GOING "GLOBAL" ON BIG TECH REGULATION

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Gonzalez v Google LLC marked the Supreme Court's first potential pronouncement on Big Tech's "Section 230 immunities" for content featured on their platforms. The Court eventually declined to rule on the matter, but the case gives rise to an issue more fundamental than content moderation. It raises deep concerns regarding the democratic harms caused by Big Tech's recommendation algorithms and their structural shaping of public discursive spheres. This Article argues that these democratic harms are not the problem of any one democracy alone, and thus require a broad collaborative regulatory response. Current approaches to Big Tech regulation remain essentially parochial when they urgently need to go "global."

The Article first reframes the stakes of Big Tech as that of "political voice" deficits. It argues that these democratic deficits are–descriptively and normatively–a concern of multiple democracies individually and collectively. Following this insight, the Article critically reviews the limits of current regulatory approaches. Then, drawing on international environmental law, it offers an alternative approach that sets to institutionalize wider cooperation on the global stage via the legal framework of due diligence. This framework is no cure-all. But it charts a way forward that considers the constitutive transnationality of Big Tech and its profound implications for political space, action, and contestation.

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I. Introduction

For some of those writing in the field of Law & Technology, the Supreme Court of the United States (SCOTUS)'s decision to grant certiorari in *Gonzalez v. Google, LLC* was a watershed moment.[1] The issue before SCOTUS was whether Big Tech companies have immunity for recommending content to users when such recommendations lead to tragic results. Advocates of a broad interpretation of Section 230 immunities were anxious about the possibility of the Court ruling in favor of the plaintiffs to find Big Tech companies liable.[2] Those on the other side of the "230 fence" were hoping that *Gonzalez* would finally curb these companies' unruly power over digital content.[3] Perhaps to the disappointment of both sides of the debate, SCOTUS declined to rule on whether the use of recommendation algorithms falls within or outside the liability regime of Section 230.[4]

Putting to one side the ultimate judgment, *Gonzalez* gives rise to a more fundamental concern than Big Tech's power to moderate content. It reveals the risks posed to democracy by Big Tech's use of recommendation algorithms and their effects

1. Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021), *cert. granted*, 598 U.S. 617 (2023) (No. 21-1333). The Court also took up the case of Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023) (No. 21-1496) raising similar issues.

2. For an unpacking of the term Big Tech see *infra* note 15 and accompanying text.

3. *See generally* Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. Chi. Legal F. 45 (2020). For an overview of the Section 230 debate prior to the Court's decision to grant cert *Gonzalez*, see generally Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 Yale L.J.F. 475 (2021). For views critical of a broad interpretation of Section 230. For a view that opposes the general revoking of Section 230 immunities in *Gonzalez*, see Tomer Kenneth & Ira Rubinstein, *Gonzalez v. Google: The Case for Protecting "Targeted Recommendations"*, 72 Duke L. J. Online 176 (2023).

4. Gonzalez v. Google LLC, 598 U.S. 617, 622 (2023).

on information consumption and on discursive interactions. The stakes are far broader than those envisaged by either camp of the Section 230 debates. In fact, they are far broader than those which the doctrine of Section 230(c)(1) itself is able to capture. Recommendation algorithms are at the heart of Big Tech companies' political economy. They are the driving force behind these companies' power to regulate not just content, but more fundamentally, the flow of information and the architecture of communication in democratic societies. For better or for worse, recommendation algorithms shape our present informational ecosystem.

The focus on recommendation algorithms thus requires a move beyond the present fixation on content moderation to take a hard look at these algorithms' underlying functions within Big Tech's advertising-based business model.[5] In a nutshell, this business model operates to generate ad revenue by maximizing user engagement.[6] It does so by personalizing information and communications via the deployment of recommendation algorithms in order to match certain users to certain other users, and certain users to certain types of information.[7] Indeed, this is exactly the issue that the plaintiffs in *Gonzalez* raised. But the fundamental concern which is not well captured by Section 230, is that personalization is troubling not only when it results in a particularly disastrous matching, such as linking terrorist content with individuals prone

5. The issue of content moderation has attracted a plethora of scholarship in recent years. *See infra* note 22 for a list of representative scholarship. But, for a flavor of the scholarly terrain, see, e.g., Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020) (arguing that Facebook's Oversight Board is a novel form of internet governance); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV 526, 530 (2022) (arguing that content moderation should be viewed as mass speech administration and calls for a "systems thinking approach to content moderation regulation"); Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content is Hard*, 1 J. FREE SPEECH L. 227 (2021) (putting forward a content-neutral approach to regulating content using privacy and competition law).

6. Julie E. Cohen, *Tailoring Election Regulation: The Platform is the Frame,* 4 GEO. L. TECH. REV. 641, 646 (2020) ("For platforms, competition for eyeballs both incentivizes and rewards interface design that keeps users on the platform and tracks them carefully and comprehensively as they browse, click, like, hate, comment on, and share items with one another").

7. *See infra* notes 33–44 and accompanying text (discussing the strategies of personalization used by Big Tech firms).

to radicalization. Personalization is concerning more generally because it potentially prescribes a particular architecture of connectivity that features the fragmentation of discursive spheres into discrete homogenous siloes. This obstructs the potential flow of reliable information and thwarts opportunities for crucial forms of democratic exchange. The specific legal framing of Section 230 distracts us from the more fundamental and structural social and democratic harms that lie at the heart of Big Tech's operations.

Several views of these broader social ills have already been the subject of recent scholarship in the field.[8] This Article, however, marks a departure from existing theorization in two important ways. First, it reframes the stakes of Big Tech through a first-principles analysis of the extensive, deep-seated, and long-term democratic implications of the fragmented informational and discursive architecture they are thought to produce. Specifically, the Article analyzes these democratic implications through the lens of the "political voice."[9] This concept and its corollary, "political voice" deficits, draw their normative weight from a wide range of theories of democracy which do not necessarily form a part of one coherent corpus, but which I consciously amalgamate for the purpose of theorizing the importance of certain types of discursive interactions. In summary, the notion of the "political voice" denotes the ability of stakeholders to receive meaningful information and to partake effectively in open, deliberative, vibrant, and agonistic forms of public discourse with fellow community members and public decision-makers.[10] The political voice differs, therefore,

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8. *See, e.g.*, Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573 (2021); *See also infra* notes 17–22 and accompanying text (discussing emerging consensus of critiques).

9. I develop this theoretical construct elsewhere. *See* Neli Frost, *The Global "Political Voice Deficit Matrix"*, 21(4) INT. J. CON. L. 1041 (2023). The use of the definite article "the" in referring to the "political voice" does not imply a singular object or practice but rather "[attends] to the multiplicity of reality." Although referred to in the singular form, the concept embodies a multiplicity of practices. *See* ANNEMARIE MOL, THE BODY MULTIPLE: ONTOLOGY IN MEDICAL PRACTICE 6 (2002). I thank my colleague Laura Mai for drawing my attention to this point.

10. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) for the idea of "voice" in economic terms, in reference to consumers' ability to "kick up a fuss." In the context of the market, voice is therefore a tool for conveying dissatisfaction,

from freedom of speech in its emphasis and orientation. This concept's center of gravity is not placed on the individual qua individual and her fundamental rights, but rather on the individual as a member and stakeholder of one or several political communities. From this perspective, the normative purchase of the political voice lies in its potential to empower individuals to develop a vigorous understanding of their political preferences and passions vis-à-vis those of others. It is crucial for their potential to establish collective identities, to act in concert and operate collectively within and as a community, even if through "conflictual consensus,"[11] and to be able to mobilize politically to ensure that their interests are taken into account by those in power or to contest hegemonic power structures. The political voice is, therefore, fundamental for liberty in the neo-republican sense of non-domination,[12] for principles of self-determination, and for opportunities for social justice.[13] It is a routine of democratic experience and existence, a cornerstone of democratic governance, and a democratic requirement. "Political voice deficits" denote the partial delivery of all of these. They describe a reality in which stakeholders often have poor access to relevant information and to heterogeneous public debate and exchange. These deficits give rise to structural democratic harms.

But the second and more important departure from current debates, and the idea driving this Article, is that these democratic harms are, in fact, a common cause for concern for multiple democracies that share the normative vision that is embodied in the notion of the "political voice," and thus requires a correspondingly collaborative regulatory response designed collectively by these democracies. Most current domestic approaches to the challenges of Big Tech are therefore too parochial, with

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an instrument for changing policies, or a "mechanism of recuperation." *Id.* However, in the political context from which the notion of "voice" is originally borrowed, this notion also implies a kind of eminence. It represents a paradigm, or an ideal, which I refer to as the "political voice."

11. The term is coined by Chantal Mouffe in her theory of agonistic democracy. *See* CHANTAL MOUFFE, ON THE POLITICAL 52 (2005). Mouffe places her theory in opposition to some of the deliberative theories I draw on, but I offer to read them as capable of residing side by side.

12. *See infra* notes 67–74 and accompanying text (discussing the importance of the political voice for liberty as non-domination).

13. *See infra* pp. 16–17 (discussing the liberating and equity potentials of the political voice).

problematic consequences.[14] This Article problematizes the palpable lack of coordinated effort by governments to address the broader democratic implications of Big Tech's power over the transnational architecture of digital information and communication channels. The Article offers a way forward which is premised on this globally-oriented perspective and draws on international legal tools which may respond to the insights it generates.

The Article develops these arguments in four substantive sections. Section II reframes the stakes of Big Tech's use of recommendation algorithms in democratic terms by employing the concept of the "political voice." This reframing highlights why the question before the Court in *Gonzalez* was read too narrowly. I offer a brief summary of what the "political voice" denotes, what functions it serves in a democracy, and how these functions are hindered by the political economy of Big Tech companies. The term "Big Tech" is used to refer to companies in the information and communications industry that perform crucial gatekeeping functions in controlling the digital platforms through which users communicate online as well as receive and impart information.[15] I focus on those companies whose monetizing structure is advertising-based and, therefore, driven by the personalization of information and communications. These include mainly companies that operate social media platforms (like Facebook) and search engines (like Google). The importance of the political voice is emphasized

14. Too parochial in two ways: First, in not addressing the broader and more fundamental democratic stakes, and second, in failing to view the problem as that of more than one democracy. Section 230 and parallel initiatives in Europe, for example, are domestic by definition despite the "Brussels Effect," given their unilateral character. *See infra* note 23. See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2015) for a discussion on the European Union's influence on setting global standards. But many regulatory approaches presented in scholarship that are perhaps not explicitly domestic, still tend to rely on or imply domestic concepts and frameworks. *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 UC DAVIS L. REV, 1183 (2016) (drawing inspiration from U.S. constitutional jurisprudence); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018) (offering the overarching framework of public utility regulation as fitting to address the problem of technology giants' private power).

15. For a review of how the terminology of "gatekeepers" and "gatekeeping" has been used in reference to digital platforms, see Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951 (2021).

here as a lens through which to examine what is truly at stake in an information and communication environment governed by private corporations that economically thrive on personalization. The analysis considers the power of Big Tech companies not only to oversee *what* can be said or shared online, but also, more importantly, to influence *who* does or does not have access to what information, and who is likely to communicate (or not) with whom.

Section III presents the Article's main argument that current domestic approaches to the problems of Big Tech are myopic, and that a collaborative, globally oriented approach to these problems is necessary.[16] The point of departure for this argument takes note of the democratizing potential of digital infrastructures and their partial success in living up to that potential. I observe the revolutionary path the Internet has paved for cross-border flows of information and communications that hold the promise of considerably enriching the political awareness and experience of individuals. The ability of individuals and communities to receive information on global events and to communicate across borders has become particularly significant under conditions of globalization, given that global events and external forces routinely and significantly influence the life opportunities of individuals and shape the choices of democratic communities. In other words, not only has internal democracy come to depend on a functioning *transnational* sphere of information, discourse, and action, but globalization has also unsettled the neat mapping of political relations, giving rise to new political affinities that transcend the boundaries of nation-states and that would greatly benefit from the practices embodied in the notion of the political voice.

Section III thus advances an understanding of the political voice as a form of transnational social capital and suggests that multiple democracies share an interest in maintaining a

16. Aziz Huq offers a view of international law's role in platform moderation but focuses on content moderation on not on the more infrastructural implications that I discuss here. Aziz Z. Huq, *International Institutions and Platform-Mediated Misinformation*, 23 CHICAGO J. INT'L L. 116. (2022). Evelyn Douek also adopts a perspective similar to Huq, examining the interface between international law and content moderation. Evelyn Douek, *The Limits of International Law in Content Moderation*, 6 UC IRVINE J. OF INT'L, TRANSNAT'L & COMPAR. L. 37 (2021).

transnational communicative infrastructure that scaffolds and cultivates the political voice both within and across borders. Technology is both a promise and a peril in this context; a double-edged sword. Precisely on account of the constitutive transnational nature of Big Tech operations, the political voice deficits that they create do not limit themselves to the purview of specific democracies: they are a feature of the transnational informational and discursive arena that is layered "on top" of internet infrastructures. I argue, therefore, that political voice deficits afflict multiple democracies concurrently and jointly; and suggest that the collective character of these harms may require some form of collaboration in the global arena in the spirit of other global responses to pressing transnational concerns.

Against the backdrop of this conceptual analysis, the Article moves into thinking pragmatically about how best to go "global" in regulating Big Tech. I begin this analysis by critically examining, in Section IV, three ways in which to *not* go global: allowing Big Tech companies to regulate themselves; rejecting multilateral collaboration and allowing one hegemonic power to unilaterally shape the affordances of this transnational communicative infrastructure; or rejecting multilateral collaboration in favor of the balkanization of this infrastructure. This analysis of possible modalities of "global" regulation intones a degree of skepticism regarding the ability and indeed the desirability of any single democracy bending Big Tech's corporate arm, demanding that they make fundamental modifications to their business model and to the transnational communicative infrastructure on which we all depend.

Section V then offers a better alternative for going "global" and explores its contours. The framework this Article offers takes its cue from international environmental law as a field that raises concerns with similar features to the ones at hand. This framework builds on a core legal construct of international environmental law: the principle of prevention as an obligation of due diligence. This legal construct caters to the transnational character of political voice deficits. It emphasizes modalities of cooperation at the global level and the development of shared international standards that are perhaps better poised to ensure a functioning transnational discursive arena. The Article makes the argument that multilateral cooperation of this type might be essential where the aim is to ensure that

the transnational communicative infrastructure becomes conducive towards effective cross-border flows of information and is supportive of cross-boundary, heterogeneous, deliberative, and vibrant public exchanges. Imbuing this legal construct of prevention and due diligence with some concrete contextual content, the Article considers the extent to which democracies could employ it to mitigate the democratic harm generated by Big Tech companies in a collaborative yet decentralized fashion. It ends by returning to *Gonzalez* to offer a view of what the role of the Supreme Court could have been in this case in light of the framework proposed for Big Tech regulation, or what it could be in the future.

II. At stake with Big Tech: "political voice" and "political voice deficits"

There are many things that are wrong with Big Tech that have been attracting a plethora of critical scholarship in recent decades. In fact, there seems to be a maturing consensus amongst legal scholars, practitioners, journalists, politicians, and recently, even Big Tech companies themselves,[17] that alongside Big Tech's many important affordances, its commercial operations also raise a host of fundamental challenges including problems of privacy,[18]

17. *See, e.g.*, Meta Human Rights Report: Insights and Actions 2020-2021, (July, 2022) https://about.fb.com/wp-content/uploads/2022/07/Meta_Human-Rights-Report-July-2022.pdf (last visited: Dec. 29, 2022) (explaining how the company has tried to address abuses of its platform like misinformation and harassment).

18. *See, e.g.*, James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137 (2009) (offering a comprehensive analysis of privacy risks on Facebook and evaluating relevant policy solutions to these risks); Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 Wash. L. Rev. 119 (2004) (offering the construct of "contextual integrity" to capture the privacy challenges posed by novel information technologies); Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 Md. L. Rev. 614 (2011) (arguing that it is impossible to preserve privacy without taking into account the embeddedness of technology in social life, and that the principle of "technosocial continuity" requires that traditional areas of privacy protection be extended to digital contexts). See also Adam Satariano, *Meta's Ad Practices Ruled Illegal Under E.U. Law*, N.Y. Times (Jan. 4, 2023), https://www.nytimes.com/2023/01/04/technology/meta-facebook-eu-gdpr.html#:~:text=Meta%20suffered%20a%20major%20defeat,to%20effectively%20accept%20personalized%20ads for the most recent landmark

surveillance,[19] online safety,[20] and data ownership and equality,[21] to name but a few. Another matter that has attracted overwhelming attention concerns the effects of online content moderation on democratic freedoms.[22] Scholarly trepidations over content

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decision by the European regulator, which, although concerned with privacy, bears directly on the issues at the crux of this article.

19. *See, e.g.*, David Lyon, *Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique*, BIG DATA & SOC'Y, July 9, 2014 (illustrating how Big Data intensifies surveillance); Alan Z. Rozenshtein, *Surveillance Intermediaries,* 70 STAN. L. REV. 99 (2018) (analyzing the role that technology companies play in being the middleman between government surveillance and private citizens).

20. *See, e.g.*, danah boyd & Eszter Hargittai, *Connected and Concerned: Variation in Parents' Online Safety Concerns: Connected and Concerned: Variation in Parents' Online Safety Concerns*, 5 POL'Y & INTERNET 245 (2013) (dissecting parents' concerns for safe internet use based on factors like race, ethnicity, income, metropolitan status, and political ideology).

21. *See, e.g.*, Patrik Hummel, Matthias Braun & Peter Dabrock, *Own Data? Reflections on Data Ownership*, 34 PHIL. & TECH. 545 (2021) (rejecting the notion that one's right to data takes the form of property right); Angelina Fisher & Thomas Streinz, *Confronting Data Inequality*, 60 COLUM. J. TRANSNAT'L L. 829 (2022) (arguing that data inequality is a manifestation of unequal control over the infrastructures that create and process data).

22. *See generally* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014) (providing an analysis of new speech regulation and its emphasis on "prevention rather than deterrence, and low salience (or invisibility) rather than chilling effects" *Id.* at 2300); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (providing an analysis of what digital platforms are doing to moderate online speech from the perspective of the First Amendment); Klonick, *supra* note 5 (analyzing Facebook Oversight Board's role as an independent adjudicatory institution on online expression and its impact on internet governance); Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759 (2021) (reviewing the causes for the shift from a "posts-as-trumps" approach to online speech governance to a balancing approach, and the implications); Douek, *supra* note 5 (arguing for an understanding of the project of content moderation as a "system of mass administration"); Brenda Dvoskin, *Expert Governance of Online Speech,* 64 HARV. INT'L L. J. 85 (2023) (examining the toolkits that scholars, U.N. bodies, and the Facebook Oversight Board have developed to "pursue a system of expert governance of online speech"); Brenda Dvoskin, *Representation without Elections: Civil Society Participation as a Remedy for the Democratic Deficits of Online Speech Governance*, 67 VILL. L. REV. 447 (2022) (arguing for stronger civil society participation as a tool to democratize online speech governance); Thiago Dias Oliva, *Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression*, 20 HUMAN RIGHTS L. REV. 607 (2020) (applying a human rights lens to the issue of online content moderation); Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media:*

moderation practices mirror well the focus of doctrinal frameworks that have been put in place to regulate Big Tech, such as Section 230 in the United States and the most recent legislations in the European Union.[23]

But while these trepidations all capture some of the troubling implications of Big Tech, this Article joins law and political economy scholarship[24] in arguing that many of these concerns share a "conceptual flaw" on account of their focus on "individualist data-subject rights."[25] From this perspective, Salomé Viljoen rightly points out that the individualist lens is incapable of accounting for the structural societal harms of Big Tech's regulatory control over information and communication channels, and fails to address the "economic imperatives that drive such harms."[26]

This Article thus joins the call to consider these broader, fundamental harms to democratic societies. However, the conceptual framework offered here for theorizing these challenges departs from those offered to date. The lens in this Article engages in a first-principles analysis of the deep democratic implications of Big Tech's governance of our information and communications sphere for what I term the "political voice." I have put this construct forward in previous writing, to denote individuals' ability to meaningfully partake in open, deliberative, and agonistic public discourse and information exchanges with co-affected stakeholders and with public decision-makers.[27]

Content Moderation in Context, 52 CONN. L. REV. 1029 (2021) (considering how speech debates map onto the platform law of content moderation).

23. 2022 O.J. (L 277) 1; 2022 O.J. (L 265) 1.

24. For a political economy perspective on the intersection between law and information technologies, see, e.g., the work of Julie Cohen and Shoshana Zuboff. Cohen, *supra* note 6 (attributing the ultimate goal of social media platforms to maximizing audience engagement); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019) ("The book is a meditation on the future of law and legal institutions in the networked information age. Its central claims are that as our political economy transforms, our legal institutions too are undergoing transformation, and the two sets of process are inextricably related" *Id.* at 1); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019); Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 JOURNAL OF INFORMATION TECHNOLOGY 75 (2015).

25. Viljoen, *supra* note 8, at 578.

26. *Id.* at 634.

27. Frost, *supra* note 9.

This construct draws its normative weight from multiple theories of democracy, which do not form a part of one coherent corpus but which the Article synthesizes together in order to flesh out common critical functions ascribed to the types of practices that this notion encapsulates. The practices of robust participation in public discursive exchanges serve critical educative, epistemic, liberating, and equity functions. In terms of its educative functions, the political voice enables stakeholders to recognize their own political interests, passions, and identities, and to understand them vis-à-vis those of other community members with whom they share political affinities. At the core of the educative argument stands the proposition that democracy demands a deep relational understanding of one's own political interests as well as a sense of community-consciousness. These are vital conditions for the effective functioning of any collective in furthering public interests and goods, or in contesting hegemonic notions of these interests and goods.[28] From

28. The educative argument I offer draws on, and synthesizes, the work of John Stuart Mill and Hannah Arendt (and the work of their commentators), participatory theories of democracy, and Chantal Mouffe's agonistic theory, whom all point to the educative functions of public discourse, albeit in slightly different ways which I bring together here to theorize the political voice and its functions. *See generally* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861); JOHN STUART MILL, ON LIBERTY (1859); *see also* D.E. Miller, *John Stuart Mill's Civic Liberalism*, 21 HIST. OF POL. THOUGHT 88 (2000); STEWART JUSTMAN, THE HIDDEN TEXT OF MILL'S LIBERTY (1991); Richard W. Krouse, *Two Concepts of Democratic Representation: James and John Stuart Mill*, 44 J. OF POL. 509 (1982); DENNIS FRANK THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT: (1976); JAMES GOUINLOCK, EXCELLENCE IN PUBLIC DISCOURSE: JOHN STUART MILL, JOHN DEWEY, AND SOCIAL INTELLIGENCE (1986). *See generally* HANNAH ARENDT, THE HUMAN CONDITION (1958); HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (Beiner Ronald ed., 1982); HANNAH ARENDT, BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT (1961); *see also* MARGARET CANOVAN, HANNAH ARENDT: A REINTERPRETATION OF HER POLITICAL THOUGHT (1995); HANNAH ARENDT, THE RECOVERY OF THE PUBLIC WORLD (Melvyn A. Hill ed., 1979); SEYLA BENHABIB, THE RELUCTANT MODERNISM OF HANNAH ARENDT (Rowman & Littlefield Publishers rev. ed. 2003); JOHN MCGOWAN, HANNAH ARENDT: AN INTRODUCTION (Univ. of Minnesota Press 1998). For the work of participatory theorists who picked up and reiterated earlier discussions on the educative functions, see, e.g., Arnold Kaufman, *Human Nature and Participatory Democracy*, *in* RESPONSIBILITY: NOMOS III 266 (Carl J. Friedrich ed., 1960); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970); GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS (1963); JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984). And the work of Chantal Mouffe who contests many of the premises

an epistemic viewpoint, the political voice motivates interlocutors to establish reasoned arguments about public issues.[29] It thus facilitates debates that are geared towards public policies that reflect the public interest.[30] Both the educative and epistemic properties, in turn, empower stakeholders to jointly exercise influence and control over public decision-makers by asserting their political interests and contesting decisions that do not conform to them.[31] The capacity to direct public power is a constitutive element in guaranteeing individuals' liberty as non-domination and facilitating notions of self-determination, political justice, and the equitable distribution of public resources.[32]

Big Tech's advertising-based commercial model and the strategies of personalization that it yields are, however, potentially inimical to the political voice and its democratic functions. The monetizing structure of companies such as Meta (Facebook) or Alphabet (Google) is predicated on a bi-directional,

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of other theorists but whose "agonistic" theory of democracy I find to be in line with some of the notions that the educative argument incorporates. *See* MOUFFE, *supra* note 11.

29. The discussion of the epistemic functions of the political voice draws mainly on an analysis and synthesis of deliberative theories of democracy. *See generally*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); HÉLÈNE LANDEMORE, DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE AND THE RULE OF THE MANY (2012); David Estlund & Hélène Landemore, *The Epistemic Value of Democratic Deliberation*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 113 (Andre Bächtiger et al. eds., 2018); DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997); JOSHUA COHEN, PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS (2009); Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26 (1986); Robert B. Talisse, *Deliberation*, *in* THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 204 (David Estlund ed., 2012).

30. *See, e.g.*, Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67, 77 (James Bohman & William Rehg eds., 1997) ("[T]he interests, aims, and ideals that comprise the common good are those that survive deliberation, interests that, on public reflection, we think it legitimate to appeal in making claims on social resources").

31. The notions of democratic influence and control are part of a neo-republican theory of democracy. *See generally* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012) (describing how popular influence, coupled with control, are necessary for the neo-republican conception of liberty as non-domination).

32. Frost, *supra* note 9.

dyadic, and dynamic interaction between the user and the companies' recommendation algorithms, in which personal data is collected from users and then employed to orchestrate and orient their communicative interactions and the information available and visible to them.[33] These algorithms therefore produce a certain knowledge logic about what individual users should know, or with whom they should come in contact.[34] In the words of Siva Vaidhyanathan, Facebook "[chooses] for us what we shall see, read, and with whom we should interact through its system."[35]

This strategy of personalization is certainly concerning enough in its own right on account of its implications for privacy, and the disastrous encounters that it cultivates between,

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33. Cohen, *supra* note 6; Kurt Wagner, *This is How Facebook Uses Your Data for Ad Targeting*, VOX (Apr. 11, 2018), https://www.vox.com/2018/4/11/17177842/facebook-advertising-ads-explained-mark-zuckerberg; SIVA VAIDHYANATHAN, THE GOOGLIZATION OF EVERYTHING (AND WHY WE SHOULD WORRY) (2012). *See also*, Jonathan Lanchester, *You Are the Product*, 39 LONDON REVIEW OF BOOKS (Aug. 17, 2017), https://www.lrb.co.uk/the-paper/v39/n16/john-lanchester/you-are-the-product. *See, e.g.*, Annual Report, FACEBOOK 5 (2017) ("We generate substantially all of our revenue from selling advertising placements to marketers"); Astrid Mager, *Algorithmic Ideology How Capitalist Society Shapes Search Engines*, 15 INFO., COMMC'N. & SOC'Y 769, 778 (2012) (explaining how users "enter alliances with search engines to reach their goal of conveniently finding web information they want" and their practices "contribute to improvements of search algorithms, and also to the 'service-for-profile' model Google, and others perform").

34. Tarleton Gillespie, *The Relevance of Algorithms*, *in* MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY (Tarleton Gillespie et al. eds., 2014); Seth Finkelstein, *Google, Links, and Popularity versus Authority*, *in* THE HYPERLINKED SOCIETY 104, 106 (Joseph Turow & Lokman Tsui eds., 2008) (refers to the algorithmic process of search results as "a value-laden process with serious social implications"). Natascha Just & Michael Latzer, *Governance by Algorithms: Reality Construction by Algorithmic Selection on the Internet*, 39 MEDIA, CULTURE & SOC'Y 238, 241 (2017) (referring to the algorithmic process as one "that assigns (contextualized) relevance to information elements of a data set by an automated, statistical assessment of decentrally generated data signals").

35. Siva Vaidhyanathan, *Regulating Facebook Will Be One of the Greatest Challenges in Human History*, THE GUARDIAN (Apr. 28, 2019), http://www.theguardian.com/commentisfree/2019/apr/28/regulating-facebook-will-be-one-of-the-greatest-challenges-in-human-history. *See also* Will Oremus et al., *Here's How Facebook's Algorithm Works*, THE WASHINGTON POST (Oct. 26, 2021), https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works/ (illustrating how Facebook's algorithm curates content for its users).

for example, terrorist content and individuals prone to radicalization. But it importantly raises a more insidious concern: that of structurally promoting the fragmentation of informational and communicative domains. So while the precise effects of personalization are indeed difficult to empirically determine or quantify, the concern from the perspective of the political voice is that users' power to filter, coupled with Big Tech's power to filter, may generate certain barriers to the flow of information between heterogeneous communicative spaces. This effect has been depicted by others in employing expressions such as "echo chambers,"[36] "filter bubbles,"[37] "gated communities,"[38] "information cocoons,"[39] or "ideological bunkers"[40] to denote discrete siloes in which users are predominantly exposed to certain information and communicate almost exclusively with concurring counterparts.[41] The trepidation is that within these siloes, users are less exposed to diverse publics and countering

36. *See, e.g.,* CASS R. SUNSTEIN, *#Republic*, in #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 5 (2017); Matteo Cinelli et al., *The Echo Chamber Effect on Social Media* 118 PNAS 1 (2021), https://www.pnas.org/doi/epdf/10.1073/pnas.2023301118; Ludovic Terren and Rosa Borge, *Echo Chambers on Social Media: A Systematic Review of the Literature* 9 REV. COMM. RESEARCH 99 (2021).

37. ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011); Cohen, *supra* note 6, at 647 (claims the term "filter bubbles" is somewhat misleading because "[platform] users do not experience or self-select into impermeable bubbles but rather sort themselves into opposing tribes. They respond most readily and predictably to content that reinforces their tribal inclinations—especially content that triggers outrage or affords opportunities to signal affiliation—and they search for content using syntax that prompts algorithms to serve up tribally validating results.")

38. *See, e.g.,* SUNSTEIN, *supra* note 36, at 39.

39. CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 9 (2006) ("The central problem involves *information cocoons:* communication universes in which we hear only what we choose and only what comforts and pleases us"); Huimin Xu et al., *The Geometry of Information Cocoon: Analyzing the Cultural Space with Word Embedding*, arXiv: 2007.10083 [cs.CY] (conducting empirical research on information cocoons).

40. Lanchester, *supra* note 33.

41. *See* James G. Webster, *Structuring a Marketplace of Attention*, *in* THE HYPERLINKED SOCIETY 23 (Joseph Turow & Lokman Tsui eds., 2008) (referring to fragmentation in terms of the diffusion of attention between media outlets and arguing that three conditions led to this effect, which are the convergence of media delivery systems, the abundance of available content, and the scarcity of consumer attention).

views or adversary ideologies,[42] in a manner that may be self-reinforcing and sustaining over time. Particularly where personalization maps onto existing social, cultural, geographical or ideological divides, informational and communicative siloes may present considerable obstacles for interactions that cut across diverging sectors of society.[43] Such siloes are further believed to render information susceptible to market failures that place burdens on individuals to assess the quality, credibility, and accuracy of information they encounter.[44]

Several other compounding factors are also thought to be at play. For example, social science research has shown that cognitive tendencies towards confirmation bias—the belief in information that buttresses pre-existing outlooks[45]—and the propensity to spread information that supports these outlooks, may throw oil into the flames of personalized information environments.[46] Fragmentation that is structured along ideological lines can thus affect the quality of information available to users by further diminishing opportunities to correct false information. These conditions expose users to targeted manipulations for both economic and political purposes, including

42. *See* VAIDHYANATHAN, *supra* note 33, at 183–84 (explaining that Google, through customization of search results, is "redoubling" the threat to republican values "such as openness to differing points of view and processes of deliberation").

43. *Id.* at 73.

44. *See generally* Miriam J. Metzger & Andrew J. Flanagin, *Credibility and Trust of Information in Online Environments: The Use of Cognitive Heuristics*, 59 J. OF PRAGMATICS 210 (2013) (synthesizing recent studies on how information consumers use cognitive heuristics to determine what online sources and information to trust). The issue of trustworthy information has always been a problem. However, it is exacerbated on digital platforms because individuals confront this problem much more often, and also because many of the traditional intermediaries are removed online.

45. *See* PARISER, *supra* note 37, at 86 ("Once we've acquired schemata, we're predisposed to strengthen them. Psychological researchers call this confirmation bias—a tendency to believe things that reinforce our existing views, to see what we want to see").

46. VAIDHYANATHAN, *supra* note 33, at 138 ("Google's search functions are not effective in connecting and unifying a diverse world of Web users. Instead, its carefully customized services and search results reinforce the fragmentary state of knowledge that has marked global consciousness for centuries. Over time, as users in a diverse array of countries train Google's algorithms to respond to specialized queries with localized results, each place in the world will have a different list of what is important, true, or "relevant", in response to any query").

those driven by Big Tech companies themselves.[47] Social media companies, for example, are claimed to be economically incentivized to create "an antiseptically friendly world," in which information about issues that are of distinct public concern is potentially ostracized or even made invisible for certain users.[48] Personalization is also claimed to have an adverse impact on users' curiosity, creativity, and opportunities for learning. Pariser cites studies in psychology which demonstrate the importance of "information gaps" and encounters with puzzling and disturbing facts for animating curiosity and a desire to learn and understand.[49] Where users are unaware that they only receive a partial and biased view of the current state of affairs,

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47. *See* SUNSTEIN, *supra* note 36, at 98–136. For a discussion on the manipulation of users in the commercial context, see generally Tal Z. Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES IN L. 157 (2019). *See also* PARISER, *supra* note 37, at 122 (According to Pariser, personalization could theoretically enable "persuasion profiling" given that it enables an understanding of what people respond to: "If persuasion profiling makes it possible for a coaching device to shout 'you can do it' to people who like positive reinforcement, in theory it could also enable politicians to make appeals based on each voter's targeted fears and weak spots."). For examples on election manipulation, see generally Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (2014); *Russian Twitter Trolls Meddled in the Brexit Vote. Did They Swing It?*, THE ECONOMIST (Nov. 23, 2017), https://www.economist.com/britain/2017/11/23/russian-twitter-trolls-meddled-in-the-brexit-vote-did-they-swing-it; Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought $100,000 in Political Ads*, THE NEW YORK TIMES (Sep. 6, 2017), https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html; Emily Bell, *Silicon Valley Helped Russia Sway the US Election. So Now What?*, THE GUARDIAN (Oct. 29, 2017), http://www.theguardian.com/media/2017/oct/29/media-symbiotic-relationship-facebook-worry-democracy; Craig Timberg, THE WASHINGTON POST (Oct. 5, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says/; Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, THE GUARDIAN (Mar. 17, 2018), http://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election.

48. PARISER, *supra* note 37, at 150. *See* Emily Bell, *Facebook Creates Orwellian Headache as News is Labelled Politics*, THE GUARDIAN (Jun. 24, 2018), http://www.theguardian.com/media/media-blog/2018/jun/24/facebook-journalism-publishers (illustrating the predicament Facebook found itself in after it flagged journalistic articles exposing human rights violations as political, which prohibited their paid circulation and thereby obstructing their diffusion amongst users).

49. PARISER, *supra* note 37, at 89–91.

they may be inclined to believe that what they do see is an accurate depiction of what is out there and would not likely be triggered to search for what they do not know is hidden. Insofar as the process of learning involves coming upon the unknown, it is indeed potentially stifled by personalization.[50]

These potential effects are particularly concerning at a time where digital platforms have become the central locus for social and political interaction.[51] In directing how data and information flow on these platforms and in encouraging the clustering of users in homogenous siloes, Big Tech is effectively performing public-like regulatory functions.[52] These functions may be assimilated with the modern practice of urban planning, which involves the production by the state of "the ordered logic of the space"[53] with specified implications for social processes.[54] The parallels with urban planning offer a way of imagining how these companies structure what Hannah Arendt has termed "the space of appearances."[55] On this account, the potentially engineered fragmentation of public discursive spaces mirrors (perhaps ironically, given their character as the

50. *Id.* at 91.; VAIDHYANATHAN, *supra* note 33, at 182 ("Learning is by definition an encounter with what you don't know, what you haven't thought of, or what you couldn't conceive, and what you never understood or entertained as possible . . . . The kind of filter that Google interposes between an Internet searcher and what a search yields shields the searcher from radical encounters with the other by "personalizing" the results to reflect who the searcher is, his or her past interests, and how the information fits with what the searcher has already been shown to know").

51. Paul Nemitz, *Constitutional Democracy and Technology in the Age of Artificial Intelligence*, 376 PHIL. TRANS. R. SOC. A, Nov. 28, 2018, at 3.

52. *See* Neli Frost, *Out with the "Old", In with the "New": Challenging Dominant Regulatory Approaches in the Field of Human Rights,* 32 EUR. J. INT'L L. 507 (2021) (analyzing the public regulatory functions performed by private transnational corporations). For another view on the conscription of businesses as enforcers of law and norms see Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV 467 (2020). *See* Kristen E. Eichensehr, *Digital Switzerlands,* 167 PA. L. REV. 665, 667 (2019) (the notion of Big Tech companies as "competing power centers" that challenge "the primacy of government"). *See generally* JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017).

53. Mickey Abel, *Introduction, in* MEDIEVAL URBAN PLANNING: THE MONASTERY AND BEYOND, 2 (Mickey Abel ed., 2017).

54. *See e.g.*, LEONIE SANDERCOCK, TOWARDS COSMOPOLIS: PLANNING FOR MULTICULTURAL CITIES 14 (1998); DAVID HARVEY, SOCIAL JUSTICE AND THE CITY 27 (1973).

55. ARENDT, THE HUMAN CONDITION, *supra* note 28, at 199.

epitome of capitalism) certain feudal "modalities of medieval urbanism" that have seen a recent revival in many contemporary urban sites.[56] Though far from being a monolithic concept, medieval urbanism refers to certain features that were characteristic of medieval practices of planning that reflected and supported the social structures of the time. A prominent feature of these regimes—competing chartered towns—was the "formation of gated compounds that [were] governed by private bodies," where "exclusion [was] the foundation of social organization."[57] Chartered towns otherwise constituted "legal enclaves" in which the city charter granted certain freedoms and protections to those whose occupation enabled them to be associated with the town's dwellers, thus creating enclaves of largely homogenous populations.[58] Similar patterns of planning characterized Italian cities in the late Middle Ages, and some Islamic cities as well.[59] It is worth quoting at length one description of such an Islamic city to allude, in more visual form, to the type of ordering logic of digital discursive spaces induced by the modern fragmentation practices of Big Tech:

> The Muslim street is rarely seen as a public passage linking one point of interest with another. The maze of dead-end alleys that insinuate themselves like hundreds of inadvertent cracks in the solidly built mass of medieval Cairo are characteristic. At best, the few principal thoroughfares might define irregular superblocks, but within these superblocks neighbourhood life eats up the public pathways by hundreds of daily encroachments. A city-form anywhere, at any time, is the battleground between public rights and private interest. In the military feudalism that governed the cities of Islam, there was little room for a municipal

56. Nezar Alsayyad & Ananya Roy, *Medieval Modernity: On Citizenship and Urbanism in a Global Era*, 10 SPACE AND POLITY 1, 3 (2006).

57. *Id.* at 6.

58. *Id.* Alsayyad and Roy compare these medieval forms of urban planning to contemporary practices of exclusion and segmentations of the 'neo-liberal' city.

59. *Id.* at 7. In case of the former, noble families established semi-autonomous, "private pockets" within cities, which resembled in nature the chartered town.

> organization that would regulate and safeguard the public domain.[60]

The modality of fragmentation discussed may carry consequences for the political voice and its democratic functions. It threatens to generate political voice deficits that may produce substantial democratic harm. Political voice deficits can occur in two distinct, yet interrelated, dimensions: horizontally, between affected stakeholders themselves; and vertically, between stakeholders and public decision-makers. These deficits refer to obstacles to individuals' ability to receive pertinent information and to effectively partake in open, deliberative public discourse with heterogeneous others (horizontally) and to their ability to communicate meaningfully with public decision-makers (vertically). If precipitated, these deficits would together undermine the crucial democratic functions that the political voice serves. The overall claim is that the pollution of information and fragmentation of discursive spheres may impede the potential of individuals and communities to capitalize on the political voice as a community interest and to fully enjoy and benefit from its democratic affordances.[61]

Beginning with the *educative* functions of political voice, these are concerned with stakeholders' capacity to develop political interests and attendant collective identities, as well as sensibilities towards the interests of fellow community members and a capacity to understand them as truly legitimate. Participation in ongoing horizontal public deliberations with others is meant to help illuminate one's political preferences or passions in relation to those of others and help transform discrete interests into common ones by developing shared understandings and a self-conception as part of a given community or collective.[62]

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60. Spiro Kostof, A History of Architecture: Settings and Rituals 370 (1985).

61. Frost, *supra* note 9. *See also* Niva Elkin-Koren & Maayan Perel, *Democratic Friction in Speech Governance by AI*, *in* Handbook of Critical Studies of Artificial Intelligence 643 (Simon Lindgren, ed. 2023).

62. *See, e.g.*, Mill, Considerations on Representative Government, *supra* note 28 at 165 ("It is by political discussion that the manual labourer, whose employment is a routine […] is taught that remote causes, and events which take place far off, have a most sensible effect even on his personal interests; and it is from political discussion, and collective political action, that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens becomes consciously a member of a great community"). *See also* Mill, On Liberty, *supra* note 28, at

In a polluted and fragmented communicative environment, however, individuals are mostly exposed to pre-recognizable facts and ideas and less exposed to issues of distinct public concern. Such an environment is counter-productive for developing political preferences insofar as these are considered to be a *product* of deliberation and agonistic exchange rather than a natural personal inclination that entirely predates these practices. A shrinking space for heterogeneous debate would also reduce encounters with the perspectives of others. Opportunities to share experiences with differing stakeholders would be hard to come by, and so would occasions to compare ideas, to give reasons, to assert one's distinctness, or to persuade (or dissuade) fellow members from across the ideological, cultural, or geographical divides. On the theory of the political voice, all of these outcomes, in turn, present obstacles to consolidating sentiments of human togetherness between groups of affected stakeholders. This bears consequences for the transformation of self-interests into collective ones that is the basis for any concerted political action.[63]

In terms of the *epistemic* affordances of the political voice, these too would be impaired by fragmentation insofar as it indeed frustrates the conditions under which the democratic epistemic process may yield its intended results. As previously discussed, fragmentation entails the homogenization of discursive arenas, and the minimization of cognitive diversity within each arena. In the absence of a diversity of perspectives, less potential exists for successful collective problem-solving and for collectively

209 ("It belongs to a different occasion from the present to dwell on these things as part of national education; as being, in truth, the peculiar training of a citizen, the practical part of the political education of a free people, taking them out of the narrow circle of personal and family selfishness, and accustoming them to the comprehension of joint interests, the management of joint concerns—habituating them to act from public or semi-public motives, and guide their conduct by aims which unite instead of isolating them from one another"). *See also* THOMPSON, *supra* note 28, at 17, 38; Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES IN L. 125 (2014). *See also* ARENDT, THE HUMAN CONDITION, *supra* note 28, at 50, 183, *and* PATEMAN, *supra* note 28, at 24–25. *See also* MOUFFE, *supra* note 11.

63. *See* Seyla Benhabib, *The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond*, THEORIA: A J. OF SOC.Y AND POL. THEORY, Dec. 1997, at 6; Dana R. Villa, *Postmodernism and the Public Sphere*, 86 AM. POL. SCI. REV. 712, 714 (1992).

intelligent decisions.[64] Moreover, difficulties in access to reliable information cultivates distorted views, which bears on the potential of any deliberative process that does exist, to be a reasoned one.[65] This is most notable on social media platforms where visibility regimes are structured by principles of "popularity": the content that is most visible is that which is most interacted with, regardless of its coherence, logic, or rationality. The outcome may be that some voices are prioritized over others, thus undermining the extent to which deliberation can be equal and inclusive to meet the requirements of true epistemic discourse.[66]

But these educative and epistemic outcomes are more than just intrinsically concerning. They may also carry repercussions for communities' ability to effectively mobilize vertically vis-à-vis public decision-makers and thus affect the liberating and equity functions of the political voice. The liberating and equity functions of the political voice guarantee individuals' power to control their own destiny.[67] This control demands that individuals not only exercise a form of constraint over public decision-makers, but also that they determine the particular directions that this constraint should impose in order to prevent arbitrary interferences in their life choices.[68] Opportunities for democratic control, however, would be stifled by poor conditions of deliberative and contestatory decision-making on account of how these conditions would limit individuals' capacity to uncover their own, and particularly, collective, political interests and to guarantee that such interests are taken by public decision-makers as preconditions for policy-making and action.[69] A fragmented and polluted communicative environment threatens to decrease the likelihood that diverse groups of individuals would form effective coalitions on the basis of common ideological identifications that would enable them to act in concert ex ante or ex post; and

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64. On the importance of cognitive diversity for collective problem solving see LANDEMORE, *supra* note 29.

65. *See* Cohen, *Deliberation and Democratic Legitimacy*, *supra* note 30, at 74.

66. *See* José Van Dijck & Thomas Poell, *Understanding Social Media Logic*, 1 MEDIA & COMM. 2, 6–8 (2013); Oremus et al., *supra* note 35.

67. *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 69 (1999); PETTIT, *supra* note 31.

68. *See* PETTIT, *supra* note 31, at 172–78.

69. *See* Frost, *supra* note 9, at 1050–54. For the difference between collective and connective action, see W. Lance Bennett & Alexandra Segerberg, *The Logic of Connective Action: Digital Media and the Personalization of Contentious Politics*, 15 INFO. COMM. & SOC'Y 739 (2012).

thus increase the likelihood that public decisions-makers will pursue policies that are dominating by neo-republican standards.[70] The lack of effective opportunities to be heard may also carry innate risks of injustice.[71] In the words of Thomas Christiano, they impact the "equality of means for participating in deciding on the collective properties of society,"[72] and therefore pave the path for normative arrangements that cannot be discursively justified to all.[73] Such normative arrangements are all the more prone to result in distributive injustices.[74]

Employing the lens of the political voice to analyze the democratic harm thought to be caused by the pollution and fragmentation of information and communications, captures two crucial aspects of this harm. First, insofar as it indeed exists, this harm is not only individual-based but rather influences individuals primarily as parts of collectives. The political voice thus moves away from neo-liberal notions of freedom of speech and gravitates towards notions of collective self-determination.[75]

70. *See, e.g.*, Philip Pettit, *A Republican Law of Peoples*, 9 EUR. J. OF POL. THEORY 70, 77 (2010) (providing that under the standard republican theory "individuals are meant to enjoy freedom as non-domination in virtue of being protected against the domination of others by an undominating state"); James Bohman, *Domination, Global Harms, and the Priority of Injustice: Expanding Transnational Republicanism*, *in* DOMINATION AND GLOBAL POLITICAL JUSTICE 71, 73 (Barbara Buckinx et al. eds., 2015) (noting that neo-republicans believe a republic's institutions should be designed to promote freedom as a non-domination).

71. *See* Barbara Buckinx et al., *Domination Across Borders: An Introduction*, *in* DOMINATION AND GLOBAL POLITICAL JUSTICE 20 (Barbara Buckinx et al. eds., 2015) (discussing the risk of injustice that can arise when it is difficult for participants, such as indigenous peoples, to make their claims heard); *see also* Rainer Forst, *Transnational Justice and Non-Domination: A Discourse-Theoretical Approach*, *in* DOMINATION AND GLOBAL POLITICAL JUSTICE (Barbara Buckinx et al. eds., 2015).

72. THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 59 (1996).

73. *See* Rainer Forst, *A Kantian Republican Conception of Justice as Nondomination*, *in* REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 154 (Andreas Niederberger & Philipp Schink eds., 2013) (claiming that no one should be subject to normative arrangements that cannot be properly justified as a free and equal agent of justification because the basis of a republican conception of justice is domination via justification).

74. *See* Cécile Laborde, *Republicanism and Global Justice: A Sketch*, 9 EUR. J. OF POL. THEORY 48, 51 (2010) (contending that it would be a "misinterpretation" to assume republicans do not speak on distributive justice).

75. *See* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. OF INT'L L. 295, 303 (2013) (arguing

Relatedly, harm to the political voice is understood to be systemic, structural, and widespread. In the next part I argue that the predicaments associated with political voice deficits are therefore not limited to the purview of one democracy and its stakeholders, but rather cut across every democracy that allows Big Tech to have access to its users. The Article then takes the argument a step further, to claim that political voice deficits are also *transnational* in a descriptive and normative sense: they matter not only for the democratic relationships of individuals within the confines of a traditionally demarcated national community, but also for the political relations of individuals and communities *across* boundaries. This argument challenges the nation-state mapping of the global space and the political relationships this mapping prescribes.

III. Going "Global"

The lens of the political voice and its focus on the infrastructural features of digital technologies shed light on Big Tech's constitutive transnationality.[76] This transnationality is embedded not only in the physical structure of the World Wide Web but also in the commercial objective of platform services to govern a global medium that strings together billions of individuals from distinct geographical locations in a "community structure" type network.[77] Notably, this transnationality

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that respect for self-determination of the individual and of many collectives should be translated into appropriate institutional mechanisms to minimize systemic democratic failures within the sovereign-based system).

76. S*ee, e.g.*, Rahman, *supra* note 14, at 1625–26 (providing that defining social infrastructure as a concept can diagnose potentially problematic accumulations of private power); Benedict Kingsbury, *Infrastructure and InfraReg: On Rousing the International Law 'Wizards of is'*, 8 Cambridge Int'l L. J. 171, 179 (2019) (noting that a well-established approach for thinking infrastructurally as one that brings together the technical, social, and organizational); Benedict Kingsbury & Nahuel Maisley, *Infrastructure and Laws: Publics and Publicness*, 17 Annu. Rev. Law Soc. Sci. 353, 359–360 (2021) (arguing that like laws, infrastructures also have publics, and that both legal regulation and infrastructures should be designed to account for the multiplicity of publics and aspirations to publicness).

77. *See* Matthias C. Kettemann, The Normative Order of the Internet: A Theory of Rule and Regulation Online 25 (2020) (comparing a normative infrastructure as the intangible associated with the physical infrastructure of the internet).

is very different from that of other transnational corporations such as McDonald's or Nike. Contrary to these commodity-manufacturing corporations, whose transnational character is an implemented feature of their operations and refers only to the scope of their business and not to its nature, the transnationality of Big Tech is truly an organic property of their commercial undertakings.

Importantly, this transnationality has pioneered both the potential and the promise to *scale* the political voice and make it a robust reality, not only within democracies, but also across and between them.[78] In the words of Jack Balkin:

> the digital revolution makes it easier for content to cross cultural and geographical borders. Not only can speakers reach more people in the country in which they live, they can also interact with and form new communities of interest with people around the globe.[79]

Noting the novel communicative affordances of the Internet perhaps seems trite by now, but it is crucial to understand how these affordances interact with broader trends that have influenced democracies' political existence and shaped their fundamental ideals in order to fully come to terms with the genuine scope and nature of Big Tech's challenges. In this context, the Article departs from Yochai Benkler's view that "any consideration of the democratizing effects of the Internet must measure its effects as compared to the commercial, mass-media-based

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78. *See* Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedoms 10 (2007) (stating that the networked information economy enables a shift from the mass-mediated public sphere to a networked public sphere).

79. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. Rev. 1, 7–8 (2004). *See also* Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Promotion and Protection of the Right to Freedom of Opinion and Expression ¶10, U.N Doc. A/66/290 (Aug. 10, 2011) (referring to the Internet as a "vital communications medium which individuals can use to exercise their right to freedom of expression, or the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers"); Cengiz v. Turkey, App. nos. 48226/10 and 14027/11, ¶49, ¶52, (Dec. 1, 2015), https://hudoc.echr.coe.int/eng?i=001-158948 (discussing how the Internet has developed into "one of the principle means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest").

public sphere, not as compared to an idealized utopia that we embraced a decade ago of how the Internet might be."[80] The Article posits, rather, that the potential and perils of technology should be normatively evaluated in relation to how well technology serves the needs of societies, and in relation to the extent to which it may, and does, support the realization of certain social and political ideals.

Indeed, from a normative standpoint, the ability of individuals to receive information on events that take place beyond their borders and to communicate with foreign others has become particularly important in "our contemporary global condominium."[81] Suffice to note the integration of the global economy, the realization of transnational threats (climate change, pandemics), or the increasing delegation of political authority to global governance institutions in order to give a sense of the extent to which democracies—and the political interests and opportunities of their inhabitants—are routinely influenced by outside occurrences and power centers.[82]

These trends have problematized our classic Westphalian conceptions of democracy and the attendant crude boundaries between the "domestic" and the "international."[83] The world we now inhabit features increasing misalignments between public decision-makers and spheres of affected stakeholders,[84]

80. BENKLER, *supra* note 78, at 10.

81. Benvenisti, *supra* note 75, at 298.

82. *See, e.g.*, Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization,* 98 MICH. L. REV. 2329, 2329 (2000) ("Among the most common critiques of globalization is that it increasingly constrains the ability of democratic communities to make unfettered choices about policies that affect the fundamental welfare of their citizens, including those of health and safety, the environment, and consumer protection"); Richard H. Pildes, *The Age of Political Fragmentation,* 32 JOURNAL OF DEMOCRACY 146, 147–48 (2021) (explaining that political fragmentation includes the ability of political parties, organized and nonorganized groups, and individuals both inside and outside of government to influence and disrupt processes for making and implementing policy).

83. *See* SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 30–31 (2003); Nancy Fraser, *Reframing Justice in a Globalizing World,* 36 NEW LEFT REV. 69, 69 (2005); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 1 (2004).

84. *See generally* Joseph H. H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy,* 64 HEIDELBERG J. OF INT'L L. 547 (2004); Benvenisti, *supra* note 75; Benedict Kingsbury, *International Law as Inter-Public Law, in* 49 MORAL UNIVERSALISM AND PLURALISM 167 (Melissa S. Williams &

and between these spheres and national polities. Such misalignments generate novel vertical as well as horizontal political yokes that were inconceivable by the once dominant conceptions of sovereignty and their attendant configurations of global space.[85] Diffused individuals and communities from across the globe share "interlinked interests"[86] that bind them together not by the commonality of territory, culture, language, or history but by the commonality of aspirations and trepidations.[87]

Crucially, challenges to our Westphalian conception of sovereignty, democracy, and political space also call into question the domestic conception of the political voice as a classic feature of democracy.[88] As a *democratic* requirement, the notion of the political voice carries a rather fixed set of assumptions regarding the boundaries of the political discursive community to which it applies and within which it assumes normative functions. This notion draws on a theoretical corpus that presupposes a political discursive community that tightly overlaps with the boundaries of the nation-state: the interlocutors are fellow citizens, and public decision-makers are national governments. This imagery of public discourse and political participation as contextualized within national polities is largely a product of the tethering of these principles to a theory of government. John Stuart Mill, for example, directly invoked the centrality of nationality to his theory of government in *Considerations on Representative Government.* He specifies that "[f]ree institutions are next to impossible in a country made up of different nationalities."[89] Mill expressed skepticism regarding the ability of people from different descents or religions, or those lacking collective languages, histories, or recollections, to develop a sense of community that could form the basis for

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Henry S. Richardson eds., 2009); Jean L. Cohen, *Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)*, 2 Humanity 127 (2011); Fraser, *supra* note 83; Benhabib, *supra* note 83.

85. See Benvenisti, *supra* note 75 (changes to our conception of sovereignty).

86. Robert E. Goodin, Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn 134 (2008).

87. Kingsbury and Maisley, *supra* note 76 at 358 (referring to these as "normative publics").

88. *Id.*

89. Mill, Considerations on Representative Government *supra* note 28, at 296.

the establishment of functioning free political institutions.[90] Notably, Mill's educative arguments regarding the importance of what is couched here as the political voice were also intertwined with his emphasis on political participation in the form of voting. Although in his view, the deliberative components of politics were necessary elements for a legitimate political regime, they were also insufficient unless coupled with the ability to practically influence decision-making through the act of voting. Tellingly, he writes:

> But political discussions fly over the heads of those who have no votes, and are not endeavouring to acquire them. Their position, in comparison with the electors, is that of the audience in a court of justice, compared with the twelve men in the jury-box. It is not *their* suffrage that are asked, it is not their opinion that is sought to be influenced; . . . Whoever, in an otherwise popular government, has no vote, and no prospect of obtaining it, will either be a permanent malcontent, or will feel as one whom the general affairs of society do not concern.[91]

Similarly, deliberative democratic theorists often posit strong ties between the deliberative process and that of democratic majority voting, thus cementing the notion of public discourse within the nation-state. From this standpoint, majority rule is "an essential component of democratic decision-making with its own epistemic properties . . . ideally suited to predict which of the two options identified in the deliberative phase is the best."[92] In other words, the process of deliberative opinion formation remains incomplete and potentially ineffective in terms of its legitimizing functions in the absence of appropriate mechanisms of voting power through which to ensure "institutionally structured political will-formation."[93]

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90. *Id.* at 294–295. Mill, it should also be mentioned, had racist conceptions in relation to how fitting democracy was, as a form of political organization, to different societies. According to Mill, democracy would only operate successfully whereby a society has passed a certain threshold of development to become "civilized." *Id.* at 139, 142–3, and 150.

91. *Id.* at 165.

92. LANDEMORE, *supra* note 29, at 145.

93. Jürgen Habermas, *Popular Sovereignty as Procedure*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 57 (James Bohman & William Rehg eds., 1997); JÜRGEN HABERMAS, THE DIVIDED WEST 141–42 (Ciaran Cronin trans.,

However, it is partly *because* of the absence of a vote in the transnational arena that we need to rethink our domestic conception of the political voice and reorient our normative assumptions regarding who the relevant "public" in "public discourse" is, and how this "who" should be defined for the political voice to fulfill its democratic functions under these conditions.[94] Global governance scholarship,[95] and to some extent international human rights scholarship,[96] have taken considerable steps in this direction, ascribing the use of voice normative functions beyond the nation-state as a "regulative ideal" that should govern the vertical relations of power established in and by global governance regimes.[97] Where individuals' life opportunities are heavily influenced by the authority and decision-making power of foreign institutions in which they lack democratic stake, information exchanges and opportunities to communicate demands ex ante, or contest decisions ex post, become vital to securing neo-republican freedom and political justice.[98] Such discursive exchanges invest individuals with normative powers "to interpret, shape, and reformulate the contents of common obligations with others",[99] and therefore provide them standing to "shape the very institutions that in turn shape their freedom and powers."[100]

2006) (noting that "[O]nly within constitutional states do administrative mechanisms exist to insure the equal inclusion of citizens in the legislative process. Where these are lacking, as in the case of the constitutions of international organizations, there is always the danger that the "dominant" interests will impose themselves in a hegemonic manner under the guise of impartial laws").

94. Fraser, *supra* note 83.

95. *See generally* Benedict Kingsbury et al., *Global Administrative Law and Deliberative Democracy, in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW (Anne Orford & Florian Hoffmann eds., 2016).

96. *See, e.g.*, Cristina Lafont, *Accountability and Global Governance: Challenging the State-Centric Conception of Human Rights*, 3 ETHICS & GLOBAL POLITICS 193, 193 (2010) (analyzing the difficulties of making global institutions more democratically accountable).

97. Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 212 (2014).

98. Bohman, *supra* note 70, at 84; Buckinx et al., *supra* note 71, at 2.

99. Bohman, *supra* note 70, at 74.

100. JAMES BOHMAN, DEMOCRACY ACROSS BORDERS: FROM DÊMOS TO DÊMOI 91 (2007). Bohman builds in his analysis on the Habermasian distinction between communicative freedom and communicative power, with the former transforming into the latter when institutionalized within decision- making processes.

Rethinking the "public" in public discourse also requires, however, that we adjust our understanding of the *horizontal* dimension of the political voice and its educative and epistemic functions that are often disregarded by global governance scholarship. Whereby the relevant groups of affected stakeholders with which individuals are affiliated transcend the national community of a particular democracy, the political voice also assumes normative functions in the context of cross-border information flows and discursive interactions. A focus on the horizontal dimension redirects our gaze from global governance institutions to democratic societies themselves and to the strong interest they share today in preserving a functioning transnational deliberative public sphere in order to uphold, among others, the robustness of their own democratic edifice and to maximize their influence on decision-making processes on the world stage. It also, however, points to the performative potentials of the political voice to enact novel collective identities that transcend those prescribed by existing political institutions and that can mobilize politically.

Access to robust information on global events and to transnational discursive exchanges are now preconditions for the potential of individuals and democratic communities to develop a rigorous and comprehensive understanding of their political interests and preferences and of the potentials and impediments for their realization. It creates opportunities for the exchange of either agonistic or reasoned validity claims between diverse, dispersed, and marginalized consociates, and it creates opportunities for the cultivation of rich political awareness that may empower stakeholders to solidify transnational ties with foreign others with whom they may share an "identity of situation" or "sympathies in common."[101] Deliberative exchanges contribute, therefore, to the potential of heterogenous societies to understand as legitimate the positions of others or to converge on broader notions of the common good and to collectively mobilize for the advancement of this common good domestically, regionally, and/or globally, and thereby bolster the legitimacy of foreign and global decision-making.[102]

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101. *See* MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, *supra* note 28, at 295–304.

102. *See* William Smith, *Transnational and Global Deliberation*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 855, 857 (Andre Bächtiger et al. eds., 2018); William Smith & James Brassett, *Deliberation and Global Governance:*

The upshot is that the political voice is remarkably important today in strengthening internal *and* transnational democratic processes. This is not only a claim about Big Tech. It is a broader critical and normative claim about the need to rechart our outmoded conceptual conjectures of the political voice. Indeed, the phenomenon of political voice deficits was not birthed solely by Big Tech. As previously mentioned, vertical deficits are more broadly the product of global governance and have been widely discussed and addressed in recent decades by international law and international relations scholars.[103] At the same time, however, this normative argument cannot be decoupled today from discussions on Big Tech.[104] The focus of this analysis on the horizontal dimension of the political voice and its deficits requires that we pay careful attention to the ways in which these deficits are generated and amplified by the one communicative infrastructure that can enable the political voice to exist and acquire robust meaning across and beyond borders. Indeed, it is particularly by reference to this crucial and constitutive role of technology and its affordances that we should gauge the normativity of Big Tech. From this standpoint, digital technologies are both a promise and a peril: the very entities that have a monopoly over our global communicative infrastructures and are positioned to facilitate and scale the political voice within and across boundaries are simultaneously generating political voice deficits on a transnational scale.

To conclude this part of the analysis, the lens of the political voice and its deficits does more than reorient Law & Tech scholarship to a wider societal perspective on the democratic harms of Big Tech. It also importantly infuses this scholarship with important insights from the realm of global governance

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Liberal, Cosmopolitan, and Critical Perspectives, 22 ETHICS & INT'L AFF. 69, 88 (2008) (offering a slightly different version of the 'epistemic value' of global public discourse albeit not tying it explicitly to epistemic accounts by conceptualizing voice and public deliberation as a critical tool for "deliberative reflection", i.e., "a means for international and global political actors . . . to determine, reinterpret, and in some cases transform the principles and values that regulate their cooperative activities"). It is viewed as important given the "present uncertainty and disagreement about global governance both in theory and in practice." *Id.* at 89.

103. *See supra* notes 95–97 and accompanying text.

104. *See* KETTEMANN, *supra* note 77, at 47 ("The classical state-oriented law paradigm is challenged by globalization and the deterritorialization through the use of ICTs").

and theories of democracy to offer both a (1) descriptive view and (2) normative view of democratic harms as a wide-ranging cause for concern for multiple democracies. The normative view the Article offers identifies political voice deficits as a common concern on account of the interest that democratic societies share, individually and collectively, in upholding the political voice domestically and transnationally.[105] Unlike approaches to content moderation that are often underpinned by distinctive social, cultural, and ideological thresholds of what constitutes offensive content or an affront to freedom of speech,[106] the political voice may be taken as a cornerstone of democratic governance that oils the wheels of the democratic machinery. Thus understood, the political voice—in its domestic and transnational guises—may be qualified as a transnational social capital similar to what some international lawyers would call an "international community interest."[107] Although I employ this term carefully on account of its hegemonic connotations and the fickleness with which it is treated in international legal scholarship and doctrine,[108] I call attention to its conceptual merit in denoting how certain values or aims may be commonly

105. *See* David L. Sloss, Tyrants on Twitter: Protecting Democracies from Information Warfare 16 (2022) (the notion of "an alliance for democracy" to protect democracies from Chinese and Russian information warfare).

106. Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture*, 2 (KSG Faculty Research Working Paper Series, No. RWP05-019, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=668523.

107. For some, particularly those with strong positivist tendencies, the term represents, at best, a set of narrow and well-defined fundamental interests such as peace and security, environmental protection, or human rights, that have come to be recognized almost ubiquitously in international law as "a matter of concern to all States." Bruno Simma, *From Bilateralism to Community Interest in International Law,* 250 Collected Courses of The Hague Academy of Int'l L. 217, at 234 (1994). Others, however, adopt a more expansive view, according to which community interests include also interests of lesser prominence, insofar as these transcend the narrow interests of individual states, or those relating to specific bilateral inter-state relationships, and can be "attributed across borders to individuals or groups of individuals relating to their well-being." Isabel Feichtner, *Community Interest, in* The Max Planck Encyclopedia of Public International Law ¶ 2 (Rüdiger Wolfrum ed., 2007).

108. The "exact nature" of community interests, and the international legal process for their identification remain quite obscure and contested. *See* Samantha Besson, *Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?, in* Community Interests Across International Law 36–37 (Eyal Benvenisti & Georg Nolte eds., 2018).

shared by a wide ensemble of democracies as collective entities within a broader, global context.[109]

The descriptive view of the democratic harms discussed herein illuminates the extent to which our normative aspirations and trepidations are intimately conjoined, at present, with technological affordances. From this standpoint, not only do we imagine political voice deficits to *matter* to multiple democracies, but they also arguably *affect* multiple democracies. The descriptive element thus circles us back to Big Tech's constitutive transnationality where the discussion in this part started. This transnationality considerably challenges our capacity or motivation to distinguish between the outcomes of Big Tech's business model for distinct democratic communities, or between impairments to information flow and to heterogeneous discourse occurring *within* the political boundaries of democracies—amongst members of national communities—and impairments that occur outside of or amid democracies, *transnationally*. In this sense, the effects of Big Tech's business model defy jurisdictional borders in the positive sense, as well as orthodox demarcations of political space.[110] Political voice deficits are rather a feature of the transnational informational and discursive arena that these companies help create and sustain for all users, conjuring the imagery of a global matrix of horizontal and vertical deficits that are layered on top of the world-map of states like the cartographical system of latitude and longitude lines.[111] Taken together, these normative and descriptive views of political voice deficits precipitate an inquiry into the limits of domestic approaches in addressing them, and into the potentials of global cooperation. I take up this discussion next.

IV. How not to go "global"

We now move from the realm of high theorizing to the pragmatic world of thinking about potential solutions to the challenges outlined. This task requires making some compromises.

109. For a discussion on whether the internet in general should be protected as a common interest, see Kettemann, *supra* note 77, at 20.

110. This is despite the fact that the physical infrastructure itself is jurisdictionally distinguishable.

111. Frost, *supra* note 9.

Indeed, there is no real easy way to address what is arguably a highly complex socio-technical phenomenon with hotly contested vices and virtues. The model offered in the next Section V is no silver bullet and is likely to attract critique from various fronts. Specifically, although part of the discussion thus far has aimed to unsettle orthodox conceptions and binaries, the discussion that unfolds below self-consciously takes as a given the present world order and its legal institutions and attempts to operate from within them. But before proceeding to contemplating in positive form the merits of a collaborative effort in the global arena, this Section critically examines three popular alternatives. The shortcomings of these alternatives will help make the case for the collective regulatory framework of the type offered in Section V.

A. *Private ordering by Big Tech*

There are no legal "black holes" when it comes to governing the political voice. In the absence of state action, Big Tech companies will determine the extent to which the political voice can become a reality by means of private ordering. But private ordering of the type that is actually needed to allow for the political voice to meaningfully thrive seems like a distant possibility. After all, political voice deficits of the type imagined here are the outcome of how Big Tech companies currently structure the interactions between users and their platforms; a structuring that caters directly to these companies' core monetizing model. Unlike the issue of content moderation, countering *these* effects by means of private ordering would require Big Tech to voluntarily alter their entire business paradigm.[112] Canonical literature on the potential of transnational private ordering and models of "new governance," has long pointed to the difficulties of relying on voluntary action by private corporate actors, particularly when doing so entails negative cost-benefit outcomes, and when the prospects of intense consumer pressure are low[113]—as is clearly the case with Big Tech given

112. *See generally* Ira Rubinstein & Tomer Kenneth, *Taming Online Public Health Misinformation*, 60 HARV. J. ON LEGIS. 219 (2023).

113. *See, e.g.*, Kenneth W. Abbot & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. L. REV. 501, 560–64 (2021) (discussing the limitations

their monopolistic status.[114] Yet even where these difficulties could somehow be overcome, and Big Tech companies were to engage in the self-regulation of their own advertising-based monetizing structure for the benefit of the political voice, private ordering would still raise difficulties of another type, namely, those related to the democratic losses implicated in these practices.[115] The democratic critique shifts focus from the consequentialist challenges associated with regimes of self-regulation to a fundamental concern with private ordering's relegation of the public "to an onlooker"[116]—a passive observer with little to no involvement in the decision-making process undertaken by the private entity. This democratic critique is particularly strong in the context of Big Tech and the political voice on account of how deeply "public" the issue of "public discourse" is.[117] In sum, not only is private ordering unlikely, it is also somewhat undesirable from the perspective of democracy. This leads to a discussion of the next alternative.

B. *Allowing unilateral regulation by a hegemonic force*

If private ordering won't do, states should be involved.[118] In the absence of a collaborative multilateral framework, we might imagine one powerful state compelling changes to the transnational communicative infrastructure of digital platforms. Indeed, steps in this direction have most recently been taken by the European Union in ruling Meta's ad practices illegal under the GDPR.[119] It remains to be seen to what extent

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stemming from corporate actors' cost-benefit analysis). *See also* Frost, *supra* note 52 (describing "old" and "new" governance mechanisms).

114. *See e.g.*, Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, THE WALL STREET JOURNAL (May 26, 2020), https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499.

115. *See* Lustig & Benvenisti, *supra* note 62, at 146–52 (discussing the democratic losses associated with private ordering).

116. *Id.* at 141.

117. *See supra* notes 52–60 and accompanying text (discussing the public character of the regulatory functions performed by private Big Tech companies).

118. There are, of course, hybrid solutions that stand between private ordering and command-and-control regulatory mechanisms. A discussion of these is, however, out of the scope of this article.

119. *See* Satariano, *supra* note 18.

the European Union's decision, and its regulatory framework more broadly, will generate revolutionary effects with respect to Big Tech's commercial model, but there are already ample causes for skepticism that are practical, but more importantly, normative. Practically speaking, past regulatory attempts to reign in powerful monopolies unliterally have often shown to be unsuccessful.[120] A good example of such endeavors are those that targeted tobacco companies during the 1990s. Prior to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), independent efforts to regulate the tobacco industry proliferated in the United States and elsewhere,[121] as this industry became a "fully globalized, transnational enterprise", with four transnational corporations only "[controlling] 75 per cent of the world's cigarette market."[122] These efforts were met by elaborate lobbying efforts on the part of tobacco companies to influence state policymaking through intense information gathering,[123] direct political financing of campaigns and political caucuses, the establishment of alliances with smokers' rights groups and associations in the hospitality industry, and the funding of projects designed specifically

120. *See* Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 749 (1983) ("...one country usually cannot unilaterally regulate TNC [transnational corporation] power and behavior").

121. *See* e.g., Jenny White & Lisa A. Bero, *Public Health under Attack: The American Stop Smoking Intervention Study (ASSIST) and the Tobacco Industry*, 94 AM J PUB. HEALTH 240 (2004) (investigating the tobacco industry's vigorous reaction to the largest, most comprehensive tobacco control intervention trial in the United States). *See also* Hadii M. Mamudu et al., *Project Cerberus: Tobacco Industry Strategy to Create an Alternative to the Framework Convention on Tobacco Control*, 98 AM. J. PUB. HEALTH 1630, 1638–39, n. 11–24 (2008) (tobacco control initiatives in other countries).

122. Katherine DeLand et al., *The WHO Framework Convention on Tobacco Control and the Tobacco Free Initiative*, *in* THE GLOBAL TOBACCO EPIDEMIC AND THE LAW 11, 13 (D. Andrew Mitchell & Tania Voon eds., 2014).

123. As part of this strategy, the industry used Freedom of Information (FOI) requests to overwhelm government agencies; obtain access to scientific data in order to challenge it; to assault scientists involved in scientific reporting on the harms of tobacco; and to "anticipate regulatory developments in order to resist them." Georgina Dimopoulos et al., *The Tobacco Industry's Strategic Use of Freedom of Information Laws: A Comparative Analysis*, OXFORD UNIV. COMPAR. L. F. 2 (2016), https://ouclf.law.ox.ac.uk/the-tobacco-industrys-strategic-use-of-freedom-of-information-laws-a-comparative-analysis/.

to thwart legislative efforts.[124] By the turn of the century these extensive lobbying efforts succeeded in sustaining low taxation rates on tobacco, and in pre-empting strict local legislation of clean-air acts and laws restricting the access of youth to tobacco in a considerable number of U.S. states.[125] The success of the tobacco industry in resisting regulatory control was due, in large part, to their extensive resources and their power to form effective coalitions and convince domestic legislators to hold back on anti-tobacco policies.[126]

What eventually overpowered the tobacco industry's success was concerted global cooperation through a multitude of global governance institutions. In the mid-1990s, realizing that "singular, country-level tobacco control efforts would not be enough to counter an unregulated global tobacco industry,"[127] the WHO began developing what later became the FCTC.[128] The global attempt to regulate tobacco encountered no less resistance on the part of tobacco corporations who now directed their efforts to emphasize the negative economic implications of the FCTC, particularly for developing countries.[129] This strategy, however, largely failed, as did others,

124. *See* Michael S. Givel & Stanton A. Glantz, *Tobacco Lobby Political Influence on US State Legislatures in the 1990s*, 10 TOBACCO CONTROL 124, 124, 128–29 (2001).

125. *Id.* at 130; *see also* A. O. Goldstein & N. S. Bearman, *State Tobacco Lobbyists and Organizations in the United States: Crossed Lines*, 86 AM. J. PUB. HEALTH 1137, 1137 (1996) ("…the tobacco industry remains exceptionally competent in defeating most states tobacco control legislation. Legislators from tobacco producing states block most federal tobacco legislations").

126. *See* Goldstein & Bearman, *supra* note 125; *see generally* NAOMI ORESKES AND ERIC M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURES THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO CLIMATE CHANGE (Bloomsbury Publ'g 2010).

127. DeLand, *supra* note 122, at 14.

128. The development of the FCTC under the WHO's auspices was possible due to its Constitution according to which the organization can develop binding treaties on health-related issues. *Id.* at 11. The FCTC was adopted in 2003. WHO Framework Convention on Tobacco Control, *opened for signature* June 16–22, 2003, 2302 U.N.T.S. 166 (entered into force February 27, 2005).

129. Hadii M. Mamudu et al., *Tobacco Industry Attempts to Counter the World Bank Report Curbing the Epidemic and Obstruct the WHO Framework Convention on Tobacco Control*, 67 SOC. SCI. & MED. 1690, 1691 (2008) ("The industry worked directly and through surrogates to divert attention from the public health issues raised by tobacco consumption, attempting to reduce budgets for WHO's scientific and policy activities, pitting other UN agencies against

in the face of concerted global action.[130] In the runup to the establishment of the FCTC, the WHO leadership, in collaboration with the World Bank and various other global partnerships between inter-governmental, civil society, and private organizations, established a global cooperative framework for the sharing of information and scientific evidence regarding the adverse impact of tobacco use and its economic and environmental implications, facilitating, also, the communication of these findings to relevant policymakers worldwide.[131] The FCTC was ultimately hailed a success in reigning in monopolistic tobacco companies and bringing them under the regulatory control of the international community.

Big Tech companies raise even greater challenges than those raised by tobacco companies.[132] Their unique monopolistic character and political clout cast doubts on the potential of independent efforts by single states (or blocs) to impose regulatory measures that would succeed in pressuring these companies to introduce fundamental changes to their commercial model and monetizing structure.[133] That being said, it stands to reason that big economic powers such as the European Union or the United States could succeed in demanding such fundamental changes. One could argue in favor of this approach on consequentialist grounds: insofar as the outcome of mitigating political voice deficits is achieved, the means by which it was achieved matter less. I suggest, however, that this prospect confronts us with the same democratic losses that arise with private

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WHO, distorting scientific studies, and trying to convince developing countries that tobacco control is a 'First World' agenda").

130. Another strategy was the promotion of a voluntary regulatory regime instead of the FCTC. *See* Mamudu et al., *supra* note 129 (discussing a collaborative effort by British American Tobacco, Philip Morris, and Japan Tobacco to develop a global voluntary regulatory regime as an alternative to the FCTC).

131. *See* H.M. Mamudu & S.A. Glantz, *Civil Society and the Negotiation of the Framework Convention on Tobacco Control*, 4 GLOB. PUB. HEALTH 150 (2009) (the influence of the Framework Convention Alliance on the treaty negotiation process).

132. *See* Nemitz, *supra* note 51, at 2–4.

133. Previous attempts by Facebook, for example, included moving users from its HQ in Ireland to its offices in California in order to evade the reach of European privacy law. *See* Alex Hern, *Facebook Moves 1.5bn Users out of Reach of New European Privacy Law,* THE GUARDIAN (Apr. 19, 2018), http://www.theguardian.com/technology/2018/apr/19/facebook-moves-15bn-users-out-of-reach-of-new-european-privacy-law.

ordering. That is, any demand for fundamental changes by one hegemonic force is likely to trigger Big Tech to alter platforms' operation *as a whole* on account of the ubiquitous nature of platform-user interaction. For example, in the context of Google, its "near-monopoly on search creates a *uniform,* invisible, and robust infrastructure for accessing the vast store of knowledge and information on the Open Web."[134] The outcome, would be that the decision of one powerful state (or bloc) would determine on its own terms the communicative, and hence democratic, affordances of users worldwide.[135]

C. *Allowing Internet Balkanization*

If deferring to hegemonic forces is problematic for the reasons outlined, we may consider a third alternative: allowing each democracy to enforce changes on Big Tech's political economy only within its own jurisdiction and in relation to its own users. The outcome might be a different business model earmarked for different democracies in accordance with their diffused unilateral demands. While this alternative eliminates the issue of democratic losses that plagues the other two alternatives, it raises a problem of a different kind, that is the further fragmentation of informational and communicative spheres.[136] Even if technically possible then, the fix to the problem described in this Article would potentially only aggravate it further. Such concerns are not novel. For example, already ten years ago in a report written within the Harvard Kennedy School on "Internet Fragmentation" Jonah Force Hill alerted

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134. Jean-Christophe Plantin et al., *Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook*, 20 New Media & Soc'y 293, 305 (2018) (emphasis added).

135. *See* Bradford, *supra* note 14, at 19–35. Taking this argument further, this might be interpreted as an unlawful intervention in a state's internal affairs. A state would be seem as intervening if the act is coercive and relates to matters that each sovereign state is free to decide. *See* Barrie Sander, *Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 Chinese J. Int'l L. 1 (2019) (describing non-intervention in the context of internet "influence operations.").

136. To some extent we have long witnessed the phenomenon of internet Balkanization with China's increasing enclosure of its own internet space. *See* Tim Wu, *The Filtered Future: China's Bid to Divide the Internet,* Slate, July 11 2005, https://slate.com/news-and-politics/2005/07/china-s-bid-to-divide-the-internet.html.

that the rapid crafting of digital privacy rules by governments pose "a real threat to the Internet's unity."[137] It is worth quoting some of these concerns at length:

> Amidst the flurry of new privacy legislation under discussion in world capitals, there has been remarkably little international coordination or agreement about what types of restrictions and limitations should be put on the acquisition of online data. There are mounting concerns that if many countries adopt their own unique privacy requirements, then every firm operating on the Internet could potentially be subjected to a multiplicity of often inconsistent laws. If companies are unable to meet each country's differing requirements … then we would see firms pulling out of particular markets entirely, essentially *balkanizing the Internet by firm*.[138]

The risk of fragmentation is even greater with policies aimed not only at privacy regulation but also more fundamentally at the very heart of Big Tech's advertising-based business model. Multiple uncoordinated unilateral efforts of this kind risk fragmentation into several different Metas, Googles, or Twitters, with detrimental consequences for the cross-border flows of information and communications. In other words, in the absence of collaborative regulatory action in the global arena, the very promise of the Internet and of these platforms to scale the political voice is unlikely to materialize in the way envisioned here.

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Having laid bare the difficulties of these three alternatives, we can now think positively about the virtues of a collaborative multilateral effort that employs international legal tools. This is not to suggest that this type of effort would not come with its own set of problems. For one, democratic harms are sociopolitical harms that do not lend themselves to quantification of the type that typically attracts international legal regulation.[139]

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137. Jonah Force Hill, *Internet Fragmentation: Highlighting the Major Technical, Governance and Diplomatic Challenges for U.S. Policy Makers* 43 (Belfer Ctr. for Sci. and Int'l Aff. May 2012) https://www.belfercenter.org/sites/default/files/files/publication/internet_fragmentation_jonah_hill.pdf (last visited Jan. 30, 2023).

138. *Id*. at 43–44 (emphasis added).

139. I thank Christiaan van Veen for emphasizing this point.

Moreover, the constitutive transnationality of Big Tech also raises issues of jurisdiction that go to the heart of classic international legal paradigms; and, as is generally the case with multilateral efforts, questions arise as to which states are the ones to dictate the terms of cooperation and which voices get marginalized in the process.

These difficulties notwithstanding, the notion of a collaborative regulatory framework is not far-fetched and indeed has the promise of overcoming the issues that follow from the lack of coordination and collaboration. It has potential to exert both the necessary, and adequate pressure on Big Tech companies to introduce some deep-seated alterations to the ways in which they organize information and communicative spaces. A collaborative strategy may also impede Big Tech's attempts to artificially move users from one jurisdiction to another in order to avoid regulatory scrutiny by specific democracies.[140] Indeed, examples of frameworks similar to one offered in the next part already exist in adjacent fields. The discussion that follows draws on these examples, thus employing methods of legal reasoning by analogy in order to "push the law forward"[141] on Big Tech.

V. Going "global" differently

A. *Due diligence obligations of prevention*

This section offers a way to think about international legal tools which may form a preliminary basis for a multilateral cooperative framework to mitigate the democratic harms of Big Tech. The analogy the Article draws is from the field of international environmental law, particularly that relating to Climate Change. The framework it offers caters to the transnational character of the problems at hand. Importantly, it also considers the particular qualifying features of the democratic harms of Big Tech as harms that are collective-based, injuring individuals "as part of an aggregate entity,"[142] and the importance of

140. *See* Hern, *supra* note 133.

141. Fernando Lusa Bordin, The Analogy Between States and International Organizations 16 (Cambridge Univ. Press 2018).

142. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 645 (1998) (emphasis added).

different democracies having an active role in determining the particularities of how these harms should be mitigated. This framework centers on concepts that have played and continue to play a central role in international environmental law—the *dual notions of prevention and due diligence*.[143] Together, these concepts convey a requirement that states exercise their best efforts to prevent, or at least minimize harm inflicted from their own territory, jurisdiction, or control, upon other states or, importantly, upon a common interest.[144]

This turn to international environmental law yields an original approach to the global legal regulation of Big Tech. To date, those who have conceptualized the challenges of Big Tech in international legal terms have done so primarily through the lens of international human rights law, focusing on content moderation and personal data collection; or on principles of state sovereignty and the right to non-intervention in internal affairs, problematizing online political targeting and "influence operations."[145] These lenses touch upon crucial aspects of Big Tech's operations. But they are also underpinned by a vision of international law as a framework that aims to mitigate the destructive power of states, rather than on this regime's collaborative potential as a "law of cooperation" that could be put to use to target threats of a transnational nature.[146] Climate change, by contrast, is a paradigmatic example of an area of law which provokes international legal obligations for the protection of interests that are *transnational* in scope, and are collectively shared by members of the international community. The drawing of parallels

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143. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8) ("[T]he general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment"); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 53 (Sept. 25); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 193 (April 21).

144. *See* KETTEMANN, *supra* note 77, at 56.

145. *See, e.g.*, Sander, *supra* note 135; *see also* Huq, *supra* note 16.

146. *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 62 (1964) ("This move of international society, from an essentially negative code of rules of abstention to positive rules of co-operation . . . is an evolution of immense significance for the principles and structure of international law").

between environmental damage and transnational political voice deficits is also cogent on account of other substantive similarities between these two objects of study: both involve challenges to interests that are technologically-driven and thus highly dynamic,[147] that result primarily from the conduct of private actors,[148] that have a delayed effect on societies, and, importantly, whose addressing would require "[bridging] the discrepancy between ecological unity and administrative separation."[149] Indeed, this comparison is already evident by the use of idioms such as "information ecology," "information climate," or "pollution of information" in the literature concerned with the influence of Big Tech on informational and communicative spheres.[150]

147. Daniel Bodansky et al., *International Environmental Law: Mapping the Field*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 6–9 (Daniel Bodansky et al. eds., 2008) (discussing some distinctive features of international environmental problems including them being very dynamic).

148. *Id.* at 6 ("Emissions of carbon dioxide and other 'greenhouse gases' result from generating and consuming electricity, driving cars, manufacturing products, growing food, and cutting trees— activities that qualify as private rather than governmental"). Likewise, the current challenges posed to the "political voice" and transnational discursive spheres, are primarily the product of the private regulatory control by Big Tech of global informational and communicative infrastructures. The challenge for international law in both cases is therefore the same: to "develop effective ways of regulating these private activities . . . by requiring states to regulate or otherwise influence the behaviour of the relevant non-state actors within their borders." *Id.* at 6–7. This is despite the fact that a considerable difference exists between the characteristics of private actors operating in these two fields. Whereas in the area of environmental law there are countless private polluters who contribute to climate-related harm, there is only a limited number of private Big Tech companies who exert their regulatory control over global communicative infrastructures.

149. Jutta Brunnée, *"Common Interest"—Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 791, 795 (1989). "Ecological unity" may refer not only to the environment but also to the global communicative infrastructure.

150. *See, e.g.*, Eyal Benvenisti, *Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?* 29 EUR. J. INT'L L. 9 (2018) (stressing the importance of "protecting the channels of communications against…pollution"); *see also* BONNIE A. NARDI AND VICKY O'DAY, INFORMATION ECOLOGIES: USING TECHNOLOGY WITH HEART 24 (1999) (for the use of the metaphor of ecology to "discuss how all of us can find point of leverage to influence directions of technological change").

While ostensibly straightforward, the legal status of due diligence is obscure and its precise prerequisites are contextual.[151] International lawyers are at odds as to what the concept of due diligence demands, and as to whether it can be qualified as a general international legal principle, applicable as a (binding?) legal obligation in all contexts, or whether its purview is limited to specific areas of international law.[152] I refrain from making specific determinations on this point, keeping the discussion at a higher level of abstraction. But it is also precisely on account of this flexibility that I find due diligence an attractive concept. It is highly amenable to the present context of attempting to devise new norms and legal structures for the protection of the political voice or the prevention of political voice deficits. As a regulatory instrument, due diligence corresponds to circumstances whereby risks to public interests need to be mitigated,[153] and their mitigation requires the cooperation of diffused actors.[154] Given its advantages, the notion of due diligence is gaining increasing traction as a "normative tool to address and grapple with the growing transboundary effects and repercussions of governmental and private activities in an increasingly interconnected, contested, and complex international order."[155] Irrespective then, of whether it functions as a

151. *See* Anne Peters et al., *Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 1 (Heike Krieger et al. eds., 2020); ALICE OLLINO, DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL LAW 44 –57 (Cambridge Univ. Press 2022).

152. *See* Peters et al., *supra* note 151, at 8–9. *See also* Neil McDonald, *The Role of Due Diligence in International Law*, 68 INT'L & COMPAR. L. Q. 1041, 1042 (2019) ("There is no general principle or obligation for States to exercise due diligence within international law"); Thomas Cottier & Sofya Matteotti-Berkutova, *International Environmental Law and the Evolving Concept of "Common Concern of Mankind," in* INTERNATIONAL TRADE REGULATION AND THE MITIGATION OF CLIMATE CHANGE: WORLD TRADE FORUM 21, 39 (Thomas Cottier et al. eds., 2009).

153. *See* Peters et al., *supra* note 151, at 2 ("Due diligence is needed when a risk has to be controlled or contained, in order to prevent harm and damage done to another actor or to a public interest"). *See also* OLLINO, *supra* note 151, at 6 ("the 'rise' of due diligence has gone hand in hand with the appraisal of risk under international law").

154. *See* Heike Krieger & Anne Peters, *Due Diligence and Structural Change in the International Legal Order*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 351, 378 (Heike Krieger et al. eds., 2020).

155. Peters et al., *supra* note 151, at 3. *See also* JOANNA KULESZA, DUE DILIGENCE IN INTERNATIONAL LAW 1 (2016) (making a similar point about the importance

principle, an obligation, a standard, or a concept,[156] due diligence is reflective of international law's gravitation towards a law of cooperation that emphasizes humanity as a whole.[157] This concept, therefore, maps on neatly to the aim of preventing or minimizing inherently transnational political voice deficits, created by inherently transnational private companies.

In order to contemplate its potential "operational contours"[158] and trace a very rough blueprint of how due diligence may apply to address political voice deficits, there is a need to delve deeper into the nitty gritty of this concept—into its scope and content. I undertake this task by focusing on references to due diligence in the field of Climate Change. Intertwined with the "no harm" rule,[159] which later developed in codification efforts and the jurisprudence of the International Court of Justice (ICJ) into the principle of prevention,[160] the notion of due diligence in this field "dictates a proactive

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of specifying what due diligence obligations entail "in forever more areas of international cooperation, be it preventing terrorist activity, planned within state territory and aimed against foreign states or authorizing international companies to conduct risky activities possibly generating significant transboundary harm to foreign interests and individuals").

156. *See* Peters et al., *supra* note 151, at 8–9. All of these elements have been used by the International Law Association Study Group on Due Diligence in International Law, Second Report (2016), https://www.ila-hq.org/en_GB/documents/draft-study-group-report-johannesburg-2016.

157. *See* Jorge E. Viñuales, *Due Diligence in International Environmental Law: A Fine-Grained Cartography*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 111, 127 (Heike Krieger et al. eds., 2020).

158. Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, 52 ARCHIV DES VÖLKERRECHTS 293, 296 (2014).

159. The origins of the "no harm" rule, are found in Trail Smelter (U.S. v. Can.) 3 R.I.A.A. 1905 (1938) and Trail Smelter (U.S. v. Can.) 3 R.I.A.A. 1938 (1941). It was later enshrined in the what is known as the Stockholm Declaration. The United Nations Conference on the Human Environment, *the Declaration of the United Nations on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972). It was then re-stated in Principle 2 of the Rio Declaration on Environment and Development, the United Nations Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development*, U.N. Doc A/CONF.151/26(Vol. I), annex I (June 3–14, 1992).

160. *See Pulp Mills*, *supra* note 143, at ¶101. For a discussion on the principles of international environmental law and the evolution of the 'no harm' principle into the principle of prevention see PIERRE-MARIE DUPUY AND JORGE VIÑUALES, INTERNATIONAL ENVIRONMENTAL LAW 58–104 (2018).

approach to risk,"[161] and operates beyond territorial limits to "regulate transnational threats."[162] The concept has found its way into several international legal instruments, including the Rio Declaration on Environment and Development and the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (ILC Draft Articles).[163] It has also been employed as an evaluative and interpretive tool by domestic courts to assess states' obligation to mitigate environmental harm pertaining to Climate Change.[164] These instruments and commentary thereon spell out in somewhat more detail the scope of the obligation (to whom it applies and what type of behavior it covers) and the standard of care expected from states when discharging it.

1. *The scope of the obligation*

The parameters of the due diligence obligation in international environmental law are widely cast to embrace both affirmative acts and failures to act that produce external harm or even risk of harm to the environment.[165] This obligation to act diligently also includes an obligation to ensure that private actors do not generate similar harms or risks thereof.[166] The scope of governments' obligations was alluded to by the Dutch courts in the various instances in the case of *Urgenda*.[167] The Court of Appeals and Supreme Court both acknowledged that in the case of transnational threats such as Climate Change, the international legal principle of harm prevention plays an important role in constraining executive discretion and determining the scope of individual governments' obligations as part

161. Leslie-Anne Duvic-Paoli, The Prevention Principle in International Environmental Law 199 (Cambridge Univ. Press 2018).

162. *Id.* at 360.

163. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 144–70. While these draft articles do not represent formal rules, they indicate the scope of the obligation.

164. *See* HR 20 December 2019, NJ 2020, 19/00135 m.nt. DJV (Urgenda Foundation v./State of the Netherlands) [hereinafter *the Urgenda Case*].

165. *See* Viñuales, *supra* note 157, at 121.

166. *See* Viñuales, *supra* note 157, at 113. According to Vinūales, this is clear since *the Alabama Claims*.

167. In *the Urgenda Case*, a Dutch environmental group sued the Dutch government to require it to do more to prevent Climate Change. *See supra* note 164 and *infra* notes 207–210 and accompanying text.

of a collective global effort.[168] As put by Duvic-Paoli, prevention "represent[s] the aspirations of international law to protect common universal values."[169]

The architecture, language, and grammar of prevention and due diligence fit well, therefore, with the idea of promoting a multilateral effort to mitigate transnational political voice deficits. This effort would demand that democracies take the protection of the political voice as a relevant consideration when forming policies on Big Tech, with a view to mitigating the democratic harms, or the risk of such harms, generated by these companies' political economy. By the same token, inaction by democracies to take appropriate measures with this view in mind, would constitute an omission, ex post, that infringes upon the protected community interests and legitimate expectations of fellow democracies and their inhabitants. The following remark by Colin Sparks on the regulation of the Internet is particularly instructive in this context. It emphasizes the duty of democracies to ensure that *private action* is curbed for the benefit of open, deliberative discursive domains:

> The *agora,* of course, was the marketplace of Athens, as well as the physical site of the classical public sphere. But before the meetings of the Assembly of citizens, it was the duty of the *Council* to close all of the market stalls in order to make room for the business of the city.[170]

Although attractive in principle, obligations of due diligence do not come without difficulties. In the context of the scope of obligations, questions arise regarding the right interpretation for the location of harm; a pertinent issue with respect to political voice deficits whereby it is truly difficult to pinpoint a physical location where democratic harm takes place. As evident from the discussion in Section III, political voice deficits are a feature of our transnational informational and discursive public sphere, affecting the political voice of diffused publics indiscriminately much in the same way that harm to the environment cannot be easily demarcated as occurring strictly within the boundaries of a given state to which diligence

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168. *See the Urgenda Case*, *supra* note 164.

169. DUVIC-PAOLI, *supra* note 161, at 360.

170. Colin Sparks, *The Internet and the Global Public Sphere*, *in* MEDIATED POLITICS 75, 92 (W. Lance Bennett & Robert M. Entman eds., 2000) (emphasis added).

would be due. Despite these difficulties, scholarly commentary on the ILC Draft Articles has offered a broad interpretation that is conducive to the idea of parallel obligations to prevent political voice deficits. Such interpretation breaks free from the narrow model of Westphalian territoriality and the corresponding view of prevention as a bilateral, inter-state obligation between a state of origin and an affected state. It allows a construal of the obligation to prevent as targeted towards harm to a common interest, regardless of the specific location of harm.[171] Like in the context of the environment, if this interpretation was extended to the context of democratic harm, due diligence obligations could apply to democracies generally without the need to strictly demarcate whether the obligations are directed inwards—towards a democracy's own polity, or outwards—towards other democracies. Directed inward, prevention would align with other duties of the democratic state that are associated with the basic exchanges between citizens and their government and are underpinned by the idea of the social contract.[172] Directed outwards, prevention would imply "a 'diagonal' right of individuals or groups vis-a-vis States other than their own."[173]

The question of scope becomes even more complicated, however, when needing to determine to which democracies due diligence obligations to prevent apply in practice. In other words, which democracies are those in whose jurisdiction Big Tech operates, and from which the harm to the political voice could be said to emanate? This spatial conundrum testifies to the complexity of trying to regulate socio-political harms. Unlike environmental matters that are characterized by a

171. *See* Duvic-Paoli, *supra* note 161, at 234.

172. Democracies, in this context, facilitate the provision of "inherently public goods" by private bodies. Some have argued that these are goods that "cannot be fully specified and realized apart from the state institutions providing these goods." Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 Phil. & Pub. Aff. 67, 90 (2013).

173. Duvic-Paoli, *supra* note 161, at 236. See the entire chapter for a detailed discussion on the geographical scope of prevention. *See also* Benvenisti, *supra* note 75 (arguing for an interpretation of sovereignty that requires states to assume obligations towards strangers situated beyond their boundaries even absent specific obligations in treaties). On the notion of global solidarity see generally to the contributions in Netherlands Yearbook of International Law 2020: Global Solidarity and Common but Differentiated Responsibilities (Maarten den Heijer & Harmen van der Wilt eds., 2020).

strong physical component and are often quantifiable,[174] (states can measure CO2 emissions from their territory, for example) Big Tech's operations are even harder to neatly map on to traditional allocations of state jurisdiction, control, and responsibility in classic international law. Yet similar conundrums have already been addressed in the more general context of Internet jurisdiction, particularly in relation to cyber operations. Nested within the broader and more rudimentary issue of the general applicability of international law to cyberspace,[175] this debate hinged, inter alia, on the perceived misalignment between the "territoriality-focused paradigm" of international law and the "a-territorial" features of cyberspace.[176]

International dialogue on these principled questions took center stage amongst the members of the UN Group of Governmental Experts (GGE), who managed to agree in their 2013 report that cyberspace is not a free-for-all domain but rather one regulated by the same principles regulating physical domains.[177] The 2013 report went on to specify that: "State sovereignty and international norms and principles that flow from sovereignty apply to State conduct of ICT-related activities, and to their jurisdiction over ICT infrastructure within their territory."[178] And yet, even this rudimentary understanding failed to crystallize in the years that followed, as the UN GGE process reached a

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174. Indeed, this physical component is central in the ILC Draft Articles.

175. *See* David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that the establishment of cyberspace undermines traditional territorial boundaries of law).

176. DAN JERKER B. SVANTESSON, SOLVING THE INTERNET JURISDICTION PUZZLE 4 (Oxford Univ. Press 2017).

177. *See* Anders Henriksen, *The End of the Road for the UN GGE Process: The Future Regulation of Cyberspace*, 5 J. OF CYBERSEC. 1, 2 (2019). This is still the position reflected in the writings of some scholars. *See, e.g.*, Dapo Akande et al., *Old Habits Die Hard: Applying Existing International Law in Cyberspace and Beyond*, EJIL: TALK! (Jan. 5, 2021), https://www.ejiltalk.org/old-habits-die-hard-applying-existing-international-law-in-cyberspace-and-beyond/; Nicholas Tsagourias, *The Legal Status of Cyberspace*, *in* RESEARCH HANDBOOK ON INT'L L. AND CYBERSPACE 13–16 (Nicholas Tsagourias & Russell Buchan eds., 2015); Harold Hongju Koh, Legal Adviser, U.S. Sec'y of State, *International Law in Cyberspace*, Remarks as Prepared for Delivery to the USCYBERCOM Inter-Agency Conference (Sept. 18, 2012), *in* 54 HARV. INT'L L. J. Online 1 (2012) (U.S. position on the issue).

178. The Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, Rep. of the G.A., UN Doc A/68/98, ¶ 20, (2013).

dead-end following its last session in 2017.[179] In particular, disagreement still persists over the particular ways in which international legal principles apply in this arena and the extent to which they apply.[180] For some, given that cyberspace is a novel domain of activity, the absence of state practice and *opinio juris* calls into question the applicability of customary international legal rules to this domain.[181] Others, in contrast, do not view international law generally as "domain specific," but rather find it relevant to any domain except where explicitly limited to a specific context.[182] This is particularly true in relation to cyberspace and cyber-activities which consist of a physical infrastructure passing on territory, and involve "persons or entities over which States may exercise their sovereign prerogatives."[183]

This interpretation of the ultimate physicality of Internet conduct facilitates the task of delineating democracies' scope of obligations in the present context.[184] Big Tech companies would be viewed to operate from the jurisdiction of any democracy that allows them access—via their physical infrastructure—to users within this jurisdiction. From this viewpoint, there is no need to consider whether or not due diligence "has crystalli[z]ed

179. With states such as China, Russia, and Cuba failing to accept the draft report. *See* Eyal Benvenisti, *State Sovereignty and Cyberspace: What Role for International Law?*, *GlobalTrust* (Aug. 30, 2017), and Henriksen, *supra* note 177, at 2–3.

180. Henriksen, *supra* note 177, at 2; Akande et al., *supra* note 177.

181. *See, e.g.*, Akande et al., *supra* note 177 (Israel's Deputy Attorney General's argument); *see also* Benvenisti, *supra* note 150, at 76–77, comparing this stance to the ILC's decision to exclude confined aquifers from the definition of an "international watercourse."

182. *See* Akande et al., *supra* note 177 (arguing that "we should be sceptical about a supposition that the application of international law rules is 'domain' specific").

183. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 12 (Michael N. Schmitt ed., 2d ed. 2017). The position expressed in the Tallinn Manuals and by other international legal scholars entirely coheres with the notion of jurisdiction in international law as the "legal instantiation of sovereignty" and with the territorially-centred paradigm of jurisdiction according to which "a state has the exclusive right to regulate all that occurs in its territory for the simple reason that it occurs in its territory." *See* Tsagourias, *supra* note 177, at 14; SVANTESSON, *supra* note 176, at 4.

184. Constantine Antonopoulos, *State Responsibility in Cyberspace*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE (Nicholas Tsagourias & Russell Buchan eds., 2015) (discussing the challenges of attributing conduct in cyberspace to states for the purpose of establishing state responsibility).

for cyberspace."[185] Due diligence would apply here in the same manner that it applies elsewhere:[186]any harm resulting from jurisdictional access to users would be under the purview of democracies that made this access possible.

2. *The standard of care expected of states*

The standard of care relates to the lengths we expect states to go to in order to satisfy the obligation of due diligence.[187] While this standard of care is still subject to much flexibility, commentary has helpfully consolidated around three formative features of due diligence that provide guidance on when diligence is due, what it entails, and the extent to which it should be exercised. These general features may serve as a yardstick against which to evaluate executive discretion and measure whether or not a state has acted diligently in a particular case. They may further be mapped onto the particularities of the interest that the obligation aims to protect, taking into consideration context-specific issues this application may give rise to in order to infuse the due diligence obligation with more concrete meaning in relation to the political voice.

The first feature relates to the capability of a given state to act to discharge its obligation and to influence the source of the risk.[188] The general threshold is low: states are demanded to act when they can;[189] and "acting" can mean taking substantive and procedural measures.[190] If a state could act to influence a

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185. Akande et al., *supra* note 177.

186. OLLINO, *supra* note 151, at 142.

187. Viñuales, *supra* note 157, at 124.

188. OLLINO, *supra* note 151, at 135.

189. RODA VERHEYEN, CLIMATE CHANGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 160 (2005) ("Clearly, the no-harm rule does not require a State to fully prevent damage. Instead, it requires a State to prevent damage where it can and otherwise to minimize the risk as much as possible given the particular situation—including minimizing the risk of climate change damage"). *See also* Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1, 13 (2008) (in the context of reducing greenhouse gas emissions, for example, "the general duty to enter into consultation on preventative measures and duty to cooperate and to exchange information as outlined by the ILC in its Articles on the Prevention of Transboundary Harm from Hazardous Activities (Articles 8 and 9) is also important").

190. OLLINO, *supra* note 151, at 167 ("The substance of due diligence is 'positive' in the sense that due diligence always requires a proactive approach

source of risk and did not, it would be considered as failing to act in due diligence.[191] The yardstick for evaluating whether or not a state has the capacity to act is an objective international standard of behavior.[192] The specific circumstances considered, however, may include a variety of conditions or a combination of them, such as states' control over the territory or jurisdiction from which the risk emanates;[193] states' economic or technological capabilities;[194] or other contextual capabilities that emanate from specific circumstances with regards to specific risks.[195]

To concretize this first feature in the context of democratic harms, due diligence obligations may require democracies to formulate and implement policies that target the source of risk: Big Tech's advertising-based business model. Substantive action may include, for example, conditioning Big Tech's access to users on some deep-seated alterations to their business model. Most importantly, however, procedural as well as substantive efforts will need to involve the facilitation of international cooperation in formulating shared and coherent standards that could apply to democracies concomitantly and ensure the transnational flow of reliable information and access to open, deliberative public discursive spheres.

The second feature of due diligence relates to the foreseeability or predictability of the risk: the duty to act diligently to prevent harm only arises in relation to a risk that is either known or reasonably foreseeable as a "general consequence of an act or omission."[196] The point of reference for the foreseeability of risks to the climate is general scientific knowledge regarding the overall harmful effects of greenhouse gas emissions, thus setting low the threshold for foreseeability. Claims that specific

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toward risk, whether in the form of legislation, vigilance, monitoring, or physical action").

191. Voigt, *supra* note 189, at 10.

192. *See* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, *in* STATE RESPONSIBILITY IN INTERNATIONAL LAW 129–33 (René Provost ed., 2002) (discussing the objective nature of the due diligence standard and the ways in which this concept may nonetheless be somewhat flexible); *see also Pulp Mills*, *supra* note 143, ¶ 197; VERHEYEN, *supra* note 189, at 176.

193. OLLINO, *supra* note 151, at 134–35.

194. Int'l. Law Comm'n., Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries, art. 3, commentary ¶ 13.

195. Viñuales, *supra* note 157, at 126.

196. Voigt, *supra* note 189, at 12.

risks from specific activities were not foreseeable are therefore unlikely to discharge a state from its due diligence obligations.[197] This feature generally presents considerable obstacles to ascribing due diligence obligations for political voice deficits. As stated at the outset of this section, democratic harm is not quantifiable and hard to prove. Taking the cue from Climate Change, however, the benchmark for foreseeability may be set against the accumulating social science knowledge, public critiques, congressional hearings,[198] and whistleblower accounts,[199] which increasingly consolidate and converge on conclusions that speak to the adverse effects of personalization and fragmentation of information and communications on the political voice.

The third and last feature limits states' efforts to act diligently to those efforts that are proportionate to the risk they aim to mitigate.[200] Proportionality assessments are highly contextual, but the general rationale aims to strike a balance between the legitimate interests of the harmful and harmed state.[201] An assessment of this sort thus demands an inquiry into "whose expectations count,"[202] and ties into the structure of legal relations that due diligence envisions and prescribes. Like

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197. *See* Verheyen, *supra* note 189, at 181 (arguing that states are unlikely to be successful in claiming that they don't know about the effects of manmade climate change in light of existing scientific consensus).

198. *See, e.g.*, Taylor Hatmaker, *Meta, TikTok, YouTube and Twitter Dodge Questions on Social Media and National Security*, TechCrunch (Sept. 14, 2022), https://techcrunch.com/2022/09/14/meta-tiktok-youtube-and-twitter-senate-hearing/ (congressional testimonies of social media company executives).

199. *See, e.g.*, Ryan Mac & Cecilia Kang, *Whistle-Blower Says Facebook "Chooses Profits over Safety,"* N.Y. Times, (Oct. 3, 2021), https://www.nytimes.com/2021/10/03/technology/whistle-blower-facebook-frances-haugen.html (reporting that former Facebook employee Frances Haugen accused the company of failing to remedy the harmful effects of its algorithm).

200. *See, e.g.*, *Alabama Claims of the United States of America against Great Britain,* Award of Sept. 14, 1872, 24 R.I.A.A. 125, 129 (stating that due diligence should be exercised in "exact proportion to the risks" engendered by a particular situation) [hereinafter *the Alabama Claims*]; *see also* Duvic-Paoli, *supra* note 161, at 202 ("The degree of care should be appropriate and proportional to the level of risk that the harm represents: the more hazardous the activity, the higher will be the duty of care").

201. Verheyen, *supra* note 189 at 183–84.

202. Peters et al., *supra* note 151, at 2; *see also* Verheyen, *supra* note 189 at 180 ("*Corfu Channel* clearly established that circumstantial evidence suffices to prove foreseeability and that positive proof knowledge is not necessary").

in the context of Climate Change, the democratic harms of Big Tech cannot be apportioned to one democracy or the other but rather injure democracies individually and collectively. These harms align with a more progressive incarnation of due diligence that has moved beyond the narrow regulation of bilateral relations between two (often neighboring) states to one that aims to address "the challenges of a global risk society,"[203] and is held widely towards the international community as a whole.[204] In this more progressive guise, proportionality assessment becomes less relevant, and due diligence turns to function as an important tool through which to further normative ambitions in the global arena.

To conclude, despite their caveats, due diligence obligations of prevention transpire as a fitting legal tool through which to mitigate the democratic harms of Big Tech. They offer a particularly relevant legal construct for contexts in which technological advancement may quickly render highly specified legal rules outdated;[205] and are fitting to address transnational risks that are triggered by private actors and which do not easily lend themselves to more traditional jurisdictional allocations. Though only a regulatory starting point, these obligations call attention to the ways in which international legal instruments can "be put in the service of promoting democratic values."[206]

B. *The role of courts: going back to Gonzalez*

What role, if any, can courts play within the framework offered here? My analysis of the challenges arising from the possibility of one hegemonic force unilaterally compelling changes to the transnational communicative infrastructure

203. Krieger & Peters, *supra* note 154, at 387.

204. *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33–34 (*erga omnes* obligations).

205. Krieger & Peters, *supra* note 154, at 380.

206. Akbar Rasulov, *From the Wells of Disappointment': The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship*, 32 Eur. J. Int'l L. 17, 23 (2021). On the relationship between international law and democracy, *see generally EJIL Symposium Issue: International Law and Democracy Revisited*, 32 Eur. J. Int'l L. 9 (2021). Of course, given how Big Tech seeps into every aspect of our daily lives, their regulation raises difficult and contested ideological issues that democracies will need to overcome in order to cooperate.

tout court, suggests a very limited role for courts. That is to say that even where SCOTUS *were* to reframe the stakes of Big Tech in the case of *Gonzalez* in democratic terms as posing considerable risk to the political voice, any affirmative pronouncement of the Court on the matter that would have required action by Google, may have been received as highly contentious from the viewpoint of other democracies whose users might have been directly affected.

That being said, courts do in fact have an important role to play within the collaborative, multilateral framework of due diligence. Such a role has already been exercised, for example, by the Dutch courts in the context of Climate Change litigation. In the case of *Urgenda*, a Dutch NGO filed a claim on behalf of 886 Dutch citizens challenging the Dutch government's response to Climate Change. The courts employed due diligence as an interpretive tool; a benchmark to evaluate to what extent the Dutch government has made sufficient efforts to mitigate harm to the environment.[207] Although the international legal principle of prevention was not acknowledged as creating substantive legal obligations under domestic law, this principle played a crucial role in framing the courts' response: it was regarded as a consideration that the government *must* take into account when forming policies about issues relating to *transnational* threats.[208] According to the Dutch courts, then, due diligence obligations of prevention may constrain the state's discretionary power when it comes to matters that have a cross-boundary impact.[209] This position highlights the shared responsibility of states in addressing transnational threats with wider global impact and the need to defer—even interpretatively—to international standards of prevention as "global norms to take action."[210]

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207. *See the Urgenda Case,* supra note 164 and accompanying text.

208. *Rb. 's-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. Ch.W. Backes (Stichting Urgenda/Staat der Nederlanden)*, ¶¶ 4.43., 4.52., 4.55., 4.63.

209. *See Id.,* and *The Urgenda Case, supra* note 164, ¶¶ 5.7.1, 5.7.5; *see also* Maiku Meguro, *Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. INT'L L. 933, 949 (2020) ("By constructing the legal reasoning in this way, the judgment [of the Dutch Supreme Court] brought back the pattern of legal thinking whereby a state is held responsible based on a legal threshold, which is *internationally* determined, rather than simply exercising its own discretion to determine what would work the best for the state within the jurisdiction").

210. *See* Brian J. Preston, *The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)*, 33 J. ENVIRON. L. 1, 15 (2021) (pointing

The *Urgenda* case is instructive for thinking about the role that courts may assume within the multilateral framework the Article offers for mitigating the democratic harms generated by Big Tech. Where such a framework was ever to become a reality, courts could employ, and indeed develop, the notion of due diligence and the standard of care it prescribes as a yardstick in assessing the legality of government policy in relation to Big Tech and the extent to which it conforms to shared global standards.[211] What is important to emphasize in this context is that in doing so, domestic courts should not be viewed as deferring to the values and interests of foreign communities. They should rather be seen as "[reclaiming] the domestic political space that is increasingly restricted by the forces of globalization."[212] This position of the courts is not plagued by the same difficulties discussed above which characterize unilateral pronouncements outside of a collaborative regime. Employing the language of international law would be a means through which to protect the political voice and, hence, the democratic process itself through broader collaboration in the global arena.

VI. Conclusion

The hazards that Big Tech pose go way beyond the individual harms associated with content moderation or data collection. Drawing on a wide range of theories of democracy, I have offered in this Article to think about the outcomes of Big Tech's advertising-based business model in terms of political voice deficits, and their attendant educative, epistemic, liberating, and equity-thwarting implications.

What this Article sought to make clear above all else is that there is limited scope to continue thinking about these deficits purely in "domestic" terms. The structural democratic harms they entail are a contemporary feature of our *transnational* informational and communicative sphere and afflict

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out that the Hague District Court accepted the argument that there exists a norm to take action before states convened for the Paris Agreement).

211. *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am. J. Int'l L. 241, 252–67 (2008) (the role of domestic courts as reviewers of the executive branch in defense of international law).

212. *Id.* at 244.

multiple democracies individually and collectively. We live in an era where global economic integration and political interdependence render vital the opportunity for robust cross-border information exchanges and deliberative communications, and ensuring this potential is indeed in the shared interest of democracies writ large.

Taking this global perspective seriously requires that we contemplate—within the realm of the "possible"—which legal tools could be enlisted to collaboratively address the challenges of Big Tech on the global stage. Following a critical discussion outlining the limits of existing global yet non-collaborative approaches, the Article has offered a way forward that builds on the international legal construct of due diligence obligations of prevention. Their drawbacks notwithstanding, due diligence obligations are increasingly appreciated as fitting to address transnational risks in a highly interconnected, complex world. They emphasize procedural mechanisms of cooperation to develop shared standards but also emphasize the responsibility of each state to mitigate collective harm. Taking cues from the field of Climate Change, this Article provides a rough and very preliminary blueprint of how these obligations could be applied to mitigate the democratic harms generated by Big Tech.

The framework offered here does not imply a limited role for courts. If adopted, courts, including SCOTUS, could indeed have a meaningful role to play within this framework as an agent of change, albeit in a very different capacity than the one taken in *Gonzalez*. In an age of a general backlash against international law and institutions, ideas about enhancing global regulatory solutions have fallen out of favor. But what if "going global" is really needed to remedy the democratic costs of Big Tech? Will we continue to resist thinking in that direction? My suggesting here has been that we should not. And that now is the time indeed go "global."