3.

68. Excluding headnotes and syllabus, *Twitter* is seventeen pages and *Gonzalez* is a two-page *per curiam* decision. And yet, as Justice Thomas notes in his *Twitter* opinion, “the amount of content on defendants’ platforms is staggering . . . billions of videos, posts, comments, and tweets uploaded by the platforms’ users.” *Twitter*, 598 U.S. at 480.

69. *Twitter*, 598 U.S. at 493.

70. *Gonzalez*, 598 U.S. at 505 (remanding to the Ninth Circuit to reconsider the question of secondary liability in light of the Court’s *Twitter* decision).

71. See *Gonzalez*, 598 U.S. at 621; *Twitter*, 598 U.S. at 507 (Jackson, J., concurring) (“I join the opinion of the Court with the understanding that today’s decisions are narrow in important respects. . . . [T]he Court’s view of the facts—including its characterizations of the social media platforms and algorithms at issue—properly rests on the particular allegations in those complaints. Other cases presenting different allegations and different records may lead to different conclusions.”).

72. *Twitter*, 598 U.S. at 507.

73. In a pair of upcoming Supreme Court cases (to be decided in June 2024), plaintiffs in Texas and Florida argue the reverse: platforms are prohibited from suppressing their users’ posts, on the theory that they are quasi-governments and thus the First Amendment protects their users’ speech. See Adam Liptak, *Supreme Court to Decide How the First Amendment Applies to Social Media*, N.Y. Times (Feb. 25, 2024), <https://www.nytimes.com/2024/02/26/us/politics/supreme-court-social-media-texas-florida.html> (last visited Feb. 26, 2024).

breadth and limits of the First Amendment.<sup>74</sup>

Some commentators have stressed the difference between the two cases: *Twitter* is about ATA liability; *Gonzalez* is about § 230 immunity. *Twitter* is about harm through *inaction* (Twitter’s failure to remove ISIS posts); *Gonzalez* is about harm through *action* (Google’s use of algorithms that spread and amplify ISIS’s message). In fact, as the Supreme Court noted, “the allegations underlying [Gonzalez’s] secondary-liability claims are materially identical to those at issue in *Twitter*”: the reason it remanded *Gonzalez* to the Ninth Circuit for consideration in light of *Twitter*.<sup>75</sup> If one reads the various opinions, it becomes apparent that not only are ATA liability and § 230 immunity both central to both cases. (The Ninth Circuit majority dedicates much of its opinion to ATA liability in *Gonzalez*, and it remands *Taamneh-Twitter* precisely on the question of § 230 immunity.) Both inaction (failure to suppress) and action (amplification) are also central to both cases.<sup>76</sup> But the standard distinction between the two cases is useful for highlighting the difference between the two central things at stake: liability for failure to remove dangerous videos; and liability for the deployment of algorithms that amplify dangerous content. Heuristically, we might view the two key objects in the title of this essay—the video and the algorithm—as signifiers of that difference: signifiers of the twin dangers that law must address.

#### A. Digital Democracy?

These cases also, of course, engage in a wider debate—both academic and popular—about digital democracy. Over the past two decades, books on the subject have multiplied: *The Myth of Digital Democracy*; *Digitising Democracy*; *The Splinters of Our Discontent: How to Fix Social Media and Democracy Without Breaking Them*; and more.<sup>77</sup> Articles appear almost daily: “A Strong Democracy Is a Digital Democracy”; “Twitter and Facebook Warning Labels Aren’t Enough to Save Democracy.”<sup>78</sup> Like

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74. The Ninth Circuit majority notes that the only reason it is not addressing First Amendment issues is that the parties did not raise them. *Gonzalez v. Google LLC*, 2 F.4th 871, 913 n. 24 (9th Cir. 2021).

75. *Gonzalez*, 598 U.S. at 622.

76. See e.g. *Twitter*, 598 U.S. at 481, 499, 505.

77. See generally MATTHEW HINDMAN, *THE MYTH OF DIGITAL DEMOCRACY* (2009); VOLKER BOEHME-NEBLER, *DIGITISING DEMOCRACY* (2020); MIKE GODWIN, *THE SPLINTERS OF OUR DISCONTENT: HOW TO FIX SOCIAL MEDIA AND DEMOCRACY WITHOUT BREAKING THEM* (2019).

78. Audrey Tang, *A Strong Democracy Is a Digital Democracy*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/opinion/taiwan-digital-democracy.html>. Geoffrey A. Fowler, *Twitter and Facebook Warning Labels Aren’t Enough to Save Democracy*, WASH. POST (Nov. 9, 2020), <https://www.washingtonpost.com/technology/2020/11/09/facebook-twitter-election-misinformation-labels/>. Irina Kalinka points out that tech corporations themselves engage in this conversation, entering the political field and laying claim to versions of democracy that “valoriz[e] data and automation, predictability, and systematization” in ways that align with corporate interests. Kalinka, “The Political Imaginary of User Democracy” (unpublished paper, Nov. 2023).

these books and articles, the two cases raise one of the questions most central to tech law, and to our age of digital social media generally: the question of the relationship between social media and democracy. Are social media democratizing? What should the role of law be in promoting digital democracy?

In the briefs and opinions (from both lower and higher courts), supporters of both sides insist that they stand for true against false democracy. For the defendants' supporters, freedom from liability has made the internet "a democratic space that promotes free expression, creativity, and innovation."<sup>79</sup> The "importance of First Amendment values in American society" reminds us that the "ability to share information . . . is essential for a vibrant democratic discourse."<sup>80</sup> Immunity "[p]rotect[s] and facilitat[es] valuable speech on the internet" and is thus essential to "our democracy."<sup>81</sup> Without that immunity, the internet would lose touch with its "democratic roots."<sup>82</sup> The "cost to free speech . . . —and thus [to] our democracy— would be massive."<sup>83</sup> At the same time, the platforms' architecture enables "democratic self-governance," which relies on the "ability to locate and receive customized information."<sup>84</sup> If liability disables that organizational architecture, the "vast democratic forums of the Internet" will become "useless jumbles of information, like libraries of randomly shelved books . . . on an almost unimaginable scale."<sup>85</sup>

For the plaintiffs' supporters, liability offers the protection from dangerous speech essential to democracy. No one "should accept at face value the straightforward assumption that unchecked and broadly immunized social media companies work for the betterment of our democracy."<sup>86</sup> In fact, platforms have been compromising democratic free speech by both actively "promoting particular views within the marketplace of ideas" and "censoring divergent views."<sup>87</sup> When a platform "puts a massive thumb on the scale for its preferred view," it in fact "silence[s]

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79. Brief of Authors Alliance and Internet Creators as Amici Curiae in Support of the Respondent [hereinafter Authors Alliance] at 6, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

80. *Id.* at 33.

81. Brief of NYU Stern Center for Business and Human Rights as Amicus Curiae in Support of Respondent [hereinafter NYU Stern Center] at 2, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

82. Authors Alliance at 36.

83. NYU Stern Center at 14.

84. Brief of Center for Democracy & Technology and 6 Technologists as Amici Curiae in Support of Respondent [hereinafter Center for Democracy] at 19, Gonzalez 598 U.S. 617 (2023) (No. 21-1333) (citing Natali Hellberger, *On the Democratic Role of News Recommenders*, 7 DIGIT. JOURNALISM 993 (2019)).

85. Knight First Amendment Institute at 2.

86. Brief of Free Speech for People as Amicus Curiae in Support of Petitioners [hereinafter Free Speech for People] at 28, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

87. Brief of the Liberty Justice Center as Amicus Curiae in Support of Petitioners at 7, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

dissent and distort[s] the marketplace of ideas.”<sup>88</sup> So immunity for the platforms, far from fostering democracy, destroys “the function of the Internet as an open, democratic marketplace of ideas.”<sup>89</sup>

These claims, of course, rehearse some of the classic debates about the breadth of the First Amendment and its relationship to democracy: should we ensure that speech does not trample liberal rights by setting greater limits on it? or should we allow it the freedom to express all views, even if the voice of the majority silences that of the minority? At the same time, one can find in the briefs and opinions—in their rhetoric and modes of imagining discursive space—the two antithetical visual-spatial models of democracy I have described: an audiovisual performing polis and a digital demos dispersed across the worldwide web. Both plaintiffs’ and defendants’ supporters deploy both models: sometimes in antithesis; sometimes promiscuously mingled in metaphor, in rhetoric that figures place as both polis and cosmopolis, time as both immediate and ongoing, communication as both live and virtual.

In the briefs defending Google and Twitter, the models appear as utopian dream. There, internet democracy serves as a kind of democratic agora. The internet “has democratized speech, creating a forum for public self-expression.” There as “never before have so many people [had] opportunities to speak [and] be heard.”<sup>90</sup> The internet is a locatable “place” (“the most important plac[e]” for the exchange of ideas), a “democratic space.”<sup>91</sup> Like the agora and forum, it is a “marketplace where people with many different interests can interact, learn, and engage in commerce” while energetically debating ideas.<sup>92</sup> In that “democratized” forum-as-marketplace, speakers “answer” not to those in power but “to their audiences,” the only true judges, as in the agora or forum.<sup>93</sup> In these briefs, if internet democracy appears as a lively performing polis, it also appears as an expansive dispersed demos: it is a “world,” a cosmopolis made up of a “vast” network of “democratic forums” with “myriad avenues” spreading across digital space “connecting billions . . . who never could

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88. *Id.* at 8.

89. *Id.* at 7.

90. Brief of American Civil Liberties Union, American Civil Liberties Union of Northern California, and Daphne Keller as Amicus Curiae in Support of Respondent [hereinafter ACLU] at 2, Gonzalez 598 U.S. 617 (2023) (No. 21-1333). Note that in this and the next several paragraphs, I have compressed significantly, sometimes combining quote fragments from different briefs while preserving the essential thrust of each.

91. Brief of Amici Curiae Electronic Frontier Foundation, American Library Association, Association of Research Libraries, Freedom to Read Foundation, and the Internet Archive in Support of Respondent [hereinafter Electronic Frontier Foundation] at 3, Gonzalez 598 U.S. 617 (2023) (No. 21-1333) (“the most important plac[e]”). Authors Alliance at 6 (“democratic space”).

92. Brief of Amicus Curiae Progressive Policy Institute in Support of Respondent at 17, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

93. Authors Alliance at 34.

have found each other before.”<sup>94</sup> “In this democratized modern world,” nothing “hamper[s] the free flow of creators’ . . . ideas.”<sup>95</sup>

In the plaintiffs’ briefs, on the other hand, the two models appear as dystopian nightmare. The platforms have produced a lawless theatrocracy, they assert. The “internet has almost no rules at all”: it is a place of anarchic license (like Plato’s theatrocracy, “inspir[ing] the multitude with contempt of . . . law” and “a reckless excess of liberty”).<sup>96</sup> It is a place of chaos and violence, where “hate speech” “presents a real-world threat to our democracy.”<sup>97</sup> It is a place of emotion unhinged: “addictive, polarizing, emotion-churning” (as a partial dissent has it, quoting a book on the “Twilight of Democracy”).<sup>98</sup> Like the demagogues of the theatrocracy, the platforms deliberately inflame the masses (awakening the “wild beast with many heads” Patrizi describes, and making it “bark”). “Anger becomes a habit. Divisiveness becomes normal. . . . Polarization [moves] from the online world into reality.”<sup>99</sup> At the same time, what arises from the platforms proliferates virally, like the “strange creatures” Plato describes, which behave “as though they had intelligence” but are in fact automatons. Crossing borders, posts get into the wrong hands, allowing “hostile nations . . . to wage asymmetric warfare [against] democracy,” producing “anti-democratic violence around the world.”<sup>100</sup>

### *B. The Video and the Algorithm*

At the heart of these renderings of the digital performing polis and dispersed demos are the figures of the video and the algorithm: at once actual vehicles of expression and synecdoches for the promises and pathologies of democracy. In the utopian vision of the defendants’ supporters, the video stands as a crucial tool of democracy: anyone can make videos today, anyone can upload, anyone can address the crowd in the YouTube polis, that “marketplace” where videos—even the “controversial”

94. *Id.* at 34 (“world”). Electronic Frontier Foundation at 3 (“vast democratic forums”). ACLU at 2 (“myriad avenues” and “connecting billions . . .”).

95. Authors Alliance at 33-4 (and on the significance of “free flow,” *see* Weiland, *supra* note 44).

96. Brief of Amici Curiae Common Sense Media and Frances Haugen in Support of Petitioners [hereinafter Common Sense Media] at 1, Gonzalez 598 U.S. 617 (2023) (No. 21-1333) (quoting James P. Steyer, *WHICH SIDE OF HISTORY? HOW TECHNOLOGY IS RESHAPING DEMOCRACY AND OUR LIVES* 96 (James P. Steyer ed., 2020)).

97. Brief of Giffords Law Center to Prevent Gun Violence as Amicus Curiae in Support of Neither Party [hereinafter Giffords Law Center] at 4, 23, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

98. Gonzalez v. Google LLC, 2 F.4th 871 920, note 3 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part). *See* similarly Gould’s discussion of democracy at 935-6; *and see* Katzman’s comment: “Social media can be manipulated by evildoers who pose real threats to our democratic society.” *Id.* at 951 (Katzman, J., concurring in part and dissenting in part).

99. *Id.* at 920, note 3.

100. *Id.* at 936 (Gould, J., concurring in part and dissenting in part) (“hostile nations . . . “); Brief of Anti-Defamation League as Amicus Curiae In Support of Neither Party [hereinafter Anti-Defamation League] at 4, Gonzalez 598 U.S. 617 (2023) (No. 21-1333) (“anti-democratic violence around the world”).

ones—“foster productive debate.”<sup>101</sup> “Bystanders can upload videos and activists can speak directly to followers” through video, “without being dependent” on “gatekeep[ers]” or authorities such as “the nightly news.”<sup>102</sup> Videos (paradoxically) stand for unmediated experience: the here-and-now of the performing polis. They are democracy in action, capturing the political scene in the moment of its unfolding, with “attendees [posting] videos of the event to . . . online platforms.”<sup>103</sup> In this, they represent the immediacy and transparency of “truth” unimpaired by distance.<sup>104</sup> Algorithms stand for a different kind of utopia: the utopia of the free and dispersed but interconnected demos. Where law threatens “gatekeeping” (in the form of liability), algorithms open the gates, allowing citizens of the internet cosmopolis to follow the “myriad avenues” where nothing “hamper[s] the free flow of creators’ . . . ideas.”<sup>105</sup> At the same time, they “organize [the] otherwise unnavigable flood,” making it possible for viewers to “confront [the] morass of billions of unsorted videos”—that audiovisual overload—with cool equanimity, transforming the theatre of the “marketplace” into the free flow of “ideas.”<sup>106</sup>

For the plaintiffs supporters, on the other hand, videos represent dangerously contagious theatrocratic emotion. The platforms exploit the “frantic and unhallowed lust for pleasure” that Plato describes, for they promote “the videos most likely to entice the user even when those videos contain misinformation, violence, or . . . terrorism.”<sup>107</sup> Increasingly aesthetically mesmerizing, they are like the venomous demagogue in the agora, seducing the polis and then “instill[ing] fear and terror in civilian populations.”<sup>108</sup> YouTube has become “a platform ‘weaponized,’ . . . spread[ing] its harmful content” by video.<sup>109</sup> “The more intense and dramatic a video,” the more spectators it will draw; “the more intense or

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101. Brief of Washington Legal Foundation as Amicus Curiae Supporting Respondent at 4, *Gonzalez* 598 U.S. 617 (2023) (No. 21-1333).

102. Brief of the Lawyers’ Committee for Civil Rights Under Law and Five Civil Rights Organizations as Amicus Curiae in Support of Neither Party [hereinafter Lawyers’ Committee] at 27, *Gonzalez* 598 U.S. 617 (2023) (No. 21-1333).

103. Brief of Amicus Curiae Reporters Committee for Freedom of the Press and the Media Law Resource Center in Support of Respondents at 7, *Gonzalez* 598 U.S. 617 (2023) (No. 21-1333).

104. Lawyers’ Committee at 26 (quoting Darnella Frazier, the woman who filmed the murder of George Floyd).

105. *Id.* at 27 (“gatekeeping”). ACLU at 2 (“myriad avenues”). Authors Alliance at 33 (“nothing hampers . . .”).

106. Brief for Respondent at 4, *Gonzalez* 598 U.S. 617 (2023) (No. 21-1333).

107. Free Speech for People at 12.

108. *Gonzalez v. Google LLC*, 2 F.4th 871, 909 (9th Cir. 2021) (majority opinion acknowledging plaintiffs’ arguments) and at 909 (noting ISIS’s increasingly “highly stylized, professional-quality [video] propaganda”).

109. Paul M. Barrett & Justin Hendrix, *A Platform ‘Weaponized’: How YouTube Spreads Harmful Content—And What Can Be Done About It*, NYU Stern Center for Business and Human Rights (June 16, 2022), <https://www.stern.nyu.edu/experience-stern/faculty-research/platform-weaponized-how-youtube-spreads-harmful-content-and-what-can-be-done-about-it>.

shocking the content the more intense the mimicry.”<sup>110</sup> Like theatre, videos inspire imitation, leading the susceptible spectator into crime. Algorithms are still more dangerous, representing those secret viral networks that are spreading invisibly throughout the dispersed demos. They treacherously open “channel[s] that can serve as a gateway to more extremist content,” offering first a “path” and then an “immersive universe” that “radicalize[s] users [and] contribute[s] to deadly terrorist attacks.”<sup>111</sup> They are “echo chambers” that turn videos viral, “amplifying [their] harmful content.”<sup>112</sup> They traverse ordinary space and time, sending videos “skyrocketing” or relaying them secretly through underground networks.<sup>113</sup> As “Secret Algorithms,” they engage in covert operations.<sup>114</sup> We try to track them down, prove that it is they who have done those deadly deeds, hold them responsible. But we find that we are (as Hobbes writes) “in the Dark,” unable to prove the “causes of . . . evill,” which “for the most part are invisible.” Searching for causes, we find that “there is nothing to accuse” but the algorithm, that “*Power, or Agent Invisible.*”

#### CONCLUSION

One could imagine a kind of democratic Pollyanna-as-lawyer-and-friend-of-the-Court declaring to the Justices who will consider the next such case: “Digital democracy is not a myth but reality waiting to happen! Restore the performing polis as it was in the glory days of Athenian democracy! Gather the dispersed demos as a true marketplace of ideas! Cure their pathologies! Here’s how!” What would follow is a proposal: a little liability but not too much liability; a little immunity but not too much immunity; videos, of course (though not dramatically incendiary ones); algorithms, of course too (though not treacherously seditious ones).

I could myself put together such a proposal. It would interpret the ATA broadly, recognizing that terrorism acts precisely *through* communication, and that the capitalist communication industry is a collaborator when it enables and exploits terror, amplifying content to accrue advertising revenues. It would recognize that videos and algorithms may be digital phenomena that cannot “know” that they produce violence, but the

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110. Brief of Amici Curiae Counter Extremist Project (CEP) and Hany Farid in Support of Petitioners [hereinafter Counter Extremist Project] at 10, Gonzalez 598 U.S. 617 (2023) (No. 21-1333).

111. Anti-Defamation League at 10 (“channel[s] that . . . serve as a gateway . . .”). Brief of Amici Curiae National Police Association, Inc. and National Fallen Officer Foundation Supporting Petitioners at 14, Gonzalez 598 U.S. 617 (2023) (No. 21-1333) (citing Gonzalez, 2 F.4th at 917) (“path,” “immersive universe . . .”).

112. Giffords Law Center at 8 (“echo chambers”). Common Sense Media at 2 (“amplifying . . .”).

113. Counter Extremist Project at 12.

114. Free Speech for People at 13 (quoting FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 92-93 (2015)); and 26 (quoting Meghan J. Ryan, *Secret Algorithms, IP Rights, and the Public Interest*, 21 Nev. L.J. 61, 96 (2020)) (on “algorithm secrecy”).



executives who draw monumental salaries from the profits these generate do know in a very concrete, very human (all-too-human) sense. It would interpret § 230 narrowly, recognizing that its drafters could not have imagined in 1996 that platforms would deploy terrorist propaganda for their profit. (They only wanted to ensure that platforms would continue to benefit from pornography, which is so essential to the American pursuit of happiness.) It would look at the various civil rights acts' liability provisions, prohibiting § 230 from shielding platforms for hosting or promoting content that clearly violates statutory civil rights. And, while we're at it, it would also extend ATA liability to the gun manufacturers who paid for the decision in *Bruen*, which held that there is a constitutional right to carry guns in public (a decision that will lead to countless deaths and stands as a prime example of Robert Cover's famous assertion that "legal interpretation takes place in a field of pain and death.")<sup>115</sup> My proposal might end with a clarion call to restore democracy.

This last line is only partially tongue-in-cheek. Even if I do not know what "democracy" means, I use the word in a belief in its power as a claim or rhetorical call to action, a tool of persuasion, a demand, a form of advocacy that may be necessary to pursuing specific political aims. I use it in the belief that rhetoric—far from being empty—is one of the most powerful political tools there is. (Everyone knows that, but "rhetoric" is itself one of those words that acts rhetorically, in dismissal of its own force.) I use the word "democracy" as a rubric for pointing to a vast array of disparate political goods, some concrete, some abstract, some realistically achievable, some less so, some ultimately beneficial, some with disastrously unintended consequences (the risk of all political action). So it does not really matter whether we know what "democracy" means. Most of us (with certain notable exceptions) use the word in good faith: as a political topos, an imaginary site, a place for envisioning the good.

I know that we live in subjection to the internet, which mesmerizes us, magnifying our fears, desires, and pleasures. I know that in our world of streaming media, videos and algorithms are servants of capital, and that capital uses them indiscriminately for its own increase (on orders of magnitude so large as to boggle the mind), without caring whether they spread truth or lies, heal or kill. I know that we live not in a democracy but a media plutocracy, for the masters of capital turned the right to freedom of expression into a vehicle of domination (in ways that would have shocked the founders). I know all this. And yet, even as the images on my screen mock me by caricaturing what they insist are my own desires ("Naked Energy!" "Ocean Views!" "Toyota Mirai Empower Station!"), I also love the media theatre in which we live. By turns enchanted, horrified, amused,

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115. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 71. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

and appalled by that never-ending audiovisual stream, I am by nature pro-theatrical and somehow inclined to say, “let a thousand videos bloom in the sunshine of the algorithm.” And anyway we probably have no choice. Like it or not, in our world, both videos and algorithms are essential political tools, sometimes for ill, but sometimes for good. Darnella Frazier’s video of the murder of George Floyd went viral via algorithms, which set off a mass movement for racial justice, bringing somewhere between fifteen and twenty-five million people into the streets in protest—galvanizing a dispersed demos, transforming it into a transnational performing polis, if only for a moment. Then we could say, with the Seattle protestors: “This is what democracy looks like.”<sup>116</sup>

So what is law to do about social media and the algorithm? I know that it is sometimes hard for anyone—let alone an algorithm—to distinguish good from evil. And of course, law is indeterminate (as we all used to say with tedious frequency). That means that Clarence Thomas and I both want freedom of speech with greater media accountability, and that his interpretation of the ATA and § 230 might look scarily like mine, though for opposite reasons. I also know that I will not decide the next such case (unless something very surprising happens): he will. Or someone like him. The easy answer to the question, “what is law to do?” would be the critical one. There is no escape from the capitalist algorithm, whose empire marches forward like a Pacman, with a cheerful appetite for eating everything in its path. Law has always been hand-in-glove with capital: why should it be any different now? But that is too easy or too cynical or perhaps just too lazy. Law with a *capital* L may be the servant of capital (no pun intended), but not all laws are, not always. Freedom of speech is defined by its limits, just as democracy is defined by its limits: those it includes and those it excludes. New cases will, I hope, offer an opportunity for resetting those limits: an opportunity for looking at capital run amok, for transforming the regime of profit-maximizing videos and algorithms into something that looks a bit more, if only ever-so-faintly, like democracy — like our utopian visions of the performing polis and the dispersed demos instead of their dystopian others.

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116. Central slogan of the Seattle protests against the WTO Summit in 1999.