

SOCIAL MEDIA AS CURATORS OF SPEECH: THE NEW STATE OF FREE SPEECH

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Social media companies now control unprecedented amounts of speech online. As their influence grows, social media companies' control over speech begins to resemble that of a State. This places new pressures on conceptions of democratic free speech which have traditionally focused on threats posed to free speech by the State. This article demonstrates that private curation of speech online destabilises the minimalist conception of democratic free speech such that it ultimately collapses into incoherency in the social media age. The reflective conception of free speech, in contrast, is able to adapt to the new risks to free speech and democracy posed by private curation on social media. Consequently, a reflective conception of democratic free speech is a more suitable conception on which to base future policy development regarding speech on social media.

I INTRODUCTION

Social media companies now control unprecedented amounts of speech online through content moderation. Such extensive private curation of speech poses new risks to free speech and democracy as social media companies decide which voices are amplified and which are silenced online. Social media companies' increasing role as gatekeepers of speech places new pressures on conceptions of democratic free speech that have typically focused on threats to free speech posed by States, rather than private companies.

This article demonstrates that a minimalist conception of democratic free speech, which has typically focused on threats to free speech posed by States, is no longer equipped to respond to the threats posed by private curation of speech by social media companies. Indeed, the minimalist conception collapses into incoherency in this new social media paradigm. In contrast, this article contends that a reflective conception of democratic free speech is much better equipped to respond to the new threats to free speech and democracy posed by private curation by social media companies. This has important ramifications for policy

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decision-making regarding speech on social media which ought to be informed by a reflective, rather than minimalist, conception of democratic free speech.

This article proceeds in three parts. Part II begins with a discussion of the meaning, scope and novelty of the phenomenon of private curation of speech online by social media companies. This Part argues that, for practical reasons, curation of content on social media platforms must largely be left to the social media companies who administer those platforms. An examination of the so-called network effect, and the significant control over speech that this effect enables for social media companies, is also undertaken in this Part. Part III briefly summarises each of the minimalist and reflective conceptions of democratic free speech to which the phenomenon of private curation is to be applied. It outlines the underlying democratic models and commitments from which each conception's free speech tendencies are derived. A picture emerges of two novel but intuitively recognisable conceptions of democratic free speech. In Part IV, the phenomenon of private curation on social media is applied to the minimalist and reflective conceptions outlined in Part III to draw out internal tensions within the conceptions and the different capacities of each conception to respond to these tensions. It is argued that extensive private curation of speech by social media companies generates concerns and risks for democratic free speech under each of the minimalist and reflective conceptions. It will become clear that, unlike for the reflective conception, the minimalist conception cannot coherently respond to these concerns and the tensions they generate within its rationales. The reflective conception, in contrast, emerges as equipped with the internal resources required to coherently adapt and respond to these novel concerns.

II PRIVATE CURATION ON SOCIAL MEDIA

A The Phenomenon of Private Curation on Social Media

In this article, private curation is taken to be a type of private restraint of speech, being the restraint of speech by non-State actors, rather than the State. In the context of social media, private restraint of speech may be carried out by social media companies, such as Meta and TikTok. The term private curation is used to refer to the processes that these social media companies use to determine what content they host, what content they take down or promote and which users they exclude.¹ Examples of these processes include the implementation of 'terms or conditions of service ... content guidelines ... and moderation policies',² such

1 For a detailed discussion of the development, nature, enforcement and modifications of processes used by social media companies to curate speech, see Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131(6) *Harvard Law Review* 1598, 1630–58 ('The New Governors').

2 Terry Flew, Fiona Martin and Nicolas Suzor, 'Internet Regulation as Media Policy: Rethinking the Question of Digital Communication Platform Governance' (2019) 10(1) *International Journal of Digital Television* 33, 40 <https://doi.org/10.1386/jdmp.10.1.33_1>. See also *ibid* 1599.

as Facebook and Instagram's 'Community Standards'³ and 'Oversight Board',⁴ X's 'Rules and Policies',⁵ and TikTok's 'Community Guidelines'.⁶

In some cases, social media companies adopt these processes for various reasons where they are not expressly required by the State.⁷ These reasons ostensibly include the promotion of positive user experiences,⁸ platform legitimacy and oversight,⁹ the need to respond to public backlash against arbitrary decision-making regarding moderation,¹⁰ and a commitment to 'corporate social responsibility',¹¹ as part of broader economic concerns of the companies.¹² However, it has also been speculated that reasons for the implementation of such processes include social media companies' desire to protect speech from censorship by the State,¹³ and to forestall future regulation by the State.¹⁴

In other cases, these processes are implemented at the express behest of the State, whether as a result of overt political pressure or regulatory measures.¹⁵ For

3 'Community Standards', *Meta* (Web Page) <<https://transparency.meta.com/en-gb/policies/community-standards/>>.

4 *Oversight Board* (Web Page) <oversightboard.com>.

5 'Rules and Policies', *X Help Center* (Web Page) <<https://help.x.com/en/rules-and-policies>>.

6 'Community Guidelines', *TikTok* (Web Page, 14 August 2025) <<https://www.tiktok.com/safety/en/policies-and-engagement/overview>> ('TikTok Community Guidelines').

7 The boundary is often blurred between whether these processes are implemented voluntarily or at the behest of the State, as described by Hannah Bloch-Wehba in the context of measures by social media companies in Europe: Hannah Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72(1) *SMU Law Review* 27, 50.

8 Klonick, 'The New Governors' (n 1) 1615; Danielle Keats Citron and Helen Norton, 'Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age' (2011) 91(4) *Boston University Law Review* 1434. See also 'Community Standards' (n 3); 'TikTok Community Guidelines' (n 6).

9 Kate Klonick, 'Inside the Making of Facebook's Supreme Court', *The New Yorker* (online, 12 February 2021) <<https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court>> ('Facebook's Supreme Court'); Evelyn Douek, 'Content Moderation as Systems Thinking' (2022) 136(2) *Harvard Law Review* 526, 553 ('Content Moderation').

10 Klonick, 'Facebook's Supreme Court' (n 9).

11 Citron and Norton (n 8) 1455. See also Klonick, 'The New Governors' (n 1) 1625–6.

12 Klonick, 'The New Governors' (n 1) 1615, 1627–30; Citron and Norton (n 8) 1454. For example, X's lack of content moderation is claimed to have caused several exoduses of users and advertisers from the platform: Umair Haque, 'The Reason Twitter's Losing Active Users', *Harvard Business Review* (online, 13 February 2016) <<https://hbr.org/2016/02/the-reason-twitters-losing-active-users>>; Aisha Counts and Earl Nakano, 'Harmful Content Has Surged on Twitter, Keeping Advertisers Away', *Time* (online, 19 July 2023) <<https://time.com/6295711/twitters-hate-content-advertisers/>>.

13 Klonick, 'The New Governors' (n 1) 1622.

14 See, eg, *ibid* 1615; Bloch-Wehba (n 7) 47–8 describing threats of State action in Europe; Douek, 'Content Moderation' (n 9) 553. This pressure is also reflected in calls in the press and academia for social media to 'self-regulate' to avoid State regulation: see, eg, Michael A Cusumano, Annabelle Gawer and David B Yoffie, 'Social Media Companies Should Self-Regulate. Now.', *Harvard Business Review* (online, 16 January 2021) <<https://hbr.org/2021/01/social-media-companies-should-self-regulate-now>>; Martha Minow and Newton Minow, 'Social Media Companies Should Pursue Serious Self-Supervision – Soon: Response to Professors Douek and Kadri' (2023) 136(8) *Harvard Law Review Forum* 428. For a discussion on anticipation of regulation as a motivating factor for self-regulation more broadly, see Richard L Abel, *American Lawyers* (Oxford University Press, 1989) 142–57.

15 Bloch-Wehba (n 7) 28–30; Rebecca MacKinnon, Andi Wilson and Liz Woolery, Open Technology Institute, *Internet Freedom at a Crossroads: Recommendations for the 45th President's Internet Freedom Agenda* (Report, December 2016) <https://na-production.s3.amazonaws.com/documents/Internet_Freedom_Agenda_12_21.pdf>.

example, in Australia, the *Online Safety Act 2021* (Cth) ('*Online Safety Act*') imposes obligations on social media companies to take 'reasonable steps' to ensure user safety and minimise harmful content, such as cyber-abuse, on their platforms.¹⁶ The Act's eSafety Commissioner has the power to issue a removal notice regarding harmful content with which social media companies must comply within 24 hours of receipt.¹⁷ In Germany, the *Netzwerkdurchsetzungsgesetz* [Network Enforcement Act] requires social media companies to monitor, report and remove, within 24 hours,¹⁸ content that is illegal under German law,¹⁹ including hateful, defamatory, extremist, and violent content.²⁰ Additionally, in the United Kingdom, the *Online Safety Act 2023* (UK) imposes several duties on social media companies to 'identify, mitigate and manage the risks of harm ... from (i) illegal content and activity'²¹ to ensure greater 'transparency', 'accountability' and the 'protection' and safety of social media users, particularly children.²²

Regardless of whether these processes are adopted at the behest of the State or not, they are predominantly implemented and policed by the social media companies themselves.²³ This is because States tend to not have (or at least to have not, to date, invested in) the enormous resources required to monitor speech itself.²⁴ There are notable exceptions to this, whereby States such as China or Russia²⁵ have established what are essentially shadow content moderation²⁶ systems to enable more direct influence over moderation decisions on social media.²⁷ In such

16 *Online Safety Act 2021* (Cth) s 46 ('*Online Safety Act*').

17 Ibid div 3.

18 *Netzwerkdurchsetzungsgesetz* [Network Enforcement Act] (Germany) 1 September 2017, BGBl I, 2017, 3352, § 3(2)(2) ('*Network Enforcement Act*').

19 Ibid § 1(3).

20 Imara McMillan, 'Enforcement through the Network: The *Network Enforcement Act* and Article 10 of the *European Convention on Human Rights*' (2019) 20(1) *Chicago Journal of International Law* 252, 260–1.

21 *Online Safety Act 2023* (UK) s 1(2).

22 Ibid s 1(3).

23 Terry Flew, 'Convergent Media Policy' in Seamus Simpson, Manuel Puppis and Hilde Van den Bulck (eds), *European Media Policy for the Twenty-First Century: Assessing the Past, Setting Agendas for the Future* (Routledge, 2017) 219, 229 <<https://doi.org/10.4324/9781315719597-12>>; Bloch-Wehba (n 7); Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press, 2018) 197 <<https://doi.org/10.12987/9780300235029>>.

24 See, eg, regarding the United Kingdom, Lisa-Maria Neudert, 'Regulatory Capacity Capture: The United Kingdom's Online Safety Regime' (2023) 12(4) *Internet Policy Review* 1, 4–8.

25 Other countries that engage in moderation of content – although not to the same extent – include Belarus, Myanmar, India, Brazil, Turkey, Egypt and Vietnam. For a more detailed description of the technological frameworks employed in various countries, in addition to Russia and China, see David Bromell, *Regulating Free Speech in a Digital Age: Hate, Harm and the Limits of Censorship* (Springer, 2022) 33–4 <<https://doi.org/10.1007/978-3-030-95550-2>>.

26 Content moderation is 'the screening, evaluation, categorization, approval or removal/hiding of online content according to relevant communications and publishing policies. It seeks to support and enforce positive communications behaviour online, and to minimize aggression and anti-social behaviour. ... It also seeks to avoid the publication of illegal or harmful content': Flew, Martin and Suzor (n 2) 40.

27 See, eg, 'China: Freedom on the Net 2023 Country Report', *Freedom House* (Web Page) <<https://freedomhouse.org/country/china/freedom-net/2023>>; James Kynge and Sun Yu, 'China and Big Tech: Xi's Blueprint for a Digital Dictatorship', *Financial Times* (online, 7 September 2021) <<https://www.ft.com/content/9ef38be2-9b4d-49a4-a812-97ad6d70ea6f>>; Adam Satariano, Paul Mozur and Aaron Krolik, 'Russia Strengthens Its Internet Controls in Critical Year for Putin', *The New York*

instances, these States have created extensive technological frameworks to enable the moderation of content. Measures employed by States to restrict content include firewalls and internet blackouts, artificial intelligence ('AI') tools to detect and remove content, State-corporate partnerships with, or investment in, social media companies to influence moderation decisions, and the use of reverse censorship (being the flooding of newsfeeds with misleading information) to reduce the visibility of other content.²⁸

For the most part, however, social media companies themselves are better placed than States to monitor and moderate speech on their platforms. Social media companies have extensive global data centres, content-management systems, advanced AI algorithms, significant financial investment and revenue streams, global reach, and large content moderation teams to support and enable real-time, 24 hour monitoring, detection and moderation of content on their platforms.²⁹ In contrast to social media companies, States – even those with more advanced content moderation systems like China – tend to have limited technological infrastructure and storage capacities, basic AI capabilities, limited personnel and inadequate expertise and training, limited budgets and funding, and limited jurisdictional reach to support the monitoring and moderation of content online.³⁰ Regardless of the situation for States with advanced content moderation systems like China, for countries like Australia and the United Kingdom, the capacity of the State to actively moderate content, (typically restricted by a reluctance to invest in speech curation online rather than any lack of ability to develop such capacity), is even more limited.

In many respects, therefore, social media appears to have changed the traditional relationship between the State and private curators of speech, such as newspaper editors.³¹ For the reasons stated above, the traditional model of the State as censor or curator of speech no longer functions (or not at least without enormous investment) in the face of vast quantities of speech on social media.

Times (online, 15 March 2024) <<https://www.nytimes.com/2024/03/15/technology/russia-internet-censors-vladimir-putin.html>>; 'Russia: Freedom on the Net 2023 Country Report', *Freedom House* (Web Page) <<https://freedomhouse.org/country/russia/freedom-net/2023>>. See generally Bromell (n 25) 33–4.

28 Bromell (n 25) 33–4.

29 Wouter Wolfs and Jan Jaap Veldhuis, 'Regulating Social Media through Self-Regulation: A Process-Tracing Case Study of the European Commission and Facebook' (2023) 5(1) *Political Research Exchange* 2182696 <<https://doi.org/10.1080/2474736X.2023.2182696>>.

30 For a prescient analysis of the challenges for States in regulating the internet generally, see James Boyle, 'A Nondelegation Doctrine for the Digital Age' (2000) 50(1) *Duke Law Journal* 5, 10 <<https://doi.org/10.2307/1373112>>. See also Molly K Land, 'Against Privatized Censorship: Proposals for Responsible Delegation' (2020) 60(2) *Virginia Journal of International Law* 363, 374 <<https://doi.org/10.2139/ssrn.3442184>>.

31 Flew (n 23) 227; Klonick, 'The New Governors' (n 1). For an analysis of the impacts of technological change on the workings of States more broadly, see Christopher Hood, 'The Tools of Government in the Information Age' in Robert E Goodin, Michael Moran and Martin Rein (eds), *The Oxford Handbook of Public Policy* (Oxford University Press, 2008) 469 <<https://doi.org/10.1093/oxfordhb/9780199548453.003.0022>>.

Where the curation of speech was once largely State-controlled, such control is now frequently left to social media companies.³²

It is important to note that it is not entirely novel for the State to leave the curation of speech to non-State actors:³³ broadcasters and publishers of traditional mass media, such as the press and news, have exercised curatorial control over much speech. However, the State is better equipped to enforce laws restricting speech on traditional mass media than on social media.³⁴ When it comes to social media, the State must rely on social media companies to curate online speech to an unprecedented extent, given the resource limitations of States outlined above.

The fact that the curation of speech on social media is now very largely performed by social media companies, rather than the State, is particularly salient for free speech, and different democratic justifications of free speech. The implications of this, particularly for the reflective conception of free speech, will be explored further in Part IV of this article.

B Private Curation and the Network Effect

A striking feature of social media which contributes to the significant control social media companies exert over speech is the network effect. The network effect is the phenomenon whereby the value of a good or service to its users increases with the number of users of that good or service.³⁵ In the case of social media,³⁶ because its principal use is to facilitate interactions with other users, the more users there are, the more opportunities there are to interact with others, and the more valuable³⁷ that platform becomes to its users.³⁸

32 James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 2020) <<https://doi.org/10.12987/9780300252989>>; Flew, Martin and Suzor (n 2) 42; Flew (n 23) 227–8; Bloch-Wehba (n 7) 30–2; Klonick, ‘The New Governors’ (n 1).

33 Bloch-Wehba (n 7) 40. Indeed, Jody Freeman and Martha Minow argue that, at least in the United States (‘US’), there has been a general trend towards the ‘outsourcing’ of many government functions to non-State actors, in Jody Freeman and Martha Minow, ‘Introduction: Reframing the Outsourcing Debates’ in Jody Freeman and Martha Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 1 <<https://doi.org/10.4159/9780674273726>>.

34 Flew, Martin and Suzor (n 2) 42.

35 The network effect is often described as *network externalities* or *positive consumption externalities*. For a classic description of the phenomenon, see Michael L Katz and Carl Shapiro, ‘Network Externalities, Competition, and Compatibility’ (1985) 75(3) *American Economic Review* 424, 424.

36 It is noted that ‘[i]n thinking about network effects, it helps to remember that they are not a new phenomenon, limited to high-tech industries ... network effects are nearly ubiquitous’: William J Kolasky, ‘Network Effects: A Contrarian View’ (1999) 7(3) *George Mason Law Review* 577, 585.

37 Conversely, social media platforms have little value to most users unless they first reach a critical mass of users. This is because if there are few users to communicate and interact with on a platform, communication on the platform is less engaging, and so less attractive to its users. Once a critical mass is achieved, however, the value of that platform to its users then tends to further increase as more users join the platform: Bin Wang, ‘Survival and Competition among Social Networking Websites: A Research Commentary on “Critical Mass and Willingness to Pay for Social Networks” by J Christopher Westland’ (2010) 9(1) *Electronic Commerce Research and Applications* 20, 20 <<https://doi.org/10.1016/j.elerap.2009.08.002>>; Spencer Weber Waller, ‘Antitrust and Social Networking’ (2012) 90(5) *North Carolina Law Review* 1771, 1776–9.

38 At some point, however, there may be a rough equilibrium point where the increase in value from increased users is counterbalanced by the burden on value caused by ‘congestion, clutter or other

When a very significant number of users are present on a platform, the platform becomes so valuable for users that it may be difficult for them to leave the platform.³⁹ In this way, the network effect on social media reinforces other characteristics of social media, such as the ‘lock-in’ effect (the perceived difficulty for users in switching to other platforms)⁴⁰ and the ‘stickiness’ of a platform (how engaging a platform is for users such that they continue to return to it).⁴¹ The network effect, and its enhancement of these characteristics, leads to a situation in which social media users tend to be highly concentrated on certain social media platforms and not on others.⁴²

This aspect of the network effect outlined here can be described as a direct effect on users (whereby the value of a good or service increases directly as a result of the number of users themselves).⁴³ However, the network effect can also be enhanced by indirect effects (whereby the value of a good or service increases with an increase of complementary goods or services).⁴⁴ In the context of social media, indirect effects are also evident, because the more users that join a social media platform, the more attractive that platform is to complementary service providers like advertisers and third-party apps. These providers are more likely to then invest further in these platforms. This increases the revenue of the platforms in question, and results in improvements in features and applications which, in turn, makes the platforms more attractive to their users.⁴⁵

The network effect, and related characteristics of social media, can lead to the emergence of something akin to natural monopolies.⁴⁶ In this article, the term *natural monopoly* is used in a notional sense to refer to the inherent qualities of an

diseconomies of scale’ associated with extremely large numbers of users: Kolasky (n 36) 587.

- 39 Described as ‘relational switching costs’ in Thomas A Burnham, Judy K Frels and Vijay Mahajan, ‘Consumer Switching Costs: A Typology, Antecedents, and Consequences’ (2003) 31(2) *Journal of the Academy of Marketing Science* 109, 112 <<https://doi.org/10.1177/009207030225089>>. See also Cory Doctorow, ‘Why It’s Easier to Move Country than Switch Social Media’, *Wired* (online, 12 April 2021) <<https://www.wired.com/story/social-media-competitive-compatibility/>>.
- 40 Spencer Weber Waller notes certain features that contribute to social media companies’ dominance, including platforms’ ‘stickiness’, being the difficulty in leaving the social media platforms once a member due to its compelling engagement features: Waller (n 37) 1789–90.
- 41 The *lock-in* effect describes social media platforms’ ‘market power over current users who are, or feel, locked-in to the system ... where the potential substitutes ... are in fact very poor substitutes’: *ibid* 1791.
- 42 WT.Social, Ello and Peach are examples of small social media companies that have not benefited from the network effect, and therefore do not exert significant control over speech to the same extent as more dominant social media platforms.
- 43 Katz and Shapiro (n 35) 424.
- 44 *Ibid*.
- 45 See generally *ibid*. See, in the context of social media, Emanuele Giovannetti and Mohsen Hamoudia, ‘The Interaction between Direct and Indirect Network Externalities in the Early Diffusion of Mobile Social Networking’ (2022) 12(4) *Eurasian Business Review* 617 <<https://doi.org/10.1007/s40821-022-00208-1>>; Kuan-Yu Lin and Hsi-Peng Lu, ‘Why People Use Social Networking Sites: An Empirical Study Integrating Network Externalities and Motivation Theory’ (2011) 27(3) *Computers in Human Behavior* 1152 <<https://doi.org/10.1016/j.chb.2010.12.009>>.
- 46 For a discussion of related characteristics that are alleged to contribute to the emergence of natural monopolies – being the lock-in effect, high barriers to entry for competing companies, and returns to scale – see Kolasky (n 36) 588, 591–4.

industry which tend to lead to the dominance of a single or few providers.⁴⁷ Where the network effect is present on certain platforms, this may lead to a situation in which these platforms become dominant.⁴⁸ This connection between the network effect and natural monopolies⁴⁹ (and monopolies more generally)⁵⁰ is commonly observed in academic⁵¹ and non-academic literature⁵² which describe social media companies as monopolies.⁵³

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- 47 This article's use of the term *natural monopoly* can be contrasted to the term's use in economics, whereby natural monopolies are defined as occurring in '[a]n industry in which multi-firm production is more costly than production by a monopoly': William J Baumol, 'On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry' (1977) 67(5) *American Economic Review* 809, 810. For more recent definitions of the term in economics, see Alfred E Kahn, *The Economics of Regulation: Principles and Institutions* (John Wiley & Sons, 1971) vol 2, 119–23; Richard A Posner, *Natural Monopoly and its Regulation* (Cato Institute, 1999) 1; Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* (Addison-Wesley, 4th ed, 2004) 104.
- 48 For a detailed discussion of the network effect in the context of monopolies, see Waller (n 37). See also Joel Klein and Preeta Bansal, 'International Antitrust Enforcement in the Computer Industry' (1996) 41(1) *Villanova Law Review* 173, 173; Wilko Bolt and David Humphrey, 'Public Good Issues in Target: Natural Monopoly, Scale Economies, Network Effects and Cost Allocation' (Working Paper No 505, European Central Bank, July 2005) 7 <<https://www.ecb.europa.eu/pub/pdf/scpwpws/ecbwp505.pdf>>; Cf Kolasky (n 36) 578.
- 49 See, eg, Francesco Ducci, *Natural Monopolies in Digital Platform Markets* (Cambridge University Press, 2020) 4 <<https://doi.org/10.1017/9781108867528>>; Daniel McIntosh, 'We Need to Talk about Data: How Digital Monopolies Arise and Why They Have Power and Influence' (2019) 23(2) *Journal of Technology Law and Policy* 185; Seth G Benzell and Feliz Chang, 'Facebook, Welfare, and Natural Monopoly: A Quantitative Analysis of Antitrust Remedies' (Research Paper, University of Cincinnati College of Law, 2022) 22.
- 50 Some commentators claim that social media companies have intentionally attempted to acquire monopoly power (although it is noted that this claim is not necessarily contradictory to a claim of intentional monopolisation – monopolies can be created both through intentional company strategy and natural industry advantages). See, eg, Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Vintage, 2011) ('*The Master Switch*').
- 51 For literature in the fields of law and public policy that refers to social media companies' monopoly power, see Wu, *The Master Switch* (n 50); McIntosh (n 49); Benzell and Chang (n 49) 12; Flew, Martin and Suzor (n 2) 34–5. For academic literature that makes this claim in the field of economics, see Ducci (n 49) 10–46; Harald Øverby and Jan Arild Audestad, *Introduction to Digital Economics* (Springer, 2nd ed, 2021) ch 13 <<https://doi.org/10.1007/978-3-030-78237-5>>.
- 52 See, eg, Tim Wu, 'In the Grip of the New Monopolists', *Wall Street Journal* (online, 13 November 2010) <<https://www.wsj.com/articles/SB10001424052748704635704575604993311538482>>; Daniel Liss, 'Today's Real Story: The Facebook Monopoly', *TechCrunch* (online, 19 August 2021) <<https://techcrunch.com/2021/08/19/todays-real-story-the-facebook-monopoly/>>.
- 53 Some commentators claim that social media companies are *not* natural monopolies in the strict economic sense because it is not necessarily cheaper for one company to offer its services than multiple companies and most social media companies have competitors. See, eg, Øverby and Audestad (n 51) 195; Herbert Hovenkamp, 'Antitrust and Platform Monopoly' (2021) 130(8) *Yale Law Journal* 1952, 1969–70; Waller (n 37) 1774–5, 1972. However, whilst the fact that there may be several dominant social media companies may suggest more of an oligopoly than a monopoly, claims of monopoly are easier to sustain if each major social media company's dominance in a particular sub-category of communication is considered. For example, TikTok is a dominant platform for video-based content, Instagram for image-based content and X for political communication. On the various sub-categories of major social media platforms, see Amanda Lotz, "'Big Tech' Isn't One Big Monopoly: It's 5 Companies All in Different Businesses', *The Conversation* (online, 24 March 2018) <<https://theconversation.com/big-tech-isnt-one-big-monopoly-its-5-companies-all-in-different-businesses-92791>>. In any event, the concern of this article is not to defend the proposition that social media companies are natural monopolies in a strictly economic sense, but to

The idea that the network effect is associated with natural monopolies is not unique to social media.⁵⁴ Traditional mass media has been described as exhibiting something akin to network effects⁵⁵ and a similarity to natural monopolies.⁵⁶ However, the network effect is even more significant in the context of social media. The immense scope and global reach of the networks generated by social media, and hence the amount of speech social media companies host, outstrips the reach of traditional mass media. Most traditional mass media have daily engagement numbers in the millions,⁵⁷ rather than billions of daily users seen by some social media platforms.⁵⁸ Whilst few traditional mass media providers, like Japan's Yomiuri Shimbun and Asahi Shimbun newspapers, rival the networks of major social media companies in terms of sheer numbers, they do not have the global reach of these social media companies; their readership is generally confined to their geographical locations.⁵⁹

In summary, as a result of the network effect, most social media users tend to congregate on a few platforms that resemble natural monopolies.⁶⁰ As a result, these platforms host and control an extremely large volume of speech generated by their very large user base. This has significant implications for both the minimalist and reflective conceptions of free speech. In particular, this article is concerned with

contend that the network effect enables social media companies to exert significant control over speech which, in turn, generates concerns for free speech and democracy.

- 54 For a discussion of the role of network effects in the emergence of monopolistic tendencies in other industries, see Kolasky (n 36).
- 55 See, eg, Henry Wickham Steed, *The Press* (Penguin Books, 1938) 141–60; Elena Argentesi and Lapo Filistrucchi, 'Estimating Market Power in a Two-Sided Market: The Case of Newspapers' (2007) 22(7) *Journal of Applied Econometrics* 1247 <<https://doi.org/10.1002/jae.997>>; Jorge Ferrando et al, 'Intermarket Network Externalities and Competition: An Application to the Media Industry' (2008) 4(3) *International Journal of Economic Theory* 357 <<https://doi.org/10.1111/j.1742-7363.2008.00084.x>>. The network effect is also often described in the context of software programs: see Klein and Bansal (n 48) 173, 177.
- 56 Tim A Pilgrim, 'Newspapers as Natural Monopolies: Some Historical Considerations' (1992) 18(1–4) *Journalism History* 3, 3 <<https://doi.org/10.1080/00947679.1992.12066704>>; Humphrey McQueen, *Australia's Media Monopolies* (Widescope, 1977); Gerald W Johnson, 'The Monopoly of News', *The Atlantic* (online, September 1950) <<https://www.theatlantic.com/magazine/archive/1950/09/the-monopoly-of-news/639650/>>.
- 57 For example, '[i]n 2022, estimated total US daily newspaper circulation (print and digital combined) was 20.9 million for both weekday and Sunday, down 8% and 10% respectively from 2021': Pew Research Center, 'Newspapers Fact Sheet' (Fact Sheet, 10 November 2023) <<https://www.pewresearch.org/journalism/fact-sheet/newspapers/>>.
- 58 Naveen Kumar, 'Facebook Users Statistics (2026): Worldwide Data', *Demand Sage* (Web Page, 25 February 2026) <<https://www.demandsage.com/facebook-statistics/#:~:text=As%20of%202024%2C%20Facebook%20has,its%20monthly%20active%20user%20base.>>>.
- 59 Japan's major newspapers, Yomiuri Shimbun and Asahi Shimbun had a daily circulation of more than eight million and six million respectively in 2024, according to 'Top Ten Most Read Newspaper in World', *International Journal of Research* (Web Page, 22 March 2024) <[https://www.internationaljournalofresearch.org/2024/03/top-ten-most-read-newspaper-in-world.html#:~:text=The%20Yomiuri%20Shimbun%20\(Japan\)%3A,world's%20largest%20newspaper%20by%20circulation.>](https://www.internationaljournalofresearch.org/2024/03/top-ten-most-read-newspaper-in-world.html#:~:text=The%20Yomiuri%20Shimbun%20(Japan)%3A,world's%20largest%20newspaper%20by%20circulation.>)>.
- 60 For example, Facebook has more than three billion monthly active users, and YouTube, Instagram and WhatsApp have more than two billion monthly active users each: 'Most Popular Social Networks Worldwide as of October 2025, by Number of Monthly Active Users', *Statista* (Web Page, March 2026) <<https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>>.

the capacity of social media companies with control over large volumes of speech to effectively silence some speakers or exclude some ideas. These implications will be discussed further in Part IV of this article. To enable this discussion, the following Part III will briefly outline each of the minimalist and reflective conceptions of democratic free speech.

III CONCEPTIONS OF DEMOCRATIC FREE SPEECH

This article applies the issue of private curation of speech on social media to two different conceptions of democratic free speech, which it refers to as the *minimalist conception* and the *reflective conception*.⁶¹ These conceptions were developed as an original contribution to free speech scholarship as part of the author's doctoral dissertation.⁶² The conceptions are both familiar and novel to the free speech theorist. They are familiar because they resemble distinct and well-known traditions of free speech; the minimalist conception resembles free speech traditions that are more absolute (such as the United States' First Amendment tradition), whilst the reflective conception resembles free speech traditions that are more moderate (such as the European proportionality-based free speech tradition). However, the conceptions are also novel because of the detailed way in which they are derived from the free speech tendencies of six models of democracy in democratic theory.

Whilst much has been written in the media,⁶³ in academic publications,⁶⁴ and in the context of public policy⁶⁵ about the tensions between free speech, democracy

61 These conceptions are grounded in the democracy rationale for free speech (as opposed to alternative rationales such as the autonomy or truth rationales for free speech). The democracy rationale ultimately seeks to justify free speech based on the furtherance of democratic self-government. For an overview of the various rationales for free speech, including the democracy, suspicion of government, discovery of truth, self-fulfilment and autonomy rationales, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) 6–23 <<https://doi.org/10.1093/acprof:oso/9780199225811.002.0003>>.

62 Madeleine Hale, 'Free Speech, Democracy and Social Media' (PhD Thesis, Deakin University, 2025) (unpublished).

63 See, eg, Emily Bazelon, 'The Problem of Free Speech in an Age of Disinformation', *New York Times* (online, 13 October 2020) <<https://www.nytimes.com/2020/10/13/magazine/free-speech.html>>; Gilad Edelman, 'On Social Media, American-Style Free Speech Is Dead', *Wired* (online, 27 April 2021) <<https://www.wired.com/story/on-social-media-american-style-free-speech-is-dead/>>; Thomas B Edsall, 'Democracy is Weakening Right in Front of Us', *New York Times* (online, 17 February 2021) <<https://www.nytimes.com/2021/02/17/opinion/digital-revolution-democracy-fake-news.html>>.

64 See, eg, Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (Basic Books, 2012) 87; Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Speech, Privacy, and Reputation* (Harvard University Press, 2010); David E Pozen (ed), *The Perilous Public Square: Structural Threats to Free Expression Today* (Columbia University Press, 2020) 15 <<https://doi.org/10.7312/poze19712>>; W Lance Bennett and Steven Livingston, 'The Disinformation Order: Disruptive Communication and the Decline of Democratic Institutions' (2018) 33(2) *European Journal of Communication* 122 <<https://doi.org/10.1177/0267323118760317>>; Jack M Balkin, 'The First Amendment is an Information Policy' (2012) 41(1) *Hofstra Law Review* 2:1–30.

65 See, eg, Costica Dumbrava, 'Key Social Media Risks to Democracy: Risks from Surveillance, Personalisation, Disinformation, Moderation and Microtargeting' (In-Depth Analysis, European Parliament, 13 December 2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA\(2021\)698845](https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2021)698845)>.

and social media, little of this commentary is informed by a well-developed and sophisticated understanding of democracy. Overwhelmingly, conceptions of democracy used in these discussions are simplistic and based on unexamined assumptions about what constitutes a democracy. Consequently, the resultant analysis of issues relating to free speech and democracy in social media is, itself, often superficial and unsophisticated. Of the rare works that explore all three areas of scholarship in detail – ie, free speech theory, democratic theory and social media – most rely on only one or two models of democracy, rather than considering several models of democracy and their implications for free speech.⁶⁶ Accordingly, when examining issues at the intersection of all three areas of free speech, democracy and social media scholarship, a more detailed theoretical understanding of democracy, as it informs different conceptions of democratic free speech, is necessary.

This was the task undertaken in the author's doctoral thesis which developed these two conceptions of democratic free speech from six models of democracy selected from democratic theory. The derivation of these conceptions necessarily involves complex theoretical steps that exceed the scope of this article. A more comprehensive account of these conceptions, and how they have been derived from democratic theory, is provided in the doctoral thesis.⁶⁷ However, for the purposes of this article, these conceptions are briefly outlined here and in the remainder of this part.

As foreshadowed above, the minimalist and reflective conceptions are derived from the free speech implications of six models of democracy in democratic theory. These models have been selected for the interesting and distinct implications for free speech that they generate in the context of social media. These models are the representative, direct, pluralist, deliberative, libertarian and militant models of democracy.⁶⁸ Within some of these models, different accounts were also identified and described. In addition, certain underlying democratic commitments of each model and their accounts were also identified. These underlying democratic commitments relate to certain features, values, functional requirements and relationships which must operate successfully if each model is to function, according to its own requirements, as a genuine model of democracy.⁶⁹ Free speech

66 See, eg, Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press, 2017) <<https://doi.org/10.1515/9781400884711>> ('*#Republic*'); Lee C Bollinger and Geoffrey R Stone (eds), *Social Media, Freedom of Speech, and the Future of our Democracy* (Oxford University Press, 2022) <<https://doi.org/10.1093/oso/9780197621080.001.0001>>.

67 Hale (n 62).

68 There are numerous models of democracy, most of which are widely contested amongst scholars. This proliferation of terminology and varying degree of detail creates a challenge to any attempt to present a general and broadly encompassing account of models of democracy. A high level of detail can make it more difficult to meaningfully incorporate and apply this field of research in an effective way. Conversely the oversimplification may increase clarity but risks losing accuracy and nuance. For free speech analysis, it is thus necessary to describe these models and their accounts in a way that is sensitive to both concerns. For a discussion that captures the key themes of these models and accounts found in the literature and describes them at an appropriate level of detail to enable a meaningful analysis of the democratic rationale of free speech, see *ibid*.

69 There is, of course, extensive dispute about which democratic commitments are required for each model to be a genuine model of democracy. However, the commitments identified in this article present each

tendencies were then implied from these models, accounts and their underlying democratic commitments with regard to: (i) content-neutrality; (ii) understanding of free speech as a purely negative, or both negative and positive, liberty; and (iii) coverage of speech. From the identification of these free speech tendencies a pattern emerges whereby some models of democracy share certain free speech tendencies. These shared free speech tendencies give rise to two distinct conceptions of democratic free speech: the minimalist conception and the reflective conception. The following sections will provide a brief overview of these models of democracy, their underlying democratic commitments, and their resultant shared free speech implications from which the minimalist and reflective conceptions are derived.

A Models of Democracy

1 Representative Democracy

A representative model of democracy is characterised by a system in which political representatives make political decisions on behalf of their constituents.⁷⁰ One important issue often discussed in the literature on representative democracy is the relationship between constituents and their representatives.⁷¹ The *elite account*, *trustee account* and *delegate account* are used to describe different relationships between constituents and their representatives.⁷² Under the elite account, representatives are seen as better placed than constituents to discern their constituents' best interests, and thus political decision-making is almost entirely within the realm of the political representative.⁷³ Under the trustee account,⁷⁴

model and their accounts in a way that is consistent with recognisable treatments in the literature. These commitments also enable interesting contrasts between the models that are particularly salient for free speech analysis.

70 Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967) 221–2 <<https://doi.org/10.1525/9780520340503>>.

71 See, eg, Michael Saward, 'Representative and Direct Democracy' in Roland Axtmann (ed), *Understanding Democratic Politics: An Introduction* (Sage Publications, 2003) 52 <<https://doi.org/10.4135/9781446220962.n6>>; *ibid*; Robert M Alexander, *Representation and the Electoral College* (Oxford University Press, 2019) ch 2 <<https://doi.org/10.1093/oso/9780190939427.001.0001>>; Jane Mansbridge, 'Clarifying the Concept of Representation' (2011) 105(3) *American Political Science Review* 621 <<https://doi.org/10.1017/S0003055411000189>>; Andrew Rehfeld, 'The Concepts of Representation' (2011) 105(3) *American Political Science Review* 631 <<https://doi.org/10.1017/S0003055411000190>>; Donald J McCrone and James H Kuklinski, 'The Delegate Theory of Representation' (1979) 23(2) *American Journal of Political Science* 278 <<https://doi.org/10.2307/2111003>>.

72 For the delegate and trustee account distinction, see Dovi Suzanne, 'Political Representation', *The Stanford Encyclopedia of Philosophy* (Web Page, 29 August 2018) <<https://plato.stanford.edu/entries/political-representation/#DeIVsTru>>. For a discussion of the elite account, see Pitkin (n 70) 4–5.

73 Joseph Schumpeter provides a particularly useful vehicle for describing the constituent–representative relationship in its most elite form: Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2003). See also Adam Przeworski, 'Minimalist Conception of Democracy: A Defense' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Value* (Cambridge University Press, 1999) 21. For a criticism of Schumpeter's notion of representation, see Mónica Brito Vieira and David Runciman, *Representation* (Polity Press, 2008) 46.

74 This trustee account is informed by the work of statesman and philosopher Edmund Burke. See Edmund Burke, 'Speech to the Electors of Bristol' in Philip B Kurland and Ralph Lerner, *The Founders' Constitution* (University of Chicago Press, 1987) vol 1, ch 13, doc 7 ('Speech to the Electors'); Edmund

representatives ought to broadly take their constituents' views into account but they are not strictly bound by them;⁷⁵ rather they may use their own discretion to make political decisions where necessary,⁷⁶ because they are viewed as possessing superior skills and expertise,⁷⁷ 'mature judgment, and enlightened conscience',⁷⁸ and greater 'virtue and wisdom' than their constituents.⁷⁹ Under the delegate account, constituents' decisions must be dutifully followed and faithfully conveyed by their representatives, who are to act merely as constituents' 'mouthpiece';⁸⁰ representatives are viewed as having no better ability to discern their constituents' best interests than the constituents themselves.⁸¹

As discussed in greater detail elsewhere,⁸² each of these accounts of representative democracy entail an underlying democratic commitment to accountability; that is, a requirement that representatives be accountable to their constituents (through, for example, the ability to remove representatives from elected office via elections). Another important democratic commitment held by all three accounts of representative democracy is that constituents be informed about matters relevant to political decision-making. However, by reason of the different demands required of (and faith placed in) constituents and representatives under each account, the degree to which constituents must be informed varies accordingly. Under the elite account, constituents need only be informed to a narrow degree – namely, insofar as is required for constituents to assess the performance of their representatives for accountability purposes.⁸³ Under the trustee account,

Burke, *Reflections on the Revolution in France*, ed Frank M Turner (Yale University Press, 2003) ('*Reflections on the Revolution*'). The trustee account associated with Edmund Burke is considered to inform modern representation today, particularly in the United Kingdom. See Alexander (n 71) 28; David Judge, *Representation: Theory and Practice in Britain* (Taylor and Francis, 1998) 57–8. See also United Kingdom, *Parliamentary Debates*, House of Commons, 21 February 1994, vol 238, col 46 (Tony Blair): '[W]e are representatives, not delegates, and we must act according to our conscience'.

75 Pitkin (n 70) 127.

76 Burke, 'Speech to the Electors' (n 74): 'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.' See also Judge (n 74) 47; Axtmann (n 71) 53.

77 John Stuart Mill notes the benefits of constituents entrusting political decision-making into the hands of representatives who are 'wiser', 'more highly instructed', and have '[s]uperior powers of mind': John Stuart Mill, *Considerations on Representative Government* (Batch Books, 2001) 140–2 ('*Considerations*').

78 Burke, 'Speech to the Electors' (n 74).

79 Burke, *Reflections on the Revolution* (n 74) 31, 208.

80 Mill describes a form of representation in which representatives are a 'mere mouthpiece', although Mill's own views align more closely with the trustee model: Mill, *Considerations* (n 77) 139.

81 Indeed, the presence of representatives has typically been seen under this account as merely a mode of overcoming geographical barriers that prevent constituents from voting on all matters directly: James Madison, 'The Same Subject Continued: The Union as a Safeguard against Domestic Faction and Insurrection' in Michael A Genovese (ed), *The Federalist Papers* (Palgrave Macmillan, 2009) 50, 51. Whilst the advent of new technologies like the internet reduces these geographical barriers, the need for representatives to whom to delegate political decision-making remains 'as a matter of a division of labor' in 'a more advanced complex society': *ibid* 135.

82 Each of the elite, trustee and delegate accounts of representative democracy, and the ways in which their democratic commitments are extracted, are explored in much greater detail in Hale (n 62).

83 Andrew T Kenyon, *Democracy of Expression: Positive Free Speech and Law* (Cambridge University Press, 2021) 72 <<https://doi.org/10.1017/9781108645096>>.

because representatives do most of the political decision-making, constituents must only be informed insofar as is necessary to form educated preferences about laws and policies, so that these preferences may be available to representatives to take into account if they so wish.⁸⁴ Under the delegate account, which places great faith in constituents' decision-making abilities and requires greater constituent participation in the political decision-making process, constituents must be both well informed about political matters generally and develop civic competence to support their political decision making.⁸⁵

2 Direct Democracy

The direct model of democracy is characterised by a system in which political decisions are made by constituents themselves without the use of political representatives.⁸⁶ Under this model, the exercise of power over constituents is not viewed as justified or legitimate without direct constituent participation in political decision-making.⁸⁷ This model entails an underlying democratic commitment to direct participation of constituents in political decision making (for example, through voting on political decisions,⁸⁸ proposing new laws and policies,⁸⁹ or participating in political organising bodies such as citizens' assemblies).⁹⁰ This commitment is derived from the importance of self-governance and sovereignty of the people in this model,⁹¹ and an underlying belief that constituents are capable of rational political decision-making abilities.⁹² This model also necessarily entails

84 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 231 (McHugh J) ('ACT').

85 Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers, 1st ed, 1948) 88–89; *Whitney v California*, 274 US 357, 375–8 (1927) (Brandeis and Holmes JJ) ('Whitney'); George Washington, 'Newburgh Address: George Washington to Officers of the Army' (Speech, Head Quarters Newburgh, 15 March 1783); *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ). Civic competence is taken to refer to the skills, knowledge and values that support constituents' ability to engage meaningfully and actively in democratic life: David Held, *Models of Democracy* (Polity Press, 2nd ed, 2003); Robert A Dahl, 'The Problem of Civic Competence' (1992) 3(4) *Journal of Democracy* 45, 46 <<https://doi.org/10.1353/jod.1992.0048>> ('Civic Competence'). For further discussion of the meaning of civic competence (or 'political competence'), see Matthias Brinkmann, 'The Concept of Political Competence' (2018) 30(3–4) *Critical Review: A Journal of Politics and Society* 163 <<https://doi.org/10.1080/08913811.2018.1572974>>.

86 There is little consensus amongst academic literature on an exact definition of direct democracy: David Altman, *Citizenship and Contemporary Direct Democracy* (Cambridge University Press, 2018) 6 <<https://doi.org/10.1017/9781108634397>>. Despite this, a common theme in the literature on direct democracy is an emphasis on the direct involvement of constituents in political decision-making: John G Matsusaka, 'Direct Democracy Works' (2005) 19(2) *Journal of Economic Perspectives* 185, 187 <<https://doi.org/10.1257/0895330054048713>>. For a detailed discussion of defining aspects of direct democracy, see Altman (n 86) 7–18.

87 See Thomas E Cronin, *Direct Democracy: The Politics of Imitative, Referendum, and Recall* (Harvard University Press, 1989) 39 <<https://doi.org/10.4159/harvard.9780674330092>>, citing Jean Jacques Rousseau's arguments in favour of self-governance: 'the people, being subject to the laws, ought to be their authors ... every law that the people have not ratified directly is invalid'.

88 Altman (n 86) 7.

89 Ibid 7–18.

90 For a discussion of different types of direct democracy mechanisms generally, see *ibid*.

91 Held (n 85) 27.

92 See, eg, Cronin (n 87) 39–40.

an underlying democratic commitment to constituents being well-informed and civically competent to support the development of their political decision-making abilities and direct participation in democratic decision-making processes.⁹³

3 Pluralist Democracy

The pluralist model of democracy is characterised by a system of decentralised political decision-making in which political decisions are shaped by various interest groups that represent and lobby on behalf of the constituents whose interests they represent.⁹⁴ Interest groups are viewed as associations or groups that form on the basis of, and represent, various common concerns of constituents.⁹⁵ These interest groups are considered to offset the development of a single dominant ruling class of elites by ensuring ‘a variety of competing policy-formulating and decision-making centres’.⁹⁶ Two relevant accounts of pluralist democracy are the *classic* and *radical* accounts.

The classic account refers to the descriptive accounts of pluralism associated with the early literature of Robert Dahl and David Truman.⁹⁷ Advocates of this account view inequalities in lobbying power between interest groups as being unlikely to arise.⁹⁸ Thus, a democratic commitment of this account is that interest group formation and operation does not require – and ought to remain free from – State intervention. In addition, little emphasis is placed on the development of constituents being well-informed, civically competent or highly participatory under this account; with the exception of interest group leaders,⁹⁹ most constituents need only be informed insofar as is necessary to enable them to know about, join, and express preferences to, interest groups which represent their views.¹⁰⁰

The radical account refers to the normative accounts of pluralism associated with theorists like Chantal Mouffe, William E Connolly and Dahl in his later literature.¹⁰¹ Unlike under the classic account, proponents of the radical account

93 See, eg, *ibid*, 211; Matsusaka (n 86) 197–8; Shaun Bowler and Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (University of Michigan Press, 1998) 21 <<https://doi.org/10.3998/mpub.15428>>. There is a significant body of theoretical and empirical literature dedicated to the question of whether constituents are (or are capable of becoming) informed and civically competent. For an overview of the literature, see Bowler and Donovan (n 93) 21–42. For empirical support for the claim that direct democracy constituents are informed in the context of direct democracy, see Céline Colombo, ‘Justifications and Citizen Competence in Direct Democracy: A Multilevel Analysis’ (2018) 48(3) *British Journal of Political Science* 787 <<https://doi.org/10.1017/S0007123416000090>>.

94 Held (n 85) 160–1.

95 *Ibid*.

96 *Ibid*. See also David B Truman, *The Governmental Process: Political Interests and Public Opinion* (Knopf, 1951) 508.

97 See, eg, Robert A Dahl, *Who Governs? Democracy and Power in an American City* (Yale University Press, 1961) (‘*Who Governs?*’); Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press, 1971).

98 Held (n 85) 161–2.

99 *Ibid* 169.

100 Dahl, *Who Governs?* (n 97) 102, 163; *ibid* 162.

101 See, eg, Robert A Dahl, *On Democracy* (Yale University Press, 1998); Chantal Mouffe, *The Democratic Paradox* (2000, Verso); William E Connolly, *Pluralism* (Duke University Press, 2005) <<https://doi.org/10.1515/9780822387084>>.

view inequalities between interest groups as both possible and problematic.¹⁰² This account acknowledges that interest groups with significant resources (such as corporate interest groups) may be better-equipped to lobby political decision-makers to further their interests than interest groups that are *not* well-resourced (such as grassroots organisations).¹⁰³ As a result, this account implies a democratic commitment to equality and a permissiveness regarding State intervention where it is necessary to overcome such inequalities between interest groups or prevent the centralisation of power amongst a few large and powerful interest groups.¹⁰⁴ In addition, this account also entails a stronger democratic commitment to constituent participation in democratic decision-making than the classic account. This is because greater constituent participation is seen under the radical account as an important function in overcoming inequalities. For example, greater participation of constituents in underrepresented interest groups may bring with it better resourcing, influence and status to these groups and thus support more equality between interest groups.¹⁰⁵ As a consequence, the radical account also entails an underlying democratic commitment to constituents being both well-informed and civically competent to support the greater democratic participation required of them.¹⁰⁶

4 *Deliberative Democracy*

In the deliberative model of democracy, political decisions are to be made through a process of deliberation amongst constituents.¹⁰⁷ Advocates of deliberative democracy place significant emphasis on the involvement of constituents in political decision-making through deliberation,¹⁰⁸ whereby the preferences of constituents are refined, enhanced and transformed into a legitimate expression of political will.¹⁰⁹ This model therefore entails an underlying democratic commitment

102 For example, Peter Bachrach and Morton Baratz criticise classic pluralism as ignoring fundamental inequalities between interest groups: Peter Bachrach and Morton S Baratz 'Two Faces of Power' (1962) 56(4) *American Political Science Review* 947, 949 <<https://doi.org/10.2307/1952796>>.

103 Held (n 85) 171.

104 For example, in describing the radical pluralist account of democracy, Cunningham implies that intervention by the State may be permissible under the radical account when he says that '[c]onflict within democratic politics involves competition among the various groupings in a society to turn state power to their own ends, and a principal challenge for democracies is to permit this while preventing any group from occupying and hence destroying the space that makes changing and confined deployment of state power possible': Frank Cunningham, *Theories of Democracy: A Critical Introduction* (Routledge, 2002) 185.

105 Robert A Dahl, *On Political Equality* (Yale University Press, 2006) 8–11.

106 Dahl, 'Civic Competence' (n 85) 45, 49.

107 Theories of deliberative democracy are numerous and somewhat diverse: Held (n 85) 237. However, a general account is employed in this article to enable simplicity and clarity which loosely follows the general account of deliberative democracy provided by Held (n 85) 231–25 which encompasses the prominent and diverse theories of deliberative democracy of Jürgen Habermas, James Fishkin, Joshua Cohen, John Dryzek, Iris Marion Young, Amy Gutmann and Dennis F Thompson. For an overview of various accounts of deliberative democracy, see Held (n 85) 231–55.

108 Ibid 246.

109 Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1(1) *Constellations* 1, 1–2 <<https://doi.org/10.1111/j.1467-8675.1994.tb00001.x>>; Bernard Manin, 'On Legitimacy and Deliberation', tr Elly Stein and Jane Mansbridge (1987) 15(3) *Political Theory* 338, 351–2 <<https://doi.org/10.1177/0090591787015003005>>; Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Harvard University Press, 2009) ch 7 <<https://doi.org/10.4159/9780674271579>>.

to the importance of deliberation itself. Deliberative democracy also entails a commitment to its constituents being (and a belief in the capacity of constituents to become) highly informed¹¹⁰ and civically competent, as a result of the high degree of political participation required of constituents under this model.¹¹¹ Another important commitment of the deliberative model of democracy is the emphasis placed on equality in deliberation and political decision-making,¹¹² in both a formal¹¹³ and substantive sense.¹¹⁴

5 Libertarian Democracy

The libertarian model of democracy is characterised by a commitment to leaving certain domains of human activity largely free from intervention.¹¹⁵ In particular, the libertarian model demonstrates an underlying democratic commitment to freedom from State intervention in the domain of political activity which domain includes such activities as forming associations, acting in accordance with one's conscience, and speaking.¹¹⁶ Forming part of the rationale for this is an underlying democratic commitment to the importance of people being free to rule themselves and make their own democratic decisions, to be exposed to diverse ideas and views, and to develop civic courage.¹¹⁷ This notion also entails a presumption that diversity will

110 Held (n 85) 232, 252.

111 Thomas Ehrlich, *Civic Responsibility and Higher Education* (Oryx Press, 2000) xxvi; Martha L McCoy and Patrick L Scully, 'Deliberative Dialogue to Expand Civic Engagement: What Kind of Talk Does Democracy Need?' (2002) 91(2) *National Civic Review* 117, 118 <<https://doi.org/10.1002/ncr.91202>>, quoted in Tina Nabatchi, 'An Introduction to Deliberative Civic Engagement' in Tina Nabatchi et al (eds), *Democracy in Motion: Evaluating the Practice and Impact of Deliberative Civic Engagement* (Oxford University Press, 2012) 3, 7 <<https://doi.org/10.1093/acprof:oso/9780199899265.003.0001>>.

112 Cohen (n 109) 225, 232. See also Held (n 85) 238.

113 Constituents must be formally equal under this model of democracy in the sense that all laws and rules affecting constituents' participation in the political process apply to all constituents equally: Cohen (n 109) 232.

114 In the sense all constituents are afforded equal opportunities for political participation despite historical disadvantages and systemic inequalities: *ibid*; Edana Beauvais, 'Deliberation and Equality' in Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 144, 146 <<https://doi.org/10.1093/oxfordhb/9780198747369.013.32>>.

115 Held (n 85) 237; Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 2013) 308: '[E]veryone has various rights that may not be violated, various boundaries that may not be crossed without another's consent'; John Locke, *Two Treatises of Government* (York University, 1999) vol 5, 107, 114; FA Hayek, *Road to Serfdom: Text and Documents*, ed Bruce Caldwell (Routledge, 1st ed, 2008) 112: '[T]he discretion left to the executive organs wielding coercive power should be reduced as much as possible'; Milton Friedman, 'Capitalism and Freedom' in Ricardo Blaug and John Schwarzmantel (eds), *Democracy: A Reader* (Edinburgh University Press, 2nd ed, 2016) 344.

116 Regarding the importance of protecting speech in the political domain, see Hans Kelsen, 'On the Essence and Value of Democracy' in Arthur Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press, 2001) 84, 108. Regarding the importance of resisting state intervention into the political domain more generally, see Friedman (n 115) 344.

117 'To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger owing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion': *Whitney* (n 85) 377 (Brandeis and Holmes JJ). See also Hayek (n 115) 169; Charles Fried, 'The New First Amendment Jurisprudence: A Threat to Liberty' (1992) 59(1) *University of Chicago Law Review* 225, 233 <<https://doi.org/10.2307/1599937>>.

organically arise,¹¹⁸ and a presumption that the truth will emerge where there is a free flow of ideas and views in the marketplace.¹¹⁹

Whilst State intervention is resisted under this model, most advocates of libertarianism recognise that there is a State, and that it will therefore undertake some functions, and some of those functions may encroach on some of these domains of human activity into which the State is not normally permitted to encroach.¹²⁰ However, the aspiration for most advocates of libertarianism is for these State interventions to be minimal. This is sometimes framed in terms of ‘as minimal State intervention as is possible’, although what is ‘as minimal State intervention as is possible’ is a topic of lively discussion in the libertarian literature.¹²¹

Given State power is an obvious risk to the freedom of certain domains from intervention, the libertarian model – and, by extension for the purposes of this article, the minimalist conception – typically entails concerns about intervention in these domains by the *State*, as opposed to *non-State actors* or *social processes* (although intervention by non-State actors and social processes¹²² will be considered in further detail below).¹²³ The strand of the libertarian model – and by abstraction,

118 ‘However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas’: *Gertz v Robert Welch Inc*, 418 US 323, 339–40 (1974) (Powell J for the Court). See also *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J) (*‘Abrams’*).

119 ‘[W]ho ever knew Truth put to the worse, in a free and open encounter?’: John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (Floating Press, 2009). ‘[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market’: *Abrams* (n 118) 630 (Holmes J). ‘[T]ruth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them’: Thomas Jefferson, ‘A Bill for Establishing Religious Freedom, 18 June 1779’, *National Archives: Founders Online* (Web Page) <<https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>>. See also *ACT* (n 84) 114 (Brennan J).

120 See generally, Nozick (n 115); Hayek (n 115); Friedman (n 115).

121 Advocates of this model also often frame libertarian democracy in terms of protecting liberty and freedom, but this article does not concern itself with such questions of justification. The concern is an analytical account of what the model’s position is regarding domains of human activity that are to be free from State intervention. For examples of framings in terms of protecting liberty and minimal State intervention, see Nozick (n 115) 297, 333–4; Hayek (n 115) 124; Friedman (n 115) 344–9. For a radical account that involves the elimination of the state completely, see Murray N Rothbard, *For a New Liberty: The Libertarian Manifesto* (Ludwig von Mises Institute, 2006) 84: ‘The libertarian system would meet this problem by scrapping the entire notion of creating a government.’

122 Social processes in this article refer to patterns of behaviours, relationships or phenomena (as distinct from State and non-State actors) between groups or individuals such as echo chambers on social media.

123 In this article, the term *State* refers to institutions, organisations, and other public bodies (such as public regulatory agencies, public broadcasting corporations, public educational institutions and law enforcement agencies) and officials that represent, or operate on behalf of, a government (including the legislative, executive and judicial branches of government). This is distinct from *non-State actors* which are taken to refer to private entities, such as corporate groups, institutions, organisations and individuals that are independent from a government. Of course, the boundary between State and non-State actors can be blurred at times. For example, in the case of entities that have close ties to States, such as government-linked non-government organisations, paramilitary groups and international organisations with governments memberships: see Peter Wijninga et al, *Strategic Monitor 2014: Four Strategic Challenges* (Report, Hague Centre for Strategic Studies, 1 January 2014) ch 4.

the minimalist conception – that reflects this focus on risks posed to democracy by the State will be referred to in this article as the *State-focused strand*.¹²⁴

By contrast, some advocates are also concerned about the risks that non-State actors or social processes may pose to democracy.¹²⁵ These advocates are concerned with the outcomes for democracy (such as the ability of people to rule themselves), rather than merely the identity of the actors that might pose risks to democracy (for example, the State).¹²⁶ The strand of the minimalist conception – and by abstraction, the minimalist conception – that recognises non-state risks will be referred to in this article as the *non-State-contemplating strand*. The importance of this distinction between these two strands will become evident in Part IV of this article.

6 Militant Democracy

The militant model can be characterised by a concern that democracy is vulnerable to exploitation by anti-democratic political parties and civil society groups due to the political and social freedoms that are enjoyed in a flourishing democracy.¹²⁷ As a result of this concern, a focus of this model is on the exploitation of electoral and similar democratic mechanisms by internal political parties with anti-democratic ideologies (such as authoritarian or totalitarian ideologies)¹²⁸ to gain political power.¹²⁹ More recent concerns of some advocates of militant

124 For advocates of the libertarian model who focus predominantly on the State (rather than outcomes), see Rothbard (n 121); Nozick (n 115).

125 See, eg, Hayek (n 115) 96–7; John Stuart Mill, *On Liberty* (Floating Press, 2009) 10.

126 For more on the distinction between outcome-driven and solely State-driven concerns about democracy, see Thomas W Pogge, *Realizing Rawls* (Cornell University Press, 1989) 47 in which Thomas Pogge identifies as a strength of John Rawls' theory that the 'criterion of justice ranks basic primary structures on the basis of information about the overall pattern of social primary goods they tend to generate... His criterion of justice is ultimately concerned with the institutional freedom persons actually enjoy, and he evaluates the foreseeable distribution of such freedom without asking to what extent it is established or engendered by social institutions'. In later work, Pogge changes his mind on this and affirms that it *does* matter which actor engenders a certain outcome: Thomas Pogge, *World Poverty and Human Rights* (Polity Press, 2002) 168–95.

127 For a range of definitions of militant democracy, see Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (Taylor and Francis, 2015) 15 <<https://doi.org/10.4324/9781315767819>>; Anthoula Malkopoulou and Alexander S Kirshner (eds), *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press, 2019) 1 <<https://doi.org/10.1515/9781474445627>>; Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1253, 1254 <<https://doi.org/10.1093/oxfordhb/9780199578610.013.0062>> ('Militant Democracy'); András Sajó, 'Militant Democracy and Emotional Politics' (2012) 19(4) *Constellations* 562, 562. According to Tyulkina (n 127) 14, notions of militant democracy can be traced back to laws in ancient Athens and the French Constitution in 1884, as well as in the work of philosophers such as Plato, Louis de Saint-Just, Charles de Montesquieu and Karl Popper.

128 Of course, whilst the meaning of many of these notions is contested, these terms are used in an intuitive sense as these contestations take us beyond the free speech focus of this article.

129 The classic case study of the erosion of democracy in Germany by the Nazi party during the Weimar Republic: see Müller, 'Militant Democracy' (n 127) 1257. Advocates of this model often refer to the following infamous quote by Joseph Goebbels in which he refers to the perceived vulnerability of democracy to anti-democratic overthrow in the wake of the Nazi party's ascent to power: '[I]t will always remain one of the best jokes of democracy that it provided its mortal enemies itself with the means

democracy include perceived threats to democracy¹³⁰ posed by populism¹³¹ and terrorism.¹³² Unlike the libertarian model described above, the militant model of democracy therefore permits, and indeed typically requires, State intervention into certain domains of human activity where required to protect democracy from exploitation.¹³³ It is therefore evident that a core underlying democratic commitment of this model is the preservation of democracy itself.

As a result of the underlying democratic commitments of the models and accounts of democracy identified above, certain free speech tendencies can then be implied from which the minimalist and reflective conceptions arise. These free speech tendencies relate to: (i) content-neutrality; (ii) understanding of free speech as a purely negative, or both negative and positive, liberty; and (iii) coverage of speech. The following section briefly outlines these shared free speech tendencies in the context of summarising each of the minimalist conception and reflective conception.

B Minimalist Conception

The minimalist conception is derived from the shared free speech implications of the elite and trustee accounts of the representative model, the classic account of the pluralist model, and the libertarian model of democracy, described above.

Each of these models, with a few exceptions, result in certain shared free speech tendencies towards: (i) *strong* content-neutrality; (ii) *narrow* coverage; and (iii) an understanding of free speech as a *purely negative*, and not positive, liberty. It is from these shared free speech tendencies that the minimalist conception emerges: a conception that is strongly content-neutral, narrow in coverage and negative in its understanding of free speech as a liberty. Each of these types of free speech tendencies, and how they are derived from these models, will be discussed in further detail below.

The minimalist conception is strongly content-neutral in that content-based restrictions are, at least *prima facie*, treated as suspect or generally to be avoided.¹³⁴

through which it was annihilated”: at 1253. More recent examples of concerns about extremist parties that have been associated with militant democracy can be found in Spain, France, Italy, Turkey and Israel where some political parties can be banned or disqualified: at 1264.

130 It is noted that the application of principles of militant democracy in these more recent cases is contentious. See, eg, *ibid* 1256; Cristóbal Rovira Kaltwasser, ‘Militant Democracy Versus Populism’ in Anthoula Malkopoulou and Alexander S Kirshner (eds), *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press, 2019) 72 <<https://doi.org/10.1515/9781474445627-007>>.

131 See Kaltwasser (n 130) 72–91 for a discussion of concerns from advocates of militant democracy about populist leaders (such as Donald Trump in the US and Viktor Orbán in Hungary).

132 See, eg, discussions in the context of militant democracy about anti-terrorism measures in Australia and Spain in Tyulkina (n 127) 124–60.

133 Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31(3) *American Political Science Review* 417, 432 <<https://doi.org/10.2307/1948164>>: ‘Democracies ... have to be stiffened and hardened when confronted by movements intent upon their destruction. Where fundamental rights are institutionalized, their temporary suspension is justified. ... every possible effort must be made to rescue [democracy], even at the risk and cost of violating fundamental principles.’

134 For example, in the US, content-based restrictions are ‘subject to strict or heightened scrutiny. ... In contrast, a content-neutral restriction is subject to intermediate scrutiny, a test much less severe than strict scrutiny’: Barendt (n 61) 51.

Content-based restrictions restrict speech on the basis of the content (the beliefs, ideas or views) that the speech conveys.¹³⁵ Content-based restrictions may take different forms. According to Eric Barendt, ‘the most clear case’ of content-based restriction are restrictions which restrict ‘a particular view or idea or the provision of particular information’.¹³⁶ Content-neutral restrictions, by contrast, do not restrict speech on the basis of its content.¹³⁷ These restrictions are *prima facie* neutral as to the content of the communication, and instead restrict communication on the basis of some other feature. Time, place and manner restrictions are common types of content-neutral restrictions that restrict communication on the basis of when, where and how it is conveyed.¹³⁸ For the purposes of this article, strong content-neutrality might manifest in constitutional provisions, such as the First Amendment of the *United States Constitution*, or more generally in political culture amongst, for example, lawmakers and the judiciary. This article notes that, whilst the distinction between content-neutral restrictions and content-based restrictions typically arises in the context of United States First Amendment jurisprudence, the distinction is loosely mirrored in other jurisdictions, albeit with different terminology.¹³⁹ For example, in an Australian context, Adrienne Stone states that ‘the High Court of Australia has adopted a distinction between a “direct” and “incidental” burden on freedom of expression that appears at least partially to track the distinction between content-based and content-neutral laws’.¹⁴⁰

The minimalist conception’s tendency towards strong content-neutrality is derived from the democratic commitments of the models informing this conception.¹⁴¹ In particular, this tendency is derived from the importance placed by these models on freedom from intervention, and people’s ability in a democracy to rule themselves, be exposed to diverse information, and develop civic courage. These democratic commitments entail a presumption that diverse ideas will arise organically in environments where ideas and views are free from restraint. A strongly content-neutral conception of free speech supports these commitments because it protects speech from restraint on the basis of beliefs, ideas and views contained therein. Under this strongly content-neutral conception, hateful, extreme, offensive and false speech would be protected (with the exception of speech inciting violence).¹⁴²

135 Geoffrey R Stone, ‘Content Regulation and the First Amendment’ (1983) 25(2) *William and Mary Law Review* 189, 190 (‘Content Regulation’); Geoffrey R Stone, ‘Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions’ (1978) 46(1) *University of Chicago Law Review* 81 <<https://doi.org/10.2307/1599289>>.

136 Barendt (n 61) 51.

137 Geoffrey R Stone, ‘Content Regulation’ (n 135) 189.

138 Stephen Gardbaum, ‘The Structure of a Free Speech Right’ in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 213, 229 <<https://doi.org/10.1093/oxfordhb/9780198827580.001.0001>>.

139 *Ibid* 213–33.

140 Adrienne Stone, ‘Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech’ (2017) 32(3) *Constitutional Commentary* 687, 687 n 2.

141 This derivation process is explored in much greater detail in Hale (n 62).

142 For a detailed discussion of the meaning of these terms and the rationale for their exclusion from restriction under the minimalist conception, see *ibid*.

Secondly, the minimalist conception is also narrow in its coverage of speech. In this article, coverage of speech refers to the question of what speech is relevant to free speech enquiry and thus amenable to protection (whilst not necessarily protected) by free speech principles.¹⁴³ In other words, coverage is a question of what speech will ‘implicate’,¹⁴⁴ or ‘justify an appeal to’, free speech principles.¹⁴⁵ Coverage is treated here as distinct from the notion of the protection of speech. That is, speech may be covered by free speech principles, but not guaranteed protection for various reasons.¹⁴⁶

The minimalist conception entails a narrow coverage of speech as a result of the underlying democratic commitments of the models which inform it.¹⁴⁷ For example, the classic pluralist model’s underlying democratic commitment is to interest group formation and operation that is free from intervention by the State. To support this commitment from a free speech perspective, only narrow coverage is required for speech that supports preference communication and interest group formation and operation, such as speech within interest group meetings, interest group expression, leadership and lobbying. Unlike the direct and deliberative models, speech that is not strictly relevant to the formation and operation of interest groups (such as speech in the arts, sciences and literature, but also speech that is commercial) does not tend to require coverage under the classic account of the pluralist model. Compared to these models, there is not such a pressing need to create well-informed, civically competent constituents under this account of pluralism. In addition, the elite and trustee accounts of the representative model also tend towards narrow coverage. Under the elite account, only speech that is relevant to constituents’ assessment of their representatives tends to require coverage to ensure that representatives are kept accountable and constituents are narrowly informed, as described above. Under the trustee account, constituents also need to be informed insofar as is required for them to form some political preferences, should the representative require access to them. However, in both cases only coverage of political speech (and not a broader coverage of speech in the arts, philosophy, literature and science) is required.

Thirdly, the minimalist conception also entails a purely negative understanding of free speech as a liberty. Free speech, like other liberties, can be understood

143 Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 89–112 (*‘A Philosophical Enquiry’*).

144 Frederick Schauer, ‘What Is Speech? The Question of Coverage’ in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 159, 163 <<https://doi.org/10.1093/oxfordhb/9780198827580.013.10>> (*‘What is Speech?’*).

145 Schauer, *A Philosophical Enquiry* (n 143) 91.

146 For example, ‘when we say that certain acts, or a certain class of acts, are covered by a right, we are not necessarily saying that those acts will always be protected. We are saying only that these acts have a facial claim to be considered with reference to the reasons underlying the decision to put those acts within the coverage of a right’: *ibid* 90. See also Schauer, ‘What is Speech?’ (n 144) 169. For examples of limitations on protection, see Gardbaum (n 138) 227–8.

147 For a detailed discussion of these implications regarding coverage under the minimalist conception, see Hale (n 62).

as either a purely *negative* liberty, or as both a *negative* and *positive* liberty.¹⁴⁸ When understood to be a negative liberty, free speech operates as an ‘immunity’; it does not create any additional obligations on the State to take positive steps to actively *support* free speech.¹⁴⁹ Rather, a free speech regime in which free speech is understood to be a negative liberty protects free speech by virtue of prohibiting restraints¹⁵⁰ – in the form of laws, prohibitions and other State controls – on the communication, dissemination or circulation of speech.¹⁵¹ It is important to note that in practice, no free speech regime grants an *entirely* unlimited permission to speak. Even the most permissive of free speech regimes has restraints on speech where they are reasonably required to protect, for example, national security, public safety, personal reputations, confidential information and intellectual property.¹⁵² However, an understanding of free speech as a purely negative liberty rejects the notion that free speech also entails any additional positive elements. That is, free speech does not entail any positive additional obligations on the State, other institutions or private individuals, to actively protect or foster an environment in which people may speak freely or receive speech freely.¹⁵³

The tendency of the minimalist conception towards understanding free speech as a purely negative liberty is derived from the underlying democratic commitment of some of its models towards freedom from intervention.¹⁵⁴

For example, the libertarian model does not generate any rationale (let alone any demand) for an understanding of free speech as a positive liberty because,

148 Andrew T Kenyon, ‘Positive Free Speech: A Democratic Freedom’ in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 231 <<https://doi.org/10.1093/oxfordhb/9780198827580.013.14>> (‘Positive Free Speech’). For a foundational account of the difference between positive and negative liberty, see Isaiah Berlin, *Two Concepts of Liberty* (Oxford University Press, 1958). For a discussion of arguments regarding free speech as a negative liberty or as both a negative and positive liberty, see Barendt (n 61) 100–8; Gardbaum (n 138) 220–2. See also Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart, 2020).

149 Schauer, *A Philosophical Enquiry* (n 143) 113–14.

150 Ibid.

151 ‘[F]reedom of speech is best characterized as the absence of governmental interference’: *ibid* 129.

152 Even in the most permissive of free speech regimes, like that of the US, restrictions on speech may be permissible in exceptional cases where necessary for national security or public safety reasons through, for example, the doctrine of prior restraint and the ‘clear and present danger’ test. See, eg, *New York Times Co v United States*, 403 US 713, 730 (1971) (Stewart J). See generally Geoffrey R Stone, ‘Free Speech and National Security’ (2009) 84(3) *Indiana Law Journal* 939, 959. Beyond the US, such restrictions are more readily permissible. See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19, which states that restrictions on free speech may be permissible where ‘provided by law and are necessary ... [f]or the protection of national security or of public order, or of public health or morals’. In Australia, the High Court in *ACT* (n 84) adopted ‘a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest’: at 143 (Mason CJ). However, these exceptions have faced criticism by free speech advocates: see, eg, Danielle Ireland-Piper and Jonathan Crowe, ‘Whistleblowing, National Security and the Constitutional Freedom of Political Communication’ (2018) 46(3) *Federal Law Review* 341 <<https://doi.org/10.1177/0067205X1804600301>>.

153 Kenyon, ‘Positive Free Speech’ (n 148); Barendt (n 61) 101; Gardbaum (n 138) 221.

154 For a detailed discussion of these implications regarding coverage under the minimalist conception, see Hale (n 62).

under this model, speech is an activity that is to be free from State intervention.¹⁵⁵ Indeed, the libertarian model entails a '[general hostility] to laws mandating that television channels and radio stations devote a proportion of their airtime to public service programming, or include a range of opinions in their coverage of political issues,'¹⁵⁶ because these positive steps would represent an intervention of the State into a domain of human activity which is to be free from State intervention.¹⁵⁷ Similarly, the classic account of the pluralist model and the elite and trustee accounts of the representative model do not generate any rationale for an understanding of free speech as a positive liberty (and indeed, in the case of the classic account, entail a commitment to freedom from State intervention which would be contrary to a positive understanding of free speech).

Whilst novel in its description, this strongly content-neutral, narrow and purely negative minimalist conception of free speech can be broadly reflected in the work of libertarian scholars like Robert Nozick and Joseph Schumpeter who advocate for minimal state intervention with regard to speech.¹⁵⁸ At a governmental level, the conception is also reflected in more absolutist free speech traditions like that of the United States where content-based restrictions and State interventions into the domain of speech are strongly resisted.¹⁵⁹ More recently, the minimalist conception also finds reflection in the policies of social media platforms like X¹⁶⁰ and Parler¹⁶¹ which describe themselves as 'free speech' platforms with minimal censorship.

C Reflective Conception

The reflective conception is derived from the shared free speech tendencies of the delegate account of the representative model, the radical account of the pluralist model, the deliberative model, and the militant model of democracy, described briefly above. Each of these models, with a few exceptions, result in certain shared free speech tendencies. These models tend towards: (i) *weak* content-neutrality; (ii) *broad* coverage; and (iii) an understanding of free speech as *both* a negative and positive liberty. It is from these shared free speech tendencies that the reflective conception emerges: a conception that is weakly content-neutral, broad in coverage and both positive and negative in its understanding of free speech as a

155 Carl Fox and Joe Saunders (eds), *Media Ethics, Free Speech, and the Requirements of Democracy* (Routledge, 2019) 6. This libertarian commitment is reflected in American jurisprudence, where free speech is typically viewed as a purely negative liberty: see, eg, *Buckley v Valeo*, 424 US 1, 48–9 (1976).

156 See, eg, Fox and Saunders (n 155) 7.

157 Schauer, *A Philosophical Enquiry* (n 143) 155; *ibid* 7. A positive understanding may be required in a 'thick' account of libertarian democracy like that envisaged by Andrew Kenyon (but not considered here). '[I]f one wanted to argue for a libertarian democracy that was substantially legitimate in terms of public communication, the democracy... would need to support positive and negative dimensions of free speech': Kenyon, 'Positive Free Speech' (n 148) 73.

158 Nozick (n 115); Schumpeter (n 73).

159 Barendt (n 61) 51.

160 'Defending and Respecting the Rights of People Using Our Service', *X Help Center* (Web Page) <<https://help.x.com/en/rules-and-policies/defending-and-respecting-our-users-voice>>.

161 'What Is the Lack of Free Speech on Social Media Costing You?', *Parler* (online, 25 April 2025) <<https://www.parler.com/blog/what-is-the-lack-of-free-speech-on-social-media-costing-you>>.

liberty. Each of these free speech tendencies of the reflective conception, and their derivation from models of democracy, will be briefly explained below.

Firstly, as noted at the beginning of this section, the reflective conception tends towards weak content-neutrality. This article employs the term weak content-neutrality to signify that, in addition to a general commitment to content-neutrality, a degree of content-sensitivity is permitted, if not required, under a conception of democratic free speech; that is, that some content-based restrictions are permitted. As outlined above, content-based restrictions restrict speech on the basis of the content, that is the beliefs, ideas or views, that the speech conveys. The reflective conception tends towards weak content-neutrality because the democratic commitments of the models underlying the conception require the curation of certain sorts of speech.¹⁶² For example, speech that undermines democratic participation and deliberation may require content-based restrictions. Under the deliberative model, curation may be required of speech that has the potential to undermine deliberation and the reaching of a consensus, including false speech,¹⁶³ highly rhetorical or extremely polarised speech,¹⁶⁴ or speech that prevents the participation of some constituents (such as hate speech).¹⁶⁵ Under the militant model, content-based restrictions are permissible (and typically required) regarding anti-democratic or extremist speech,¹⁶⁶ and hate speech,¹⁶⁷ which is viewed under this

162 For a detailed discussion of the implications of each of the models for content-neutrality under the reflective conception, see Hale (n 62).

163 Andre Bächtiger et al, 'Deliberative Democracy: An Introduction' in Andre Bächtiger et al (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 1 <<https://doi.org/10.1093/oxfordhb/9780198747369.013.50>>; Simone Chambers, 'Truth, Deliberative Democracy, and the Virtues of Accuracy: Is Fake News Destroying the Public Sphere?' (2021) 69(1) *Political Studies* 147, 155 <<https://doi.org/10.1177/0032321719890811>>. In the German context in particular, see the *Holocaust Denial Case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 23/94, 13 April 1994 reported in (1994) 90 BVerfGE 241 where false statements about the Holocaust were not protected by free speech principles.

164 Cohen (n 109) 237–8.

165 Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 4 <<https://doi.org/10.4159/harvard.9780674065086>>.

166 Loewenstein (n 133) 429–30; Tyulkina (n 127) 92, 110, 148–9; Maciej Skrzypek, 'Between Neo-militant and Quasi-militant Democracy: Restrictions on Freedoms of Speech and the Press in Austria, Finland, and Sweden 2008–2019' (2022) 24(5) *European Politics and Society* 552, 553 <<https://doi.org/10.1080/23745118.2022.2063229>>; Claudia E Haupt, 'The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany' (2008) 20(2) *Florida Journal of International Law* 169; Müller, 'Militant Democracy' (n 127) 1258–9, 1267.

167 Viera Pejchal, *Hate Speech and Human Rights in Eastern Europe: Legislating for Divergent Values* (Routledge, 2020) 20 <<https://doi.org/10.4324/9781003005742>>. 'Hate speech regulation is one of the instruments of a militant democracy as it involves banning hate speech in order to protect other constitutional values and public goods.' See also Amos N Guiora and Kristine J Ingle, 'Militant or Bystander: How to Protect Democracy' (2018) 33(1) *Brigham Young University Journal of Public Law* 31, 42; Alexander S Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press, 2014). Writing in the context of hate speech, Kirshner states that '[t]aking democratic rights seriously means taking action when citizens violate others' core interests in participation': at 85. It is noted that some accounts of militant democracy consider that restrictions on hate speech do *not* fall within the model. See András Sajó, 'Militant Constitutionalism' in Anthoula Malkopoulou and Alexander S Kirshner, *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh University Press, 2019) 187, 202 <<https://doi.org/10.1515/9781474445627-003>>.

model as having the potential to undermine democracy itself.¹⁶⁸ Under the direct model, the delegate account of the representative model, and the radical account of the pluralist model, content-sensitivity is also required to support the cultivation of civic competence amongst constituents through the promotion of content that supports civic competence or the devaluing of content that detracts from it.¹⁶⁹

Secondly, the reflective conception is also broad in its coverage of speech. The conception tends towards broad coverage because the models underlying it are committed to ensuring its constituents are highly participatory, informed and civically competent (as described above under the delegate account, radical account and deliberative model).¹⁷⁰ This means that, unlike under the minimalist conception, coverage of more than merely political speech that supports interest group formation and voting preference communication is required. Rather, coverage under this conception extends beyond political speech to also include speech that promotes constituents being highly participatory, broadly informed and civically competent, such as speech in the arts, literature, and philosophy.¹⁷¹

Lastly, the reflective conception also entails an understanding of free speech as both a negative and positive liberty. This understanding is necessitated by the conception's underlying democratic commitments to equality, deliberation, civic competence and the preservation of democracy itself (described above under the delegate account, radical account, deliberative model and militant model).¹⁷² These commitments necessitate proactive involvement by the State regarding free speech. That is, the State is under a positive obligation to create space and equal opportunities that promote free speech, democratic participation and the preservation of democracy. Positive free speech mechanisms that the State may employ to promote these democratic commitments include the provision of civic education and public education,¹⁷³ social welfare programs,¹⁷⁴ public interest broadcasting and media literacy programs,¹⁷⁵ and the promotion of the study or

168 Erik Bleich, *The Freedom to Be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (Oxford University Press, 2011) 44–5, 47 <<https://doi.org/10.1093/acprof:oso/9780199739684.003.0003>>.

169 Robert A Dahl, 'What Political Institutions Does Large-Scale Democracy Require?' (2005) 120(2) *Political Science Quarterly* 187, 196 <<https://doi.org/10.1002/j.1538-165X.2005.tb00543.x>>.

170 For a detailed discussion of these implications regarding coverage under the reflective conception, see Hale (n 62).

171 See, eg, Katharine Gelber, 'Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory' (2010) 9(3) *Contemporary Political Theory* 304, 307 <<https://doi.org/10.1057/cpt.2009.8>> ('Freedom of Political Speech'): 'it is wrong not to include broader expressive conduct' such as 'scientific, educational, commercial or literary expressions'.

172 For a detailed discussion of the meaning of these terms and the rationale for their exclusion from restriction under the minimalist conception, see Hale (n 62).

173 Civic education and public education are considered to develop the critical thinking and reasoning skills and an understanding of public affairs and the democratic system required for civic competence: Kenyon, 'Positive Free Speech' (n 148) 107, 111; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper, 1960) 40–3, 86–7.

174 Beauvais (n 114) 147.

175 Thomas Gibbons, 'Providing a Platform for Speech: Possible Duties and Responsibilities' in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart, 2020) 16–18.

appreciation of the arts, philosophy, literature and science.¹⁷⁶ In a legal framework, the promotion of free speech to further these commitments may manifest as laws that promote equal rights of access to media platforms, laws that establish a public media broadcasting regime and laws that protect whistle-blowers.¹⁷⁷

The picture that emerges of the reflective conception – being a regime that is weakly content-neutral, broad in coverage and entails both a negative and positive understanding of liberty – is broadly reflected in the work of libertarian scholars like Cass Sunstein and Katharine Gelber who advocate for a balanced approach to speech on social media.¹⁷⁸ At a governmental level, it is also reflected in proportionality-based free speech traditions like protections provided under the European Convention on Human Rights.¹⁷⁹ A willingness to regulate social media that aligns with the reflective conception's permissiveness regarding state intervention can also be seen in Australia which has introduced legislation aimed at increasing governmental oversight of social media platforms and the removal of harmful content online and accounts held by under-16s.¹⁸⁰ Elements of the reflective conception, such as a willingness to limit hate speech and false speech, also find reflection in the policies of social media platforms like Pinterest and LinkedIn which undertake extensive content moderation to maintain online safety¹⁸¹ and standards of professionalism, respectively.¹⁸²

Part IV of this article now applies each of the minimalist and reflective conceptions to the phenomenon of private curation to examine the deeper implications of the phenomenon for democratic free speech.

IV IMPLICATIONS OF PRIVATE CURATION FOR DEMOCRATIC FREE SPEECH

From the discussion in Part III, it is clear that (i) the curation of speech online is largely left to social media companies, rather than the State and (ii) social media companies dominate curation over a large amount of speech online due to the presence of the network effect. This section will examine whether these aspects of private curation give rise to any concerns or tensions, or invite intervention, under either the minimalist or reflective conceptions of democratic free speech.

176 Fox and Saunders (n 155) 8.

177 Gibbons (n 175) 16–18.

178 See, eg, Sunstein, *#Republic* (n 66); Gelber, 'Freedom of Political Speech' (n 171).

179 For example, the *European Convention on Human Rights* does not extend free speech protection to those who would seek 'the destruction of any of the rights and freedoms' contained in it: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 17.

180 See *Online Safety Act* (n 16).

181 'Community Guidelines', *Pinterest* (online, December 2025) <<https://policy.pinterest.com/en/community-guidelines>>.

182 'We Want LinkedIn to Reflect the Best Version of Professional Life', *LinkedIn* (online, 2026) <<https://www.linkedin.com/legal/professional-community-policies>>.

A Private Curation Under the Minimalist Conception

As discussed in Part II, the minimalist conception of democratic free speech tends towards strong content-neutrality, narrow coverage and an understanding of free speech as a purely negative liberty. It is recalled that these tendencies are driven by an underlying democratic commitment to minimal intervention into the domain of speech. As discussed in Part II, this commitment is, itself, motivated by concerns that, in a democracy, people ought to be able to rule themselves (so as to be able to participate in a democracy), be exposed to diverse beliefs, ideas and views, and develop civic courage. As a result of these commitments, private curation raises tensions within the minimalist conception that will be explored in the following sections.

Over the course of the following paragraphs, it will become clear that both the State-focused and non-State-contemplating strands of the minimalist conception struggle to coherently respond to certain risks generated by the network effect on social media. It is recalled from Part III that the State-focused strand is concerned predominantly with risks posed to democracy by the State, whereas the non-State-contemplating strand is also concerned about the risks that non-State actors or social processes may pose to democracy. In the following analysis, an examination will first be made of the tensions that the network effect on social media generate within the State-focused strand of the minimalist conception. This will be followed by an examination of the tensions generated by the network effect within the non-State-contemplating strand of the minimalist conception. It will emerge that these strands of the minimalist conception either become self-defeating or depart from their own commitments, demonstrating the minimalist conception's incoherence in the face of various phenomena on social media.

It is recalled from Part III that the State-focused strand of the minimalist conception entailed a particular concern with the State. This focus on the State leaves private, non-State actors free to regulate their own activities, including determining what and whose speech they host (or do not host) on their platforms. Thus, the State-focused strand of the minimalist conception, in effect, permits the significant private curation of speech by social media companies, as exacerbated by the network effect.

In focusing on State-based threats to free speech, the minimalist conception overlooks the State-like effects that private curation can have on speech. Whilst the *mechanisms* employed by States to control speech differ from the mechanisms relied on by social media companies, the *consequences* of this significant control are substantively the same, and indeed, pose greater risks to free speech. The following section will now set out five ways in which both State and social media companies' control of speech pose similar risks for free speech.

First, unlike States, social media companies cannot control speech within entire national jurisdictions (not least because speech in a country can occur other than online).¹⁸³ Conversely, however, social media companies may control a degree of speech online across multiple national jurisdictions; they are not limited to a

183 Barendt (n 61) 152.

single jurisdiction. Depending then, on the size of a social media platform, the social media company may well be able to control large amounts of speech across many national jurisdictions. As a consequence, social media companies pose risks to speech that may, in fact, be greater than risks posed to speech by States whose control is confined to a single jurisdiction.

Second, due to the network effect, a few powerful social media companies control significant volumes of speech online with potentially devastating effects for free speech. Where major social media platforms are owned by a small number of social media companies, a person may be censored on all of those major social media platforms and thus be silenced from much of the public discourse online. Whilst it is true that a person may, in the alternative, post on smaller and less popular social media platforms (or indeed on a platform or website of their own creation), as a consequence of the network effect, their speech will not be heard by any sort of sizeable audience.¹⁸⁴ That is to say, speaking on a small platform of 100,000 users is not the same as speaking on a platform with more than 500 million users (such as X, which has clearly benefited from the network effect). Indeed, when the then former President Donald Trump was banned from all major social media platforms in the wake of the 2021 US Capitol attack,¹⁸⁵ Trump's influence on social media significantly decreased, despite his becoming active on smaller platforms such as Parler and Truth Social.¹⁸⁶ The ability of social media companies to ban users is not dissimilar to a State's ability to censor the speech of a person in a certain jurisdiction. Whilst a person who is subject to State censorship may still be able to speak through clandestine methods (such as pirate radio channels or anonymous leaflets) or indeed by moving to, and speaking from, a different jurisdiction, it is still much more difficult for that person to speak freely. Indeed, as individual social media companies become more powerful and control more speech their capacity to restrain or chill speech increases.¹⁸⁷ Thus, this is further evidence that the control of speech exercised by, on the one hand, States and, on the other, social media companies have comparable consequences.

Third, social media companies and States can restrict speech on certain topics, albeit through different mechanisms. A State may pass legislation preventing discussion of a particular topic, such as climate change. Whilst social media companies

184 Shiza Ali et al, 'Understanding the Effect of Deplatforming on Social Networks' (Conference Paper, ACM Web Science Conference, June 2021) 187 <<https://doi.org/10.1145/3447535.3462637>>.

185 James Clayton, 'A Year On, Has Trump Benefited from a Twitter Ban?', *BBC News* (online, 12 January 2022) <<https://www.bbc.com/news/technology-59948946>>.

186 'Mentions of Trump went down by 34 percent on Twitter and 23 percent on Facebook the week after he was banned from both platforms following the Capitol riot on January 6. Since then, Trump mentions have continued to decline around 90 percent on both platforms from where they were the week of the riots': Rani Molla and Shirin Ghaffary, 'Here's Just How Much People Have Stopped Talking about Trump on Facebook and Twitter', *Vox* (online, 6 May 2021) <<https://www.vox.com/recode/22421396/donald-trump-social-media-ban-facebook-twitter-decrease-drop-impact-youtube>>.

187 'The more a private censor occupies a monopoly position, the more likely it is that the effects on the amount of speech available will be greater': Schauer, *A Philosophical Enquiry* (n 143) 123. See also Barendt (n 61) 152: '[I]f the effect of private censorship is to make it impossible, or very difficult, for an author to communicate his views ... [as] may well be the case where the private censor holds a monopoly position, or is a member of a small oligopoly of press barons or media corporations'.

cannot legislate to prohibit discussions of certain topics in entire jurisdictions, they may restrict discussions of certain topics on their platforms. If those platforms are the only places where speech on those topics occurs (for example, where the topics are particularly niche), then the consequences are the same as a State restricting speech on a topic within a jurisdiction.¹⁸⁸ Where there are no other spaces in which to discuss that topic, a social media company's restriction of that topic on its platform acts as *de facto* topic-based regulation. This is effectively the same as a State's ability to prohibit certain discussions within a jurisdiction.

Fourth, although States and social media companies also have different sanctions available to them to control speech, the consequences of the imposition of the sanctions are substantively similar. Unlike the State, social media companies cannot employ fines, incarceration, and physical punishment as mechanisms of sanctioning speech. However, the sanctions available to social media companies – such as censoring speech and suspending or banning users – still have serious consequences for free speech and democracy, particularly as a result of the network effect. These *consequences* are similar to those of State speech curation because, like curation engaged in by the State, they restrict the dissemination of ideas, stifle debate and have a chilling effect on free speech.

Fifth, where social media companies have the capacity to exert significant control over speech, they are prone to the same sorts of deficiencies of States, in the exercise of that control, which threaten speech.¹⁸⁹ Like a State, social media companies are able to moderate vast quantities of speech with little oversight, transparency or accountability, and they are vulnerable to making arbitrary decisions and abusing power.¹⁹⁰ Indeed, the threats that social media companies pose to free speech are potentially *more* significant than those threatened by liberal democracies because, unlike democratic States, social media companies

188 Indeed, as a direct result of the network effect, people who wish to discuss the same topic will likely do so on a platform where other users who are interested in that topic congregate. In fact, this is a particular advantage of social media, that it brings together people that might normally be kept separate by geographical distances. As a result, social media enables the enhanced communication and dissemination of ideas and views that might normally remain in only small communities as a result of geographical distances.

189 The capacity of dominant non-State actors to exhibit the same weaknesses of the State with regard to speech is something contemplated by Schauer, who notes 'we may be more inclined to equate monopolies with governments, both in terms of responsibilities and in terms of many of the flaws in real governments that generate the argument from democracy': Schauer, *A Philosophical Enquiry* (n 143) 123.

190 The literature and commentary on the deficiencies of social media companies with regard to speech is vast. For some recent examples, see Lydia Khalil, 'X Marks the Spot Where Free Speech Comes at a Cost', *Lowy Institute* (online, 22 April 2024) <<https://www.lowyinstitute.org/publications/x-marks-spot-where-free-speech-comes-cost>>; Lee C Bollinger and Geoffrey R Stone (eds), *Social Media, Freedom of Speech, and the Future of our Democracy* (Oxford University Press, 2022) <<https://doi.org/10.1093/oso/9780197621080.001.0001>>. For conceptual analyses of the systemic structural deficiencies of social media companies, see: Klonick, 'The New Governors' (n 1) 1665–9; Gillespie (n 23) 178; Bloch-Wehba (n 7) 71–9; Bhanuraj Kashyap and Paul Ferosa, 'The Authority to Moderate: Social Media Moderation and Its Limits' (2023) 36(4) *Philosophy and Technology* 77.

are not subject to the same democratic accountability measures (such as democratic elections).¹⁹¹

For the reasons outlined above, the consequences of social media companies' control of speech as a result of the network effect are similar to, if not potentially more dire than, the consequences of State control over speech. Both States and certain social media companies have the capacity to threaten to intervene in the domain of speech through curation such that people's ability in a democracy to rule themselves, be exposed to diverse information, and develop civic courage, are undermined.

A possible objection is noted regarding the argument that private curation, under the influence of the network effect, poses threats to speech. Under this objection, it may be argued that the network effect does not threaten speech because it is self-correcting, in two respects. Firstly, the network effect might prevent social media companies from curating their platforms too heavily for fear that such curation might cause users to leave the platform. Thus, the network effect provides a disincentive against social media companies curating social media too heavily.¹⁹² Secondly, if social media companies do, in fact, curate their platforms heavily despite this disincentive effect, users may actually choose to leave the platforms.¹⁹³ This will make the platform less valuable to other users which may cause those users to also leave in a self-perpetuating cycle that results in a significant exodus of users from the platform.

However, this objection fails for several reasons. Firstly, the kind of user exodus from these platforms envisaged in the objection will be likely to occur only where there is very significant and widespread curation. This is because the stickiness and lock-in effects that keep users on social media platforms are difficult to overcome without compelling reasons, such as widespread curation. Secondly, a significant exodus will be likely to occur only if the ideas or speakers that are restrained are important to a majority of users on the platform. This leaves non-majoritarian interests unprotected by any self-regulating aspect to the network effect.¹⁹⁴

Thus, the self-correcting aspect to the network effect does not cure the concerns that have been identified. The remainder of this section will elaborate on the

191 There are, of course, other mechanisms, such as shareholder meetings or company constitutions, through which some non-State actors are held accountable. However, these mechanisms are not democratic in the traditional sense and are instead, motivated by profit maximisation, as discussed further below and in n 118.

192 Expressed differently, and in a broader context of the internet, the users 'set the rules' because they can seek out rules that are 'most to their liking [which] will therefore, to a significant extent, determine the contours of the "law of cyberspace"': David G Post, 'Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace' in Peter Ludlow (ed), *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press, 2001) 208.

193 For literature which discusses how, in the aftermath of bans from social media platform, users shift their social media activity to other platforms, see Amin Mekacher, Max Falkenberg and Andrea Baronchelli, 'The Systemic Impact of Deplatforming on Social Media' (2023) 2(11) *Proceedings of the National Academy of Sciences of the United States of America* 346 <<https://doi.org/10.1093/pnasnexus/pgad346>>; Ali et al (n 184) 187; Danny Klinenberg, 'Does Deplatforming Work? Unintended Consequences of Banning Far-Right Content Creators from Social Media' (Working Paper No 31, *Empirical Studies of Conflict*, October 2022) 16, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4019767>.

194 Klonick, 'The New Governors' (n 1) 1666.

significance of these concerns for the minimalist conception, and will show how they render incoherent both the State-focused and non-State-contemplating strands.

The consequences for free speech that follow from the network effect and private curation are inconsistent with the underlying commitments of the minimalist conception. This is because under the minimalist conception, even slight intrusions into the free speech environment threaten the conception's commitments to content-neutrality and minimal intervention, and thus the conception is threatened long before this network effect correction might occur. The domain of speech on social media, where curated by a few powerful social media companies, is not truly free from intervention and may be subject to content-sensitive restrictions by those social media companies. Such intervention would clearly undermine the minimalist conception's commitments to content-neutrality and minimal intervention into the domain of speech outlined in Part II.

It may seem that the State-focused strand of the minimalist conception is untroubled by private curation precisely because the instructions resulting from private curation are not intrusions by the *State*. However, a focus on differences in *mechanisms* of speech curation, rather than a focus on the *consequences* for speech curation is unhelpful and reduces the minimalist conception to mechanism fetishism. Of course, in a time when only the State had the mechanisms to produce these consequences for free speech this strand's focus was not mere mechanism fetishism. Now, however, this is no longer the case. As has been demonstrated above, these consequences for free speech are able to be brought about, not just by States, but also by social media companies. Social media companies are now able to generate the very consequences that motivated the minimalist commitments in the first place. Social media companies have the capacity to intervene in the domain of speech and undermine people's ability to rule themselves (necessary if they are to participate in a democracy), be exposed to diverse beliefs, ideas and views and to develop civic courage. Whilst the mechanisms of curation employed by States and social media companies may differ, the consequences for speech and democracy are now the same. Thus, this focus on mechanisms, at the expense of a focus on consequences of private curation, ignores the fundamental challenges that private curation by powerful social media companies pose to the free speech tendencies and democratic commitments of the minimalist conception. In this way, the State-focused strand of the minimalist conception collapses into incoherence: by failing to recognise the risks posed to speech and democracy by private curation, the State-focused strand creates a situation which the focus on the State was originally intended to protect against.

By contrast, the non-State-contemplating strand of the minimalist conception *is* concerned with the ability of social media companies, as non-State actors, to threaten speech online through private curation. However, it is not clear how the risks posed by private curation under this strand are to be made sense of without the conception either collapsing into incoherence or departing significantly from minimalist commitments. This is because there are only two responses available under this strand to respond to the risks posed by private curation, and neither of these is workable.

The first response available to address the concerns raised by private curation under the non-State-contemplating strand is to *not* intervene in social media companies' curation of speech. This is reflected in the more minimalist-aligned United States which has seen very little regulation to date regarding social media companies' control over speech due to strong content-neutral constitutional protections for free speech and concerns about intervention by the state into the free market.¹⁹⁵ This path of non-intervention is consistent with the minimalist conception's commitment to non-intervention into the domain of speech. However, this approach again renders this strand of the minimalist conception incoherent. Non-intervention creates a situation in which social media companies are permitted to continue to curate speech, despite the concerns this raises for minimal intervention into speech under this strand of the minimalist conception.

The alternative response available under the non-State-contemplating strand is to permit the State to regulate how social media companies curate speech and to encourage the protection of free speech online through positive mechanisms. However, this would be inconsistent with the minimalist conception's commitments to content-neutrality and minimal intervention into speech, as well as inconsistent with the conception's understanding of free speech as a negative liberty. Thus, this response would require some departure from these core commitments of the minimalist conception. It would also mean that the minimalist conception might begin to resemble a conception that is closer to the reflective conception discussed in the following section. Thus, either response available under the non-State-contemplating strand of the minimalist conception is incoherent, requiring either untenable inaction regarding private curation or an impermissible departure from minimalist commitments.

Therefore, under both the State-focused or non-State-contemplating strands, the minimalist conception becomes unworkable and incoherent in the face of the network effect on social media. Given this incoherence, it is appropriate to now examine whether or not the reflective conception is better suited to adapt to the risks posed to its commitments by private curation.

B Private Curation Under the Reflective Conception

The private curation of social media content by social media companies generates several concerns under the reflective conception. The non-democratic motivations behind the processes that social media companies use to curate speech threaten to undermine the underlying democratic commitments of the reflective conception. Social media companies are motivated by profit maximisation. These companies maximise profits primarily by encouraging high user engagement which, in turn, increases advertising revenue.¹⁹⁶ The companies are *not* motivated

¹⁹⁵ Douek, 'Content Moderation' (n 9) 604. See also Bloch-Wehba (n 7) 65.

¹⁹⁶ Gillespie (n 23) 11; Lisa Schirch (ed), *Social Media Impacts on Conflict and Democracy: The Tectonic Shift* (Routledge, 2021) 1, 10–11, 14 <<https://doi.org/10.4324/9781003087649-1>>; Amanda Lotz, 'Profit, Not Free Speech, Governs Media Companies' Decisions on Controversy', *The Conversation* (online, 10 August 2018) <<https://theconversation.com/profit-not-free-speech-governs-media-companies-decisions-on>

by concerns about democratic participation, equality and deliberation.¹⁹⁷ Rather, the profit maximisation motivations of social media companies determine what sort of speech they will curate on their platforms.¹⁹⁸

Therefore, when social media companies curate speech, they curate not with a focus on democratic participation, equality, and deliberation, but rather with a focus on the maximisation of profit. Thus, the sort of speech that tends to proliferate on social media is that which social media companies' technical mechanisms have identified will maximise profit and engagement. The concern that this generates under the reflective conception is that this approach will result in the promotion of certain sorts of speech that undermine democratic participation and deliberation, such as hate speech and false speech, respectively. Indeed, it is claimed that the profit-driven motivations of social media companies incentivise them to promote 'emotionally heightened content that generates anger or outrage, ... content that emphasises ingroup identity formation through hateful content towards other groups, false information and conspiracy theories aimed to disorient and confuse the public'.¹⁹⁹ Conversely, profit-driven motivations may drive social media companies to remove or block certain types of speech or speakers that negatively impact upon their profit.²⁰⁰ For example, it has been suggested that 'the prioritisation of these commercial goals has resulted in some platforms effectively excluding sex workers and marginalising women and LGBT people by removing or restricting their communications'.²⁰¹ Such profit-driven promotion and removal of content threatens to undermine the deliberation, participation and equality of certain speakers online,²⁰² which would undermine the conception's underlying democratic commitments identified in Part III.²⁰³

controversy-101292>; Tom Muha, 'Social Media Prioritizes Profit over People', *The Michigan Daily* (online, 9 October 2022) <<https://www.michigandaily.com/opinion/social-media-prioritizes-profit-over-people/>>.

197 As foreshadowed in n 213 above, 'shareholder values of maximizing company profits are perhaps not well matched with user concerns over equal access and democratic accountability': Klonick, 'The New Governors' (n 1) 1668.

198 Douek, 'Content Moderation' (n 9) 559: '{E}very content moderation decision is commercial: private platforms are *profit-driven entities* that moderate because it is *in their business interests*'.

199 Schirch (ed) (n 196) 1, 14, 16. See also Jonah Berger and Katherine L Milkman, 'What Makes Online Content Viral?' (2012) 49(2) *Journal of Marketing Research* 192 <<https://doi.org/10.1509/jmr.10.0353>>.

200 Klonick, 'The New Governors' (n 1) 1664, 1665.

201 Jennifer Cobbe, 'Algorithmic Censorship by Social Platforms: Power and Resistance' (2021) 34 *Philosophy and Technology* 739, 745 <<https://doi.org/10.1007/s13347-020-00429-0>>. See, in particular, Samantha Allen, 'Social Media Giants Have a Big LGBT Problem. Can They Solve It?', *The Daily Beast* (online, 12 October 2018) <<https://www.thedailybeast.com/social-media-giants-have-a-big-lgbt-problem-can-they-solve-it>>; Jesselyn Cook, 'Instagram's Shadow Ban on Vaguely "Inappropriate" Content is Plainly Sexist', *Huffpost* (online, 29 April 2019) <https://www.huffpost.com/entry/instagram-shadow-ban-sexist_n_5cc72935e4b0537911491a4f>.

202 Klonick, 'The New Governors' (n 1) 1664.

203 Traditional mass media also has the potential to decrease equality, deliberation and democratic participation due to its ability to control speech and its compromised interests in engagement and profit. However, this problem is exacerbated in the context of social media because of social media's greater scale and reach, lack of editorial oversight and artificial algorithmic amplification of content that can decrease equality, deliberation and democratic participation. For a more detailed discussion of these novel characteristics of social media, see Schirch (ed) (n 196) 4–6.

These concerns are exacerbated by the network effect, which results in certain major social media companies exerting significant control over the public discourse. The moderation decisions of these companies are more impactful than they would be if there were a great diversity of social media platforms on which to speak. With only a few dominant social media companies exerting significant control over speech, there is little recourse available for banned users who, while perhaps able to speak freely on smaller platforms, will nonetheless lose much of their influence and still desire to return to the major platforms due to the audience size of those platforms (as described under the minimalist conception above).

A further concern about the lack of democratic governance of social media companies is that, not only do social media companies have non-democratic motivations, but they are also not subject to the same democratic safeguards as States. Social media companies are not bound by democratic mechanisms that promote accountability and transparency (such as elections, judicial oversight, freedom of information laws and compulsory public consultation processes) which might protect free speech and encourage democratic decision-making.²⁰⁴ Thus, whilst at first blush it may appear that the curation of speech by the State is merely being replaced with curation of speech by social media companies, this is not in fact the case. Rather, the reflective conception recognises and affirms the distinctive capacity of the State to curate speech in a way that entails democratic accountability; the State is subject to democratic accountability mechanisms, whilst social media companies are not. There are, therefore, few corrective, democratic mechanisms available for poor speech curation decisions by social media companies. Thus, the threats posed by social media companies to speech, and democracy itself, are more concerning under the reflective conception than threats posed by States.

However, as foreshadowed at the outset of this section, the reflective conception contains the internal resources to respond to these concerns. Firstly, the reflective conception entails an understanding of free speech as both a negative and positive liberty. This ensures not only that, per a negative understanding, people are permitted to speak freely without restraint, but that, following a positive understanding, the State is under a positive obligation to create space and equal opportunities that promote free speech (through, for example, support for public broadcasting, media literacy programs and the sponsorship of initiatives that promote democratic participation). This understanding permits the State to undertake positive measures to promote free speech in the face of concerns raised for free speech by private curation. Secondly, a degree of content-sensitivity regarding speech is also permitted under this conception. This permissiveness regarding content-sensitivity permits the State to implement regulation that requires social media companies to protect or restrain certain types of speech that are consistent with the commitments of the reflective conception. Together, these free speech tendencies permit the State to adopt measures to counteract the concerns to the reflective conception's commitments that are generated by private curation and the network effect.²⁰⁵

204 Bloch-Wehba (n 7) 66–7; Klonick, 'The New Governors' (n 1) 1666–9.

205 For a summary of various possible reflective-aligned measures to combat these concerns, see Taylor Owen, 'The Case for Platform Governance' (Paper No 231, Centre for International Governance

There are various concrete measures that are able to be employed as a result of these commitments under the reflective conception. Such measures might include increased State oversight and/or co-regulation of social media companies in order to promote greater transparency and accountability. For example, to encourage greater transparency, the State might introduce mandatory reporting requirements on social media companies regarding actions they have taken towards certain content on their platforms. As noted in Part III, such measures have already been adopted by several States. For example, the *Online Safety Act* in Australia mandates ‘periodic reporting about compliance with basic online safety expectations’ imposed under the Act.²⁰⁶ In the European Union, the *Digital Services Act* similarly imposes reporting requirements on social media companies to disclose information about their content moderation processes in an annual report.²⁰⁷

In addition, a State may establish an independent industry regulator or government regulator to establish and enforce industry standards of conduct, oversee reporting requirements and implement initiatives to encourage the protection of free speech and democracy.²⁰⁸ The eSafety Commissioner in Australia is one such regulator established under the Australian Communication and Media Authority by the *Online Safety Act*. The State may also impose duties or obligations on social media companies to make content moderation decisions in the interests of free speech and other human rights or notions of the public good. This is something contemplated by both the *Online Safety Act* in Australia and the *Digital Services Act* in the European Union.

Other measures also available under this conception include requirements on social media companies to detect and remove certain content (such as harmful, violent or extreme content) in order to promote the conception’s underlying commitments.²⁰⁹ As noted in Part III, such measures have been implemented in Germany where the *Netzwerkdurchsetzungsgesetz* requires social media companies to remove content (such as hateful, defamatory, extremist, and violent content)²¹⁰ that is considered illegal under German law.²¹¹ It is recalled that the reflective conception is committed to this nuanced, rather than ‘all or nothing’ approach to the curation of speech. Authors in this tradition have identified sophisticated

Innovation, November 2019) <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.231web.pdf>>.

206 See *Online Safety Act* (n 16) div 3.

207 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC* [2022] OJ L 277/1, art 15 (‘*Digital Services Act*’).

208 Such measures have already been adopted by several States including Australia via the *Online Safety Act* (n 16), Germany via the *Network Enforcement Act* (n 18), as well as the European Union via the *Digital Services Act* (n 207). See also Bloch-Wehba (n 7) 72–4.

209 See, eg, *Online Safety Act* (n 16) in Australia and the *Network Enforcement Act* (n 18) in Germany, as discussed in Part II of this article. There have been various calls in academic literature for the regulation of harmful content on social media, for example Kyle Langvardt, ‘Regulating Online Content Moderation’ (2018) 106(5) *Georgetown Law Journal* 1353; Kashyap and Ferosa (n 190). In addition, antitrust action and proposals to increase public ownership of social media companies would also be permissible under this conception, but are beyond this article’s line of inquiry.

210 McMillan (n 20) 260–1.

211 *Network Enforcement Act* (n 18) § 1(3).

techniques for applying that sort of curation in a way that will keep it within its appropriate limits.²¹²

Also permitted under this conception is the implementation of education initiatives to combat the risks posed to free speech and democracy by private curation. Indeed, various States around the world have implemented various media literacy programs to increase critical thinking skills, including the Media Literacy Lab for high school students in Australia,²¹³ the Digital Action Plan in the European Union,²¹⁴ and the National Media Education Policy in Finland.²¹⁵

These examples of various mechanisms available under the reflective conception to address some of the concerns of private curation demonstrate that, unlike under the minimalist conception, there are ample responses available under the reflective conception. Thus, the reflective conception remains highly adaptable and workable in the face of risks posed to free speech and democracy by private curation and the network effect.

V CONCLUSION

Clearly, the reflective conception is equipped with a broad range of internal resources to address concerns generated by social media companies' private curation of speech. By contrast, the minimalist conception has only limited internal resources to address its concerns about the significant control social media companies exert over speech as a result of the network effect. Moreover, the use of such internal resources generates inherent tensions within the minimalist conception that are difficult to reconcile. In addition, and perhaps most problematically, private curation generates tensions within the minimalist conception that entail their own undoing and render the conception incoherent and unworkable in the context of social media. It therefore becomes apparent that the reflective conception is better equipped than the minimalist conception to respond to the concerns generated by private curation on social media. As such, the reflective conception emerges as a more suitable conception of democratic free speech on which to base policy decisions about speech on social media going forward.

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- 212 See, eg, in the context of social media Cass R Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press, 2021) 12–18 <<https://doi.org/10.1093/oso/9780197545119.003.0002>>; Katharine Gelber, “‘Free Speech’ and the Responsibilities of Social Media Companies: When Should Political Speech Lose its Protection?”, *ABC News* (online, 27 January 2021) <<https://www.abc.net.au/religion/katharine-gelber-social-media-and-free-speech/13093868>>; Emily B Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press, 2015) 230–81 <<https://doi.org/10.1017/CBO9781107278721>>. More generally, see John C Knechtle, ‘When to Regulate Hate Speech’ (2006) 110(3) *Penn State Law Review* 539.
- 213 Michelle Rowland, ‘Free eSmart Learning Program Helping More School Kids Stay Safe Online’, (Media Release, 25 March 2024) <<https://minister.infrastructure.gov.au/rowland/media-release/free-esmart-learning-program-helping-more-school-kids-stay-safe-online#:~:text=The%20Media%20Literacy%20Lab%20-%20which,school%20through%20the%20government%27s%20commitment>>.
- 214 European Commission, ‘Digital Education Action Plan: Policy Background’, *European Education Area* (Web Page, 18 November 2025) <<https://education.ec.europa.eu/focus-topics/digital-education/action-plan>>.
- 215 Ministry of Education and Culture, ‘Media Literacy in Finland: National Media Education Policy’ (Policy, 2019) <<https://medialukutaitosuomessa.fi/mediaeducationpolicy.pdf>>.