Is Spotify Bad for Democracy? Artificial Intelligence, Cultural Democracy, and Law

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Much scholarly attention has recently been devoted to ways in which artificial intelligence (AI) might weaken formal political democracy, but little attention has been devoted to the effect of AI on "cultural democracy"—that is, democratic control over the forms of life, aesthetic values, and conceptions of the good that circulate in a society. This work is the first to consider in detail the dangers that AI-driven cultural recommendations pose to cultural democracy. This Article argues that AI threatens to weaken cultural democracy by undermining individuals' direct and spontaneous engagement with a diverse range of cultural materials. It further contends that United States law, in its present form, is ill equipped to address these challenges, and suggests several strategies for better

regulating culture-mediating AI. Finally, it argues that while such regulations might run afoul of contemporary First Amendment doctrine, the most normatively attractive interpretation of the First Amendment not only allows but encourages such interventions.

Introduction

Increasingly, we rely on algorithmic artificial intelligence (AI) to tell us what music to listen to, what movies to watch, what audio books to queue up, what groceries to buy, what stories, jokes, and photos to glance at on our phones, and with whom to go on dates. Beyond these situations in which we intentionally turn to platforms that we know use algorithms, our choice environments are also increasingly shaped by algorithms that we are less aware of. For almost any product or service that we might buy, we are increasingly likely to be targeted by personalized, algorithmically-driven advertisements.

In the past decade, legal scholars have dedicated substantial attention to the legal and policy implications of the growing use and sophistication of AI.[1] Much of this growing body of scholarship explores the legal and political risks that AI poses for people *about whom* algorithmic recommendations are made. For instance, many scholars have focused on the

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[1] Some legal literature on AI contemplates the implications of the highly speculative possibility of a "general artificial intelligence" that meets or exceeds human capacities in a wide range of cognitive activities. *See* Simon Chesterman, *Artificial Intelligence and the Limits of Legal Personality*, 69 INT'L & COMP. L.Q. 819, 843-44 (2020). However, most recent legal scholarship on AI is less speculative, focusing on the implications of the growing use and sophistication of "narrow artificial intelligence" that algorithmically imitates human capabilities with respect to specific, narrowly defined tasks. *See* Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 404-05 (2017). Because general AI "lie[s] at best in the very remote future," John Tasioulas, *First Steps Towards an Ethics of Robots and Artificial Intelligence*, 7 J. PRAC. ETHICS 61, 63 (2019), this Article sets it aside to focus on "narrow" AI.

legal risks associated with the use of AI in decision-making by courts,[2] lawyers,[3] corporate entities engaged in criminal and tortious conduct,[4] lenders,[5] employers,[6] landlords and realtors,[7]

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[2] *See, e.g.*, Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 157 (2019) (discussing the threat to due process posed by courts relying on algorithmic risk-assessment tools when imposing criminal sentences); Andrew C. Michaels, *Artificial Intelligence, Legal Change, and Separation of Powers*, 88 U. CIN. L. REV. 1083, 1085 (2020) (considering risks to the separation of powers posed by turning Article III judicial functions over to AI systems).

[3] *See, e.g.*, Catrina Denvir, Tristan Fletcher, Jonathan Hay & Pascoe Pleasence, *The Devil in the Detail: Mitigating the Constitutional & Rule of Law Risks Associated with the Use of Artificial Intelligence in the Legal Domain*, 47 FLA. ST. U. L. REV. 29 (2019) (evaluating rule of law risks associated with the delivery of legal services by AI in place of lawyers).

[4] *See, e.g.*, Ryan Abbott & Alex Sarch, *Punishing Artificial Intelligence: Legal Fiction or Science Fiction*, 53 U.C. DAVIS L. REV. 323, 328-29 (2019) (evaluating implications of AI for criminal punishment); Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 892 (2018) (describing complications that AI poses for legal concepts of causation and intent); Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. REV. 893, 898-99 (2020) (considering how corporate use of AI might threaten the efficacy of corporate criminal law).

[5] *See, e.g.*, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 7-8 (2014) (discussing due process risks of outsourcing credit-scoring decisions entirely to algorithms); Kristin N. Johnson, Frank Pasquale & Jennifer Chapman, *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 FORDHAM L. REV. 499, 504 (2019) (considering ways in which algorithmic decision-making might undermine fair access to credit); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 1 (2018) (discussing racist effects of algorithms and "technological redlining").

[6] *See, e.g.*, Pauline T. Kim, *Big Data and Artificial Intelligence: New Challenges for Workplace Equality*, 57 U. LOUISVILLE L. REV. 313, 315 (2019) (discussing risks of workplace discrimination arising from AI).

[7] *See, e.g.*, Kristin N. Johnson, *Automating the Risk of Bias*, 87 GEO. WASH. L. REV. 1214, 1220-21 (2019) (focusing on risks of gender bias associated with algorithmic decision-making about hiring, lending, and housing).

healthcare providers,[8] and other individuals and entities whose algorithmically-influenced decisions may produce good or bad consequences for defendants, tenants, employees, consumers, and so forth.[9] Legal scholars have also begun to consider the effects of AI recommendations on the people *to whom* recommendations are made. Much of this literature is focused on the risks that AI poses to democracy,[10] the rule of law,[11] and

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[8] *See, e.g.*, A. Michael Froomkin, *Big Data: Destroyer of Informed Consent*, 21 YALE J. L. & TECH. 27, 32-33 (2019) (discussing implications of machine learning for informed consent in healthcare).

[9] *See, e.g.*, Doaa Abu-Elyounes, *Contextual Fairness: A Legal and Policy Analysis of Algorithmic Fairness*, 2020 J. L. TECH. & POL'Y 1, 6 (2020) (considering threats that AI poses to the values of justice embodied in anti-discrimination law); Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1260 (2020) (discussing implications for anti-discrimination law of "proxy discrimination" facilitated by AI); Robert H. Sloan & Richard Warner, *Beyond Bias: Artificial Intelligence and Social Justice*, 24 VA. J. L. & TECH. 1, 13-14 (2020) (discussing threats that AI poses to equal opportunity in a variety of other fields); *see also, e.g.*, Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial Intelligence*, 72 FLA. L. REV. 331, 334 (2020) (discussing the unfairness to communities who do not have access to AI and the benefits it provides).

[10] *See* Manheim & Kaplan, *supra* note 2, at 133; Paul Nemitz, *Constitutional Democracy and Technology in the Age of Artificial Intelligence,* 376 PHIL. TRANSACTIONS ROYAL SOC'Y A 20180089, at 2 (2018); G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2161 (2020); Tasioulas, *supra* note 1, at 87. A separate branch of literature considers the consequences for democracy of the political-economic effects of AI. *See, e.g.*, Maurice E. Stucke & Ariel Ezrachi, *How Digital Assistants Can Harm Our Autonomy, Privacy, and Democracy*, 32 BERKELEY TECH. L.J. 1239, 1270-71 (2017) (discussing the dangers to democracy posed by the growing economic power of digital AI platforms); Aaron James*, Planning for Mass Unemployment: Precautionary Basic Income*, *in* ETHICS OF ARTIFICIAL INTELLIGENCE 183, 183-84 (S. Matthew Liao ed., 2020) (discussing risks to democracy associated with mass unemployment resulting from AI-induced automation).

[11] *See* MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW: NOVEL ENTANGLEMENTS OF LAW AND TECHNOLOGY 183-84 (2015) (discussing how algorithmic recommendations might undermine practices of textual reading on which the rule of law depends).

public participation in liberal governance.[12] Scholarly discussions of these dangers have tended to focus on the implications of AI for the formal political life of democratic communities, such as the ways in which AI might facilitate interference with elections by delivering recommendations to voters through digital platforms, undermine campaign finance systems,[13] manipulate voters to turn out or to stay at home,[14] and deceive voters with false information[15] and forged photographs and videos of politicians.[16] Scholars have also considered ways in which AI recommendations might undermine the institutions of majoritarian democracy more indirectly by undermining the epistemic foundations of public political discourse[17] or leading the recipients of algorithmic recommendations into politically polarizing "filter bubbles."[18]

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[12] *See* Perry Keller, *Participatory Accountability at the Dawn of Artificial Intelligence* 16 (King's Coll. London Dickson Poon Sch. of Law Legal Studies Research Paper No. 2019-31), https://ssrn.com/abstract=3448315.

[13] *See* Parsons, *supra* note 10, at 232-34 (discussing AI-facilitated microtargeting of campaign advertisements); *see also* Lynn M. LoPucki, *Algorithmic Entities*, 95 WASH. U. L. REV. 887, 890-91 (2018) (arguing that under present U.S. law, autonomous computer algorithms may be able to legally control limited liability companies and, through LLCs, have the right "to spend money on political campaigns").

[14] *See* Brigit Schippers, *Artificial Intelligence and Democratic Politics,* POL. INSIGHT, Mar. 2020, at 32, 33; Jonathan Zittrain, *Engineering an Election,* 127 HARV. L. REV. F. 335, 336 (2014).

[15] *See* Manheim & Kaplan, *supra* note 2, at 148.

[16] *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1757 (2019).

[17] *See* YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 385 (2018) (discussing the deleterious effects on the public discourse surrounding elections of microtargeting on social media platforms).

[18] *See* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 106-07 (2017); Chesney & Citron, *supra* note 16, at 1768; *see also* Tawanna R. Dillahunt, Christopher A. Brooks & Samarth Gulati, *Detecting and Visualizing Filter Bubbles in Google and Bing*, *in* PROCEEDINGS OF THE 33RD ANNUAL ACM CONFERENCE EXTENDED

The focus of the AI and democracy literature on formal democratic institutions, narrowly conceived, is surprising because, contemporaneously with the growth of legal scholarship on AI, legal theorists and philosophers have also produced a growing literature on *cultural democracy*—the aspect of democracy that involves democratic participation in creating and shaping the forms of life, aesthetic values, and conceptions of the good that circulate within a society.[19] One of the main ideas driving scholarly concern with cultural democracy is the thought that, while the goal of democracy is for equal citizens to decide for themselves how to live and what to value, the scaffolding within which those decisions are made is only partially the product of formal political institutions, like legislatures and elections. The sort of music that people make and listen to, the kinship networks that people form, or the kinds of jokes that people tell might be marginally influenced by legal institutions like copyright law, family law, and free speech law, but they are shaped just as much or more by the values and beliefs of individuals and communities acting outside of the institutions of formal politics. In this Article, I will understand culture as the "public space in which members of a society articulate and develop their conceptions of the good and the meaning of life" and in which people express their "views about what is non-instrumentally valuable."[20]

Individuals do not typically aim to produce the values of their culture collectively in the same way that citizens aim to collectively produce the values of formal political institutions. However, individuals who participate in a culture are influenced by the values of other participants and often aim to influence the values of others (even if they do not aim for

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ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 1851, 1854 (2015) (finding empirical support for the existence of filter bubbles in Bing and Google searches). *See generally* ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011) (describing "filter bubbles").

[19] *See* Jack M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 173-74 (1999).

[20] Jonathan Gingerich, *Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies*, 11 N.E. U. L. REV. 523, 537-38 (2019).

everyone to share their values). A one-sided liability to being influenced without a countervailing power to influence can undermine the sense in which individuals decide how to live their own lives on an equal footing with their co-citizens. For people to be in charge of how they live, cultural democrats argue, *culture* must be democratic "in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong."[21]

This Article bridges the divide between the burgeoning literatures on the implications of AI for democracy and those on the importance of culture to democracy, and it provides the first sustained study of the unique threats that AI poses to cultural democracy. In doing so, this Article focuses on what I will call "culture-mediating artificial intelligence" (CMAI). CMAI takes the form of algorithms that recommend cultural materials, by which I mean materials that express or embody cultural values such as songs, stories, and films to human audiences as candidates for their attention. Examples of CMAI include the algorithms relied on by services like Spotify and YouTube to suggest music or videos that customers might like; algorithms used by social media platforms to sort and present stories, pictures, and videos to users; and algorithms used by search engines to filter and present search results and advertisements. This Article explores what sort of cultural creatures we make ourselves into when we delegate large swaths of our cultural lives to these platforms. This Article

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[21] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Age*, 79 N.Y.U. L. REV. 1, 4 (2004); *see* Balkin, *supra* note 19; Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1191 (2007) (discussing the importance of to-and-fro play "in flows of artistic and cultural goods"); Gingerich, *supra* note 20, at 528 (discussing the connection between rights of cultural participation and democratic legitimacy); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 25-27 (2008) (describing a democratic culture as one not controlled by an elite).

relies on Spotify as a paradigmatic example of a CMAI platform to lend specificity and focus to its analysis, but the arguments apply to CMAI platforms generally.

The implications of CMAI platforms for cultural democracy are complex, and the growth of such platforms likely enhances cultural democracy in some ways. However, I will argue that, given several plausible assumptions about the economic aims of these platforms and the attitudes with which many users interact with the platforms, the recommendations made by CMAI platforms may weaken cultural democracy by making people more likely to allow their existing cultural preferences to become further ingrained rather than discovering new artworks that they did not seek out and perhaps did not expect to enjoy. Although this argument about the effects of CMAI platforms on cultural democracy is qualified, I will argue that it provides us with good reason to conclude that, relative to other forms that CMAI platforms could realistically take in a different regulatory environment, the present manifestation of such platforms tends to undermine cultural democracy.

Part I describes the nature of CMAI and CMAI platforms, showing how machine learning algorithms can shape and be shaped by the dominant online platforms that increasingly mediate our interactions with one another and with culture and art.

Part II provides an account of the nature and value of cultural democracy. I argue that a truly democratic society—one in which power is exercised by the people—must be culturally democratic both because cultural democracy is essential to achieving democratic reciprocity among equal citizens and because it is essential to democratic self-rule. I further argue that moving toward greater cultural democracy requires individual members of a cultural community to frequently, directly, and spontaneously engage with a diverse range of cultural objects and practices in a way that allows for the possible transformation of their present cultural preferences and desires.

Part III contends that, given some plausible assumptions about how their users interact with them, CMAI platforms undermine individuals' direct and spontaneous engagement with a diverse range of cultural and aesthetic materials and, as such, inhibit our pursuit of cultural democracy. As a result of their economic objectives, CMAI platforms often rely on our own predictability to make us more predictable, making it less likely that our cultural and aesthetic desires and values will be chaotic and stochastic in the way that is necessary for our shared culture to develop in new and surprising ways.

Part IV contends that existing law is ill equipped to address the distinctive challenges that CMAI platforms pose for cultural democracy. This Part then considers several regulatory mechanisms that could remediate the dangers of CMAI platforms, including proposals to enhance independent oversight of CMAI platforms, to give users voting rights in decisions made by CMAI platforms, and to develop competing platforms that are not governed by the economic logic that drives the behavior of current CMAI platforms.

Some of the most promising regulatory proposals surveyed in Part IV are likely to be deemed unconstitutional under the Supreme Court's present understanding of the First Amendment, which increasingly privileges speech interests of the owners of the means of communication. However, Part V argues that, because of the risks that they pose of encouraging cultural orthodoxy, CMAI platforms are a threat to the values embodied in the First Amendment. An interpretation of the First Amendment that is more congruent with the values that animate it would authorize and even encourage robust regulation of CMAI platforms.

I. Culture-Mediating Artificial Intelligence and CMAI Platforms

While there is no commonly agreed-upon definition of artificial intelligence, it is often taken to mean, loosely, computers doing "things that the human needs intelligence to

do."[22] On a broad understanding of "intelligence," AI encompasses all algorithms that require "inference based on knowledge, reasoning with uncertain or incomplete information, various forms of perception and learning, and applications to problems such as control, prediction, classification, and optimization."[23] Given the informality of this definition, highly varied computational processes are described as instances of AI, ranging from deterministic algorithms that follow a set of rules programmed in advance by humans to stronger forms of AI such as "machine learning." At the same time, no matter how strong an algorithm is, it remains inert until it is paired with a set of data or information, for it is by classifying and categorizing data that AIs determine how a defined problem can be solved.[24]

One socially important context in which strong forms of AI are often deployed is to "filter, highlight, suppress," and edit information flows.[25] An increasingly common application of this filtering AI is to automatically sort, moderate, or edit cultural materials and present them to individual users as candidates for their attention. Paradigmatic applications of this sort of AI include the uses of algorithms by YouTube, Spotify, and Netflix to suggest music and videos to users, Google and Bing to respond to user queries, and Facebook, Twitter, Instagram, and TikTok to moderate and promote certain stories, photos, and artworks posted by users. These applications involve relying on AI to make "subjective" decisions in the sense that the recommendations that the AI produces are not correct or incorrect according to any simple

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[22] Toshinori Munakata, Fundamentals of the New Artificial Intelligence: Neural, Evolutionary, Fuzzy and More 1 (2nd ed. 2008).

[23] *Id.* at 2.

[24] *See* Tarleton Gillespie, *The Relevance of Algorithms, in* Media Technologies: Essays on Communication, Materiality, and Society 167, 169 (Tarleton Gillespie, Pablo Boczkowski, & Kirsten Foot, eds., 2014).

[25] Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 Colo. Tech. L.J. 203, 208 (2015).

or commonly agreed standard.[26] I call AI that is used to perform this sort of cultural filtering "culture-mediating artificial intelligence" (CMAI).[27]

A. *CMAI Platforms*

While, by itself, CMAI is just a tool that could be used for many different purposes, it is typically deployed by platforms—like Facebook, Google, Spotify, and Amazon—that moderate content with the aim of entertaining or attracting the attention of end-users.[28] Platforms that deploy CMAI as a core part of their business are what I will call "CMAI platforms."

By CMAI platforms, I mean sites where people encounter cultural information in algorithmically mediated interactions.[29]

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[26] *See id.* at 206.

[27] I focus primarily on cultural recommendations made to users rather than cultural objects created by algorithms. AIs can already create art, in some sense, and some AIs can generate paintings and works of music that are indistinguishable to certain audiences from human-created works. *See* Tim W. Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 YALE J.L. & TECH. 1, 4-5 (2020); Christian E. Mamman & Carrie Richey, *AI and IP: Are Creativity and Inventorship Inherently Human Activities?*, 14 FIU L. REV. 275, 275-76 (2020). However, the capacity of AI to create artworks remains more speculative than the capacity of AI to provide audiences with recommendations about human-created artworks. *See* Hannibal Travis, *Intelligent Entertainment: Shaping Policies on the Algorithmic Generation and Regulation of Creative Works*, 14 FIU L. REV. 179, 180 (2020). At the same time, algorithms that make recommendations about culture are continuous with those that autonomously create artworks. For instance, Netflix has relied on algorithmic tools to inform its decisions about the storylines of shows that it produces. *See* Andrew Leonard, *How Netflix Is Turning Viewers into Puppets*, SALON (Feb. 1, 2013), https://www.salon.com/2013/02/01 /how_netflix_is_turning_viewers_into_puppets. Therefore, my focus on culture-recommending AI is a matter of emphasis rather than a result of any deep conceptual distinction between algorithmic recommendation and algorithmic creation.

[28] *See* Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 424 (2013).

[29] JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 37 (2019).

The algorithmic mediation provided by platforms typically takes the form of content moderation and sorting.[30] Platforms may store trillions of pieces of information that are served up to users, whether in the form of user-generated posts, photographs or videos, or materials produced or licensed by the platform. To provide users with an appealing experience, platforms must select a tiny fraction of this overall dataset to present to each individual user.[31] CMAI platforms use CMAI both to remove offending content from the platform's index of data (for example, deleting user generated posts containing profanity or depictions of nudity), and to curate the index by selecting content items to present to their users' attention.[32] Such algorithmic curation can encompass all users of a platform at once, like as in Twitter's decision to remove profanity from its algorithmic determination of what topics are "trending,"[33] but platforms typically aim to provide more individualized forms of algorithmic curation.

To make their content as personalized as possible, as well as to allow advertisements to be targeted with optimal precision, platforms tend to create a "data double"[34] or "shadow body"[35] for each user, constructed from the data they have accumulated about each individual user's own past behavior, supplemented by further data about the behavior of demographically comparable users.[36] The "shadow body" is a predictive model of the user's preferences and desires that the CMAI platform can use to improve its content curation, with a view both to keeping the user engaged with the platform (the aim of *user engagement*) and to selling advertisements to marketers who hope to influence the user (the aim of *influence*

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[30] *See* Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 GEO. L. TECH. REV. 198, 201-02 (2018).

[31] *See* Gillespie, *supra* note 24, at 201-02.

[32] Sofia Grafanaki, *Platforms, the First Amendment, and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 118 (2018).

[33] Gillespie, *supra* note 24, at 172.

[34] COHEN, *supra* note 29, at 67.

[35] Gillespie, *supra* note 24, at 85.

[36] *See* SUNSTEIN, *supra* note 18, at 3.

sales). These aims must be balanced against one another, because it is by keeping users engaged that platforms are able to continue harvesting data about them, and an excess of advertising might turn off users. On the other hand, it is by selling ads that platforms can monetize their stores of predictive data. The overarching goal for CMAI platforms thus tends to be "predictability in pursuit of profit."[37]

CMAI platforms are at the forefront of an economic phenomenon that Soshana Zuboff calls "surveillance capitalism."[38] As capitalist firms, CMAI platforms have an overarching interest in maximizing return on capital. Surveillance capitalism is the distinctive way in which they carry out this aim by accumulating data and predictive power about users and potential users. The wealth of many platforms, such as Google, rests on their accumulation of "surveillance assets": predictions about their users' behavior that arise from the platform's non-market interactions with them.[39] For instance, users enter search terms into Google, grant Google access to their location data and IP addresses, and so on. Such data can be culled from any user behavior that the platform has the capacity to track, whether that behavior is consciously participatory (like clicking "Like" or "Follow") or less obviously so (like the length of time a user pauses when scrolling past a post in a social media feed).[40] Google uses some of this data to make improvements to its own consumer products, but much of it forms a "behavioral surplus" as data that is "available for uses beyond service improvements."[41] That is, Google can use its data both to make predictions that improve the search experience that it provides for users and to

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[37] COHEN, *supra* note 29, at 71.

[38] SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER, at iv (2019).

[39] *Id.* at 93-94. Interactions like clicking a "Like" button on Facebook are non-market interactions in the sense that Facebook is not paying the user for the information that they disclose in clicking the button and the user is not paying Facebook for the communicative tool.

[40] *See* COHEN, *supra* note 29, at 65-66.

[41] ZUBOFF, *supra* note 38, at 75.

sell "prediction products" to advertisers or anyone else who is interested in influencing the future behavior of the platform's users.[42]

To maximize the volume of data they can harvest, CMAI platforms try to keep users logged in and behaving in ways that can be surveilled by the platform.[43] For this reason, platforms try to be "sticky," both in the sense of keeping users engaged with the platform as much as possible and in the sense of making it costly for them to leave the platform for a competitor.[44] Because the value of data increases as a platform's predictive algorithms get better at converting data into accurate behavioral predictions and because larger datasets allow the platform to improve its algorithms by training them on a larger corpus of material,[45] platforms tend to prefer the further accumulation of surveillance assets to short term advertising revenue.[46]

This pattern—accumulating data, using it to make predictions about users, and then using these predictions both to sell advertisements and to improve the user experience so that even more data can be accumulated—as depicted in Figure 1, is the basic structure of surveillance capitalism. The predictions made by the CMAI, if successful, result in more satisfied users who spend more time engaged with the platform and, thereby, disclose more data. This data can in turn be used to further improve the platform's AI assets, including both its CMAI and its prediction products. If all goes well for the platform, this system conduces to the continual accumulation of data, refinement of algorithms, and influence sales.

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[42] *See id.* at 93-96 ("Google discovered that we are less valuable than others' bets on our future behavior.").

[43] *See* COHEN, *supra* note 29, at 65.

[44] *See* Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 144 (2017).

[45] *See* COHEN, *supra* note 29, at 85 (describing the "feedback loop" between improved predictive capability and increasing data accumulation).

[46] *See* ZUBOFF, *supra* note 38, at 96.
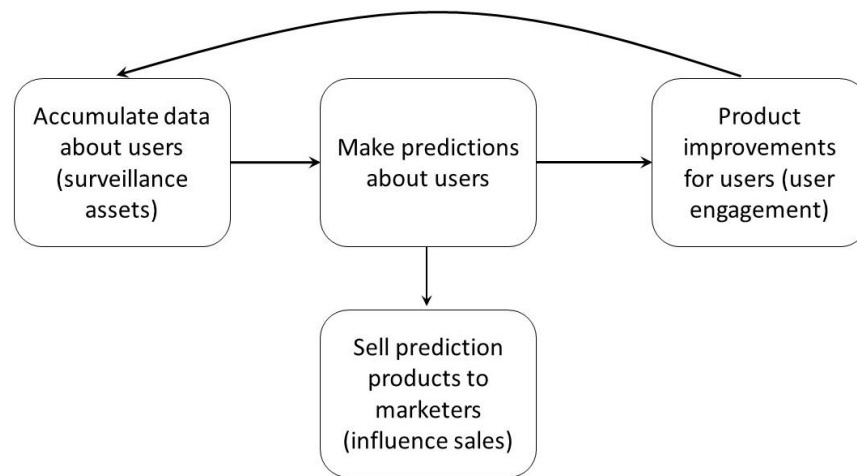
Figure 1. The Circuit of Surveillance Capitalism

B.   *Spotify as CMAI Platform*

With this theoretical description of CMAI and CMAI platforms in place, considering a specific example will help to provide a better sense of how CMAI platforms operate and why. While my argument about the effects of CMAI platforms on cultural democracy is not by any means confined to Spotify, focusing on Spotify as a concrete example will be helpful because the ways in which CMAI platforms might interfere with cultural democracy depend, to an extent, on details about the technology and aims of the platforms, and because Spotify provides an example of a platform that is focused specifically on recommending cultural materials rather than also, for instance, answering factual queries, as Google's search engine does.

Spotify is an audio streaming service that provides users with access to a catalog of millions of songs that Spotify has licensed.[47] Spotify offers both a paid service, without

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[47] *See* SPOTIFY, *What is Spotify?*, https://support.spotify.com/us/article/what-is-spotify (last visited Feb. 13, 2021).

advertisements and with more user control over what music plays, and a free service, which includes advertisements and allows more limited user control in picking out songs.[48] An important feature of Spotify's platform is the recommendations that it provides to its users: the Spotify home screen aims to suggest music that Spotify's CMAI is confident the user will like but that the user may not have heard before.[49] Spotify also includes an auto-play feature that tries to predict what music "should" come next in a playlist, based on what a user has just been listening to, which it then automatically starts playing.[50] Spotify even provides explanations, of a very limited sort, for some of its recommendations, attaching labels like "More of What You Like" to the personalized playlists that it generates.[51]

To generate the recommendations that populate a user's home screen and automatic playlist, Spotify uses a suite of algorithmic tools. CMAIs deployed by Spotify generate classifications based on, among other things, a user's individual listening history, self-disclosed musical taste (for example, reporting to Spotify that they like Da Baby but not Fleetwood Mac), demographic data, and data about the musical tastes of their demographic counterparts.[52] Because Spotify's music catalog is far too vast for any human to listen to all of it, or even to listen to all the new music that is added to it every day, Spotify also deploys algorithms that search for structural

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[48] *See id.*

[49] David Gershgorn, *How Spotify's Algorithm Knows Exactly What You Want to Listen To*, ONEZERO (Oct. 4, 2019), https://onezero.medium.com/how-spotifys-algorithm-knows-exactly-what-you-want-to-listen-to-4b6991462c5c ("Spotify needs to continue building out these algorithms because it's the only way to create custom listening experiences for each of its over 200 million users. As Spotify struggles to grow its business, that differentiating factor needs to be a compelling reason to subscribe to the service.").

[50] *See id.*

[51] *Id.*

[52] *See* Daniel First, *Will Big Data Algorithms Dismantle the Foundations of Liberalism?*, 33 A.I. & SOC'Y 545, 546 (2018).

similarities in the auditory properties of different songs (even if no humans have ever noticed these similarities).[53]

To perform these feats of algorithmic prediction, as well as to sell targeted advertising, Spotify accumulates massive amounts of data. In 2015, Spotify logged one terabyte of data about its users per day, a figure that has presumably increased markedly since then.[54] Spotify aims to collect as much user data as it can, both so that it can improve its personalized music recommendations and because its "main business . . . is sell[ing] its audience to advertisers."[55] In pursuit of its aim of accumulating data, Spotify tries to ensure that its users spend as much time engaged with the platform as possible. To accomplish this, it recommends songs that are likely to keep users listening or clicking on the platform, meaning songs that users can be expected to like as soon as they hear them.[56] This means that Spotify tends to recommend songs that are likely to satisfy its users' immediate, first-order aesthetic preferences (that is, the music they already like) rather than their higher order, aspirational preferences (that is, the music they would like to like).[57] Spotify aims to get users to spend the maximum

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[53] *See* DAMON KRUKOWSKI, WAYS OF HEARING 100 (2019).

[54] *See* Gershgorn, *supra* note 49.

[55] Michael Hahn, *How Spotify's Algorithms Are Ruining Music*, FIN. TIMES (May 2, 2019), https://www.ft.com/content/dca07c32-6844-11e9-b809-6f0d2f5705f6. This is not to deny that the largest share of Spotify's revenue, at present, is generated through its premium subscription services, rather than through advertising sales. Matthew Johnston, *How Spotify Makes Money*, INVESTOPEDIA (Mar. 30, 2022), https://www.investopedia.com/articles/investing/120314/spotify-makes-internet-music-make-money.asp. Insofar as Spotify aims to sell subscriptions, rather than ads, it may be less interested in maximizing the time that users spend on the platform, so, in practice, Spotify's objectives are more complex than the somewhat simplified analysis that I provide here suggests.

[56] *See id.*

[57] *See* Matt Strohl, *Netflix and Will*, AESTHETICS FOR BIRDS (Mar. 22, 2018), https://aestheticsforbirds.com/2018/03/22/netflix-and-will (distinguishing between "aspirational" aesthetic desires and aesthetic desires for immediate pleasure "right now"); *see also* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 402 (1997) (noting that higher-

amount of time using the platform, both to increase ad revenue, and also, perhaps more importantly, to improve its ability to make predictions about what users will like, which will in turn enable it to sell better-targeted, and hence more valuable, advertising.[58] Spotify's overarching aim is maximizing engagement to maximize profit.

In pursuit of this aim, Spotify tries to organize musical consumption around "behaviors, feelings, and moods . . . channeled through curated playlists and motivational messages."[59] As its data and algorithms continue to improve, Spotify hopes to become even better at microtargeting musical recommendations and advertisements to users' "specific proclivities and predispositions"[60] and even to influence the users' affective states (for example, by playing soothing music when the speed and rhythm with which a specific user scrolls through music signals anxiety or asks a voice-activated digital personal assistant to play a song).[61] This task is possible only through AI, since it would be prohibitively costly to perform manually. Such individualized algorithmic interventions are likely to be "stealthy" in the sense that most

order aesthetic preferences are likely to diverge from first-order aesthetic preferences when people hope to learn how to find richer pleasure in a type of aesthetic experience); *cf.* Tim Wu, *Netflix's War on Mass Culture*, NEW REPUBLIC (Mar. 22, 2018), https://newrepublic.com/article/115687/netflixs-war-mass-culture (noting that Netflix gives you "the freedom to only watch television you really enjoy").

[58] This aim is somewhat qualified: in some circumstances, platforms need to balance interests in short-term clicks with an interest in long-term retention of users. *See* Parsons, *supra* note 10, at 2203-04; *see also* Sarah Perez, *Spotify Will Now Allow Artists and Labels to Promote Tracks in Your Recommendations*, TECHCRUNCH (Nov. 2, 2020), https://techcrunch.com/2020/11/02/spotify-will-now-allow-artists-and-labels-promote-tracks-in-your-recommendations (noting that Spotify must balance accumulating information about users with extracting profit by selling advertising, which will lead some users to stop listening).

[59] MARIA ERIKSSON, RASMUS FLEISCHER, ANNA JOHANSSON, PELLE SNICKARS & PATRICK VONDERAU, SPOTIFY TEARDOWN: INSIDE THE BLACK BOX OF STREAMING MUSIC 14 (2019).

[60] Parsons, *supra* note 10, at 2238; *see* COHEN, *supra* note 29, at 84-85.

[61] *See* Tufekci, *supra* note 25, at 211-12.

users are not meaningfully aware that they are being algorithmically microtargeted.[62]

Some listeners, of course, cannot stand the recommendations that Spotify and other streaming services offer.[63] But these recommendations have nonetheless had remarkable success: even in 2013, Netflix stated that 75% of its users were "influenced" by its suggestions.[64] Since then, more and more people consume media diets that are substantially shaped by the recommendations of CMAI platforms.[65] Moreover, Spotify and other platforms continue to make sizable investments in improving the datasets on which they train their CMAIs.[66] Because of the continual testing of new algorithms by Spotify and other CMAI platforms and because my emphasis is on the effects of CMAI platforms in general rather than on the specifics of Spotify, when I write about "Spotify" in the remainder of this Article, I mean to refer to a hypothetical, further improved version of Spotify—what we might imagine Spotify will be like in five or ten years, if it continues to improve its algorithms—rather than Spotify precisely as it exists in 2022.

II. Cultural Democracy

As I contend in Part III, CMAI platforms give rise to substantial problems for democracy. To understand what these problems are, we must first explore the nature and value of cultural democracy as an aspect of democracy writ large.

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[62] *See id.* at 209.

[63] *See, e.g.*, Zohaib Ahmed, *Some YouTube Music Users Detest Autoplay Feature & Want Option to Turn It Off*, PIUNIKA WEB (Nov. 20, 2020), https://piunikaweb.com/2020/11/19/some-youtube-music-users-detest-autoplay-feature-want-option-to-turn-it-off (describing users who detest CMAI autoplay recommendations on YouTube Music).

[64] *See* Leonard, *supra* note 27.

[65] *See* SUNSTEIN, *supra* note 18, at 3.

[66] *See* Hahn, *supra* note 55.

A. *What Does Culture Have to Do with Democracy?*

In political science, democracy is often understood in minimalist terms as requiring only majoritarian elections of representatives and peaceful transitions of power.[67] On this view, the requirements of democratic governance are satisfied when the people control the formal political institutions of the state.

Departing from minimalist democracy, philosophers and political theorists in the past fifty years have developed increasingly sophisticated theories of deliberative democracy that add to minimalist theories of democracy the claim that, to be democratic, the laws and policies enacted by formal, representative institutions must be the outcome of "free and reasoned agreement among equals."[68] In contrast to minimalist theories, deliberative theories of democracy may entail expansive suites of rights that citizens of a polity must hold in order to be "free and equal," to have the capability for the free and reasoned exchange of arguments, and to respect one another as political equals.[69] Deliberative democrats are concerned with culture and informal public discourse insofar as they provide the conditions needed for public political deliberation, but both minimalist and deliberative theories of democracy focus on the *formal political institutions* of

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[67] *See* Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* DEMOCRACY'S VALUE 23, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

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

[69] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 88 (1980); *see also* JOHN RAWLS, A THEORY OF JUSTICE 221-28 (1971). This formal political conception of democracy is often connected to a view that the state should be "neutral" with respect to competing conceptions of the good life, or ideas about what is ultimately valuable. *See* JOHN RAWLS, POLITICAL LIBERALISM 191 (Colum. Univ. Press rev. ed. 2005) ("[T]he state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it.").

democracy: majoritarian elections, representative legislatures, courts and administrative agencies guided by public reason, and the laws and policies that these institutions enact.[70]

Formal political conceptions of democracy were dominant in mid-twentieth century American constitutional theory and remain highly influential.[71] However, some democratic theorists, particularly feminist political theorists, have argued that the basic value that underlies democracy—that the people should rule, rather than being ruled—requires that democratic rule extend not just to formal political institutions but also to informal and non-political institutions like the family because such institutions make a big difference to how individuals' lives go.[72] These informal, cultural conceptions of democracy entail that everyone must have the opportunity to participate in the collective processes through which people coordinate with one another about what is valuable in life and "to create or add to the culture around them."[73]

One of the leading legal theorists of informal "democratic culture," Jack Balkin, focuses on culture as encompassing all "the collective processes of meaning-making in a society."[74] On

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[70] *See* HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY 38 (2020).

[71] *See, e.g.*, Michael C. Dorf, *The Coherentism of* Democracy and Distrust, 114 YALE L.J. 1237, 1238 (2005) (commenting on the enduring influence of Ely's representation-reinforcing theory of democracy and judicial review).

[72] *See generally, e.g.*, SEYLA BENHABIB, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL (1996); BONNIE HONIG, FEMINIST INTERPRETATIONS OF HANNAH ARENDT (1995); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

[73] LESSIG, *supra* note 21, at 25; *see* Balkin, *supra* note 21, at 3 ("[A] democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals . . . ."); Gingerich, *supra* note 20, at 439; *see also* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 232 (2014) (noting that scholars of intellectual property and information law increasingly argue that it is important to protect not just a democratic system of politics but also a democratic culture).

[74] Balkin, *supra* note 21, at 36.

this view, culture includes things like the stories that people tell and the songs that they sing, but also "the institutions of representative government."[75] For Balkin, then, culture encompasses both the collective processes for the creation of shared *political* meaning—including questions about how to secure the conditions of justice in a diverse society, what duties individuals have to one another, and what laws and policies a society should adopt—as well as the collective processes for creating shared non-political meaning, such as answers to questions about what is ultimately valuable or worthwhile insofar as those questions are answered externally and without reference to formal political institutions. Balkin contends that absent widespread participation of ordinary people, or people who are not among the small subset of people who are famous producers of cultural content, in the creation of cultural meanings, a society cannot be democratic because "in an important sense, we are made out of culture; we draw on culture to be the sort of individuals we are."[76] Furthermore, much as something has gone wrong when the decisions of formal political institutions do not reflect the interests of the whole community, so something is wrong when the outcomes of cultural processes do not reflect the interests of the whole community but only a faction.[77]

Because who we are depends so much on the cultural meanings around us and because these meanings are the product of collective processes rather than the isolated behavior of individuals, a society with strong institutions of political representation yet with little opportunity for people to participate in collective processes of cultural production and dissemination would be relatively undemocratic.[78] A

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[75] *Id.* at 35; *see* SELMA JAMES, SEX, RACE, AND CLASS 13 (1975) (describing culture as a "life-style unique to themselves which a people develop").

[76] Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 438 (2009).

[77] *See* Balkin, *supra* note 21, at 6-7. I am grateful to Massimo Renzo for calling my attention to this point.

[78] For similar thoughts about the connection between individual autonomy and the possibility of democracy, see Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23,

democratic culture is characterized not only by all individuals having a roughly equal chance to run for office, influence representative institutions, and contribute to public debates about what laws and policies the state should adopt, but also by all individuals having a say in the creation of the ideas and social meaning that make us who we are and by those ideas and cultural meanings reflecting the interests of the whole community rather than merely those of a faction or an elite.

Democratic culture theories encompass the formal political institutions that minimalist theories focus on and the informal conditions of public debate that deliberative theories view as necessary to support those institutions *plus* all those spheres of life where people develop "the ideas and meanings that constitute them and the communities and subcommunities to which they belong," even when these have little to do with laws or the policies of formal institutions.[79]

Because significant scholarly attention has already focused on how AI might interfere with political culture and the formal institutions of electoral democracy,[80] this Article focuses on *non-political* culture, which is the space where individuals articulate and develop conceptions of the good, the meaning of life, and what is non-instrumentally valuable.[81] Non-political culture is what Edward Said has in mind when he describes

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55 (2001); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 294-95 (2011).

[79] Balkin*, supra* note 21, at 4. Some expansive theories of deliberative democracy, such as that of Joshua Cohen, may treat *all* culture, including aesthetic culture, as relevant to supporting democratic deliberation. *See* Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 225-26 (1993). According to such theories, the theoretical scope of deliberative democracy is coextensive with the theoretical scope of democratic culture. Although I am sympathetic to such approaches, I set them aside to explore the distinctive ways in which the democratic organization of all cultural life might be more directly connected to the values of democracy, aside from whatever effect it has on the proper functioning of the formal institutions of majoritarian rule.

[80] *See supra* notes 10-13.

[81] *See* Gingerich*, supra* note 20, at 537-38.

culture as "all those practices, like the arts of description, communication, and representation, that have relative autonomy from the economic, social, and political realms and that often exist in aesthetic forms, one of whose principal aims is pleasure."[82] Concretely, non-political culture includes not just art, music, film, TV, and Internet memes, but all those domains in which people express their non-political values. For purposes of brevity and in keeping with Said's usage, I will henceforth use the term "culture" as shorthand for non-political culture. I will use the phrase "cultural democracy" to mean the democratic control of non-political culture. This view gets called "cultural democracy" because its most controversial implication is that aspects of culture that we normally think of as pre-political or apolitical are, in fact, political and therefore should, in some respects, be run democratically.[83]

Culture, in the sense that Said is concerned with it, is particularly focused on the "aesthetic," where this has the broad meaning that philosophers sometimes give to the term, involving activities and things that are pursued for their own sake.[84] This conception of aesthetics includes all sorts of practices and objects that express values that philosophers sometimes call "ethical," where ethics concerns not the rights and duties of interpersonal morality but questions about the good, the meaning of life, and what is non-instrumentally

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[82] EDWARD SAID, CULTURE AND IMPERIALISM, at xii (1993).

[83] In Balkin's view, democratic culture is made possible, in large part, by the advent of digital communications technologies. *See* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 N.W. L. REV. 1053, 1060 (2016). I depart from Balkin in taking cultural democracy to be less dependent on any particular technological infrastructure, but this disagreement is largely immaterial to the exposition of the theory of cultural democracy.

[84] *See* C. Thi Nguyen, *Playfulness Versus Epistemic Traps*, *in* SOCIAL VIRTUE EPISTEMOLOGY (Mark Alfano ed., forthcoming 2022) (manuscript at 16) (on file with author) ("In the aesthetic attitude, we are attending to an object for its own sake, rather than for the sake of using that object as an instrument to some other end."); *see also* Jérôme Dokic, *Aesthetic Experience as a Metacognitive Feeling? A Dual Aspect View*. 116 PROC. ARISTOTELIAN SOC'Y 69, 69 (2016) (arguing that that the characteristic feature of aesthetic experiences is their autotelic nature).

valuable.[85] Aesthetics, in the broad sense meant here, is not restricted to the fine arts, or even popular culture, but includes all sorts of processes in which people pursue ideals non-instrumentally and independently of their relevance to politics and justice, including things like rock climbing, playing games, having conversations, cooking meals, picking out a wardrobe, and forming kinship networks.[86] Aesthetic activities are central to cultural democracy because of the tremendous power that they have as a vehicle for developing and communicating our views about what is non-instrumentally valuable.[87]

As Said emphasizes, culture has "relative autonomy" from politics and economics.[88] Questions about what is good and valuable are distinct from questions about what is just and right, as well as from the questions that arise when people pursue goods that they regard as merely instrumentally valuable, such as wealth. What sort of music I want to listen to or what sort of kinship group I want to enmesh myself in are not desires formed in a political vacuum—which is why they are related to the true realization of democratic values—but they are not strictly determined by them either.[89] Additionally,

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[85] *Cf.* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 7 (2006) (describing the broad sense of ethics in contrast with the narrower sense of interpersonal morality).

[86] *See, e.g.*, C. Thi Nguyen, *The Arts of Action*, 20 PHIL. IMPRINT 14, at 1 (2020) (describing rock climbing and playing games as "arts of action"); YURIKO SAITO, EVERYDAY AESTHETICS 33-37 (2007) (describing "everyday aesthetics" as including things like cooking, conversation, making tea, and picking out clothes); GAYATRI GOPINATH, UNRULY VISIONS: THE AESTHETIC PRACTICES OF QUEER DIASPORA 74 (2018) (describing queer forms of intimacy as expressing a distinctive "vision of the 'good life'").

[87] *See* Balkin, *supra* note 83, at 1071; *see also* Balkin*, supra* note 76, at 437 (describing aesthetic, non-political culture as a particularly important component of democratic culture).

[88] SAID, *supra* note 82, at xii.

[89] This conception of cultural democracy is not meant to suggest that there is a sharp line between non-political culture and institutional, justice-oriented politics. Aesthetic culture is, in many ways, deeply political—if it were not, musical taste would not be partially predicted by political orientation. *See* Scott P. Devenport & Adrian C. North, *Predicting Musical*

culture is relatively autonomous from politics in that cultural communities are often not coextensive with political ones, and cultural communities overlap in ways that formal political communities do not. As Balkin observes, culture is transnational, if not global, in nature.[90] Culture can also arise in fragmented subcultures that have little to do with political communities.

Because culture is only *semi*-autonomous from politics and economics, cultural democracy requires some social coordination about ultimate value and conceptions of the good.[91] At the same time, because culture is semi-*autonomous* from politics, it is not well-suited to direct electoral control or governance according to public reason.[92] My view here diverges from what we might call the Jacobin or Leninist view of art and politics that sees aesthetic culture as appropriately instrumentalized by formal political institutions to advance the agenda of justice or equality. On my account, culture is the natural home of the disinterested aesthetic attitude, which concerns the mental contents of individuals. Therefore, culture is unsuited to direct regulation because such regulation is unlikely to succeed at fully controlling or shaping the inner lives of individuals. For these reasons, cultural democracy must be achieved indirectly, by educating citizens to develop the appropriate attitudes toward one another and by designing an economic and political framework that makes widespread participation in culture possible.[93] When we stand back from

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Taste: Relationships with Personality Aspects and Political Orientation, 47 PSYCHOL. MUSIC 834, 845 (2019).

[90] *See* Balkin, *supra* note 83, at 1055.

[91] *See* PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION 37-38 (Randal Johnson trans., 1993) ("[T]he literary and artistic field . . . is contained within the field of power . . . while possessing a relative autonomy with respect to it, especially as regards its economic and political principles of hierarchization.").

[92] *See* Balkin, *supra* note 21, at 39-40.

[93] Such participation paradigmatically takes the form of creative activity, but it can also take the form of cultural consumption, since markets and other aggregative systems transform consumptive preferences into incentives for cultural producers to produce certain types of goods, and insofar as

culture and occupy a position in the political domain (which is itself semi-autonomous from non-political culture), we do not hold elections to decide what sort of music is best, but we do make decisions about how to structure our culture, such as when we set up a system of copyright or a policy of public funding for the arts.[94] In doing so, we make it more or less likely that our culture will allow for widespread popular participation.

B.   Why Is Cultural Democracy Valuable?

Having provided a rough description of what cultural democracy is, I now turn my attention to the question of what makes cultural democracy valuable. In doing so, I do not aim to recapitulate the entirety of the debate between cultural and political democrats but to fill out the motivations for cultural democracy sufficiently to understand what its value might tell us about CMAI platforms.

1.   Cultural Democracy and Reciprocity Among Equals

Democratic society is often understood as a form of social cooperation among its members. For many liberal theorists, democracy fundamentally involves a mutual commitment among the participants in a society to share in both ruling and being ruled.[95] Political reciprocity requires the mutual sharing of burdens among members of a cooperative scheme where recognition of each participant's equal status is expressed through this sharing of burdens.[96]

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consumptive choices might themselves be a form of self-expression. *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 567 (2004).

[94] *See* Baker, *supra* note 57, at 409.

[95] *See, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, in THE BASIC POLITICAL WRITINGS 139, 148 (Donald A. Cress trans., 1987).

[96] *See id.* at 17.

Sharing burdens in this way straightforwardly requires citizens to regard one another as political equals.[97] Norms of reciprocity would not be satisfied, for instance, in a society where everyone had an unquestioned right to vote and run for office but where men made up their minds in advance that they would not seriously entertain any political arguments advanced by women. In such a society, members would fail to express respect for one another as equal participants in the political process.

The requirements of reciprocity extend beyond the requirement that democratic citizens regard one another as equal participants in formal political process. As Seana Shiffrin argues, "[w]hat matters for reciprocity is the mutual willingness to share burdens to facilitate a meaningful sense of freedom in, and access to, the pursuit of a variety of practices that engage with diverse values."[98] To share these burdens, citizens must provide one another with the assistance that they need to pursue their own projects and values, even when they disagree about the worth of those projects and values.

To the extent that norms of reciprocal citizenship require citizens to accommodate one another's pursuits of projects that reflect diverse and conflicting conceptions of what makes for a good life, reciprocity also requires that citizens not be denied the opportunity to participate in shaping the culture that they inhabit. People form and pursue their views about what is ultimately good and non-instrumentally valuable in large part by participating in the shared cultural space provided by the cultural communities they inhabit.[99] Some individuals might

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[97] *See* ROBERT B. TALISSE, OVERDOING DEMOCRACY: WHY WE MUST PUT POLITICS IN ITS PLACE 149 (2020).

[98] Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 270, 299 (R. Jay Wallace, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004).

[99] *See* Ronald Fischer & Ype H. Poortinga, *Are Cultural Values the Same as the Values of Individuals? An Examination of Similarities in Personal, Social and Cultural Value Structures*, 12 INT'L J. CROSS CULTURAL MGMT. 157,

form conceptions of the good that deviate to some extent from prevailing norms in the world in which they live, but such deviations can only go so far.[100] It would be a flight of fantasy, for instance, to imagine that Bach "could have" composed Appalachian folk music, or that Plato "could have" endorsed Rawls's principles of justice. Because of the dependence of individual conceptions of the good on social conceptions, conveying equal respect among citizens requires that citizens take one another seriously as contributors not only to politics but also to the broader culture. Just as a community whose members often refused to entertain each other's' political proposals would fail to satisfy the norms of reciprocity, so would a community whose members often refused to seriously entertain one another's proposals for what a shared culture should look like.[101] For these reasons, norms of democratic reciprocity are violated when individuals are denied an equal opportunity to participate in culture as creators as well as consumers.[102]

2.   Cultural Democracy and Self-Rule

Second, an essential aspect of democracy is that, in democracy, *the people rule themselves* rather than being ruled by a master or a foreign power, or even by their own past. As Balkin puts it, "[t]he central question of democracy is how

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165-66 (2012) (finding that individual values depend significantly on the values in circulation in the cultures of which an individual is a part).

[100] *See* Gingerich, *supra* note 20, at 544 (describing how certain forms of life can appear to an individual as "necessary" or "impossible" depending on their cultural conditions).

[101] I do not mean here to suggest that a failure to entertain the cultural proposals of others is something that we owe *to* others or that they can demand from us. Such a duty is, in my view, likely to be undirected. I am grateful to Massimo Renzo for pressing me on this point.

[102] This is not to suggest that reciprocity requires that everyone must be willing to listen to the song of anyone they run into on the street or read the screenplay of anyone they happen to sit next to in a Los Angeles coffee shop. Obligations of reciprocity to help one another pursue diverse cultural values are context-sensitive and best accomplished through political or cultural institutions rather than through *ad hoc* action by individual citizens.

people can have power in their own lives and over their own lives."[103] For insight into how this power might be compromised and realized, we might naturally turn twentieth century anticolonial theorists, for whom this concern was quite practical and pressing. In the early twentieth century, Gandhi was concerned to understand what it would mean for India to have true *swaraj*, or self-rule. In his 1909 pamphlet, *Hind Swaraj*, Gandhi contemplated whether, if Britain granted India the same sort of self-government that it had already granted to white settler colonies like Canada, India would have *swaraj*.[104] Gandhi's answer was that it would not: if the British Raj were replaced with an Indian state run in large part by Indian civil servants who had studied in London and learned how to approach governing from the perspective of the European Westphalian state, India would not have true self-rule but instead have "English rule without the Englishman."[105] If one thinks, as Gandhi does, that the problem with empire is that it is a form of alien rule, then anti-imperialism requires not only deposing the foreign masters who rule the colonies but also transforming the political institutions and the culture that empire leaves behind. For Gandhi, this entailed "an anti-colonial cultural politics that rejected European/British culture as corrupting, materialist and eviscerating of Indian traditions."[106]

In Gandhi's view, the only way for India to escape from colonial rule was to embrace a radically anti-statist, anti-modern form of politics in which life would be built around

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[103] Balkin, *supra* note 83, at 1061.

[104] M.K. GANDHI, *HIND SWARAJ*, in HIND SWARAJ AND OTHER WRITINGS 1, 27 (Anthony J. Parel ed., 1997).

[105] *Id.* at 28; *see also* M.K. Gandhi, Gandhi's Letter to H.S.L. Polak, Oct. 14, 1909, *in* GANDHI, *supra* note 104, at 129, 130 ("If British rule was replaced tomorrow by Indian rule based on modern methods, India would be no better, except that she would be able then to retain some of the money that is drained away to England; but, then, Indians would only become a second or fifth edition of Europe or America.").

[106] Karuna Mantena, *Popular Sovereignty and Anti-Colonialism*, *in* POPULAR SOVEREIGNTY IN HISTORICAL PERSPECTIVE 297, 311 (Richard Bourke & Quentin Skinner eds., 2016).

traditional village societies and caste groups "that had resisted incorporation by the state and could therefore form the basis of a new kind of pluralist polity."[107] Gandhi turned in this direction because, as he saw it, all "modern civilization" was pushed in the same direction of "selfishness and materialism" by the forces of technology.[108] In contrast with modernity, Gandhi thought, traditional society is more like a language, something that belongs to everyone, or at least not to a particular faction. Life in traditional peasant society might not strike us as particularly open or free compared to life in modern urban society. But Gandhi would deny this: in his view, it is life in modern civilization pushes everyone in it "to be obsessed by commercial selfishness" and all the imperialist and militaristic projects that such selfishness promotes.[109]

Of course, there are severe shortcomings to Gandhi's approach. Traditional caste society may not look very democratic to Dalits, for instance.[110] Relatedly, we might worry whether traditional peasant society reflects the univocal influence of traditional elites any less than modern civilization reflects a uniform influence of capital and empire. But although Gandhi's claims about the promise of traditional village life may be impossible to sustain, his critical point, which is not Gandhi's alone but is shared by many anticolonial thinkers, seems difficult to resist.[111] A society is defective as a democracy if its culture has been heavily shaped by external forces that are

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[107] Mantena, *supra* note 106, at 312.

[108] M.K. Gandhi, Gandhi's Letter to Lord Amphill, Oct. 30, 1909, *in* GANDHI, *supra* note 104, at 133, 134.

[109] *Id.*

[110] *See* B.R. AMBEDKAR, ANNIHILATION OF CASTE: THE ANNOTATED CRITICAL EDITION § 26.4 (S. Anand ed. 2014) ("In my opinion, it is only when Hindu society becomes a casteless society that it can hope to have strength enough to defend itself. Without such internal strength, swaraj for Hindus may turn out to be only a step towards slavery.").

[111] *See, e.g.*, FRANTZ FANON, THE WRETCHED OF THE EARTH 146 (Richard Philcox trans., 2004) (arguing that, to have a legitimate claim to a nation, a people must have a national culture).

not themselves liable to be changed by the people.[112] As Shiffrin notes, for a system of rights to be democratic, the system must "not only be endorsed by us but also must be *our* product."[113] In a true democracy, culture is actively shaped by the (current) people, rather than fixed for all time by the past, domestic elites, colonial rulers, or the owners of capital, control. Rather, the people themselves must decide what forms of life and values are meaningfully available for the people to inhabit, explore, or pursue.

We might worry that accepting Gandhi's critical point undermines any possibility of ever achieving true self-rule. Is there any society in which culture is the autochthonous product of the people rather than the product of influences from without? Here, it is helpful to note Gandhi's emphasis on the claim that modern technology always pushes culture in the same direction: toward commercial selfishness and away from any other conceptions of ultimate value. Moreover, in Gandhi's view, the nature of modern civilization is that it is almost impossible for the people to challenge or transform the cultural impacts of modern technology. For a people to rule themselves, the people must have a chance to participate in shaping their total social life, including both politics and culture.[114] For the whole people to have such a chance, each individual person "must have a meaningful chance" to influence "the culture that makes some social arrangements seem possible and others impossible."[115] For the meaningful chance to be the individual's own, their desires and beliefs must

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[112] Gandhi's critical point allows for a rough and schematic distinction between benign cultural influence and the sort of culture-shaping that robs a people of its sovereignty. In equal, non-colonial exchanges between two societies, each society's culture both influences and is influenced by the other society's culture. In contrast, in a colonial exchange, the colonizing society's culture profoundly transforms the colonized society's culture, while the colonizing society's culture is only liable to be marginally influenced by the colonized society's culture.

[113] SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW 39 (2021)

[114] *See* Balkin, *supra* note 21, at 35.

[115] Gingerich, *supra* note 2019, at 546; *see* Balkin, *supra* note 1999, at 74.

not be dominated or largely scripted by other people or socially coordinated forces external to them.[116]

Stepping beyond Gandhi's discussion of colonialism, we should recognize that removing the threat of unidirectionality does not seem to completely remove worries about the adequacy of self-rule. Even a monoculture that, however improbably, came about through heterogenous impulses that melded together before settling into a stable equilibrium, would still seem lacking in the sort of self-rule necessary for true democracy, for it would be like a society colonized by its own past.[117] For this reason, self-rule in a cultural democracy requires at least the possibility of the transformation of members' desires and preferences through encounters with new or unexpected cultural materials.

C.   What Does Cultural Democracy Demand of Individuals?

We have now seen that cultural democracy is an ideal that requires that all members of a community have a roughly equal chance to contribute to public cultural expression and, thusly, to shape what aesthetic and cultural materials get produced.[118] Cultural democracy is valuable insofar as it is necessary to realize the reciprocity and popular self-rule that constitute democracy as an ideal. Recent legal scholarship on cultural democracy has focused largely on the rights that individuals in a society must be accorded by a democratic culture,[119] or else the ways in which legal institutions, like expansive copyright entitlements, might interfere with the participation of

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[116] While this is a point about the interests of participants in democratic self-rule, it largely parallels Seana Shiffrin's description of the interests of autonomous rational agents. *See* Shiffrin, *supra* note 78, at 290.

[117] Frantz Fanon considers how colonialism can trap a colonized people in its past, even when the formal institutions of colonialism have been withdrawn. *See* FANON, *supra* note 111, 180-81.

[118] Gingerich, *supra* note 20, at 547-48.

[119] *See* Balkin, *supra* note 21, at 46; Balkin, *supra* note 83, at 1061; Gingerich, *supra* note 20, at 536. *But see* Gingerich, *supra* note 20, at 427-28 (arguing that in a cultural democracy, citizens "must not outsource" their "judgements about the value of contributions to culture").

individuals in culture.[120] My focus in this section will instead be on the attitudes that members of a community must adopt toward cultural practices that they encounter for cultural democracy to flourish. I do not claim that individuals have a directed moral duty to take one another seriously as participants in culture such that they are rightly subject to blame if they fail to do so, although I do not rule out this possibility either. Instead, I contend that, while cultural democracy can be realized to a greater or lesser degree, achieving a high degree of cultural democracy requires legal, political, and economic institutions that support the development of certain cultural attitudes in the members of a community.

Because culture is semi-autonomous from the economic, political, and social realms of life, it inheres partly in the attitudes of participants in culture. This means that cultural democracy must make certain demands of the members of a cultural community. Imagine a cultural community in which there is a great deal of social, economic, and political equality, and the formal institutions of culture are open to everyone— everyone in this culture gets an education that provides them with the expertise and skills to produce things like stories and songs, and publishers and movie studios and so forth are willing to consider proposals and pitches from anyone. But imagine that in this cultural community everyone listens to the same music that they have listened to for decades and reads the same stories that they have read for centuries.[121] In this monoculture, individuals sometimes come up with strange new melodies, but pretty much everyone in the community avoids listening to them, or, if they happen to hear them, rejects them out of hand. Intuitively, such a community is lacking in cultural democracy despite its many egalitarian institutions.[122] In what follows, I hope to vindicate this intuition.

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[120] *See* Cohen, *supra* note 21, at 1197.

[121] For a similar thought experiment, see DOMINIC MCIVER LOPES, BEING FOR BEAUTY: AESTHETIC AGENCY AND VALUE 222 (2018).

[122] This is a comparative point: because cultural democracy is a scalar notion, this hypothetical cultural community might achieve some degree of cultural

In a cultural democracy, people need to encounter culture with the possibility that their current values and beliefs about culture will change. Without this openness to change, the culture seems lacking in cultural reciprocity (in that individuals with novel aesthetic ideas do not get a meaningful chance to contribute to shaping the culture), as well as in self-rule (in that, over time, the people who make up the culture will look less and less like they are deciding for themselves what sort of culture to have, rather than letting this question be settled by the past).[123] The danger of a monoculture can be guarded against if the members of a cultural community regularly attend *directly* and *spontaneously* to a *diverse range* of cultural and aesthetic objects and practices.[124]

Paying attention directly requires that the activity of directing our attention be *autotelic* in the sense that it is "engaged in for its own sake, rather than the sake of its products."[125] When we attend to something not in order to try to fix a problem with it or achieve some separate aim, but because of the value of the process of attending, our attention tends to playfully "rove over all parts of [its] object in an

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democracy (in fact, it might achieve cultural democracy to a much greater degree than a community with a "livelier" culture but with entrenched economic or social inequalities).

[123] Much of my argument here depends on the diachronic nature of culture: we should not be ruled by the past, but that the same time, we should make plans now to prevent anti-democratic effects that grow over time. It is one thing to be influenced by the past but another to be tied down by it. *See* SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY 7 (Bernard Frechtman trans., 1948) ("[B]etween the past which no longer is and the future which is not yet, this moment when [man] exists is nothing.").

[124] Like creative practice, attentive practice is "substantially determined by cultural context" but "not fully determined by it," where its non-determination stems from "the 'play' that networks of culture afford, including . . . the extent to which they enable serendipitous access to cultural resources and facilitate unexpected juxtapositions . . . ." Cohen, *supra* note 21, at 1190.

[125] Nguyen, *supra* note 84 (manuscript at 6).

unfiltered way."[126] We are not paying attention directly when, for instance, we look at an object to try to figure out how we might use it as a tool.[127]

Paying attention spontaneously requires that our attention not be guided by a plan or script.[128] If I am working on an assembly line and my visual attention is guided by "habit or rote rule following" to observe one widget and then another as they come down the assembly line,[129] then I am not paying attention spontaneously. While the attitude of spontaneity is close to that of directness, it further requires that our attention not be merely habitual; it requires a degree of freedom from our previous plans. It also requires that our attention not be simply scripted by someone else's plans, as it might be when a museumgoer punctiliously follows the instructions of a guidebook while looking at a painting, making an effort to "notice" exactly those features that the critic suggests.[130]

Paying attention to a *diverse range* of cultural objects and practices requires attending to objects that are not just superficially different from one another but that reflect distinct visions of what is good or worthwhile in music, art, literature, or life more generally. One encounters a diverse range of options only if there is enough variation in the range so that, in encountering the options, one has an opportunity to exercise one's own distinctive taste.[131] Encountering a diverse range of cultural materials does not require one to devote equal attention to every piece of art that one encounters. For instance, if one is ensconced in a subculture and mostly

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[126] *Id.* (manuscript at 16); *see also* María Lugones, *Playfulness, "World"-Travelling," and Loving Perception*, 2 HYPATIA 3, 16 (1987) (describing playfulness as involving "an openness to surprise").

[127] *See* Nguyen, *supra* note 84 (manuscript at 16).

[128] *See* Jonathan Gingerich, *Spontaneous Freedom*, 133 ETHICS (forthcoming 2022) (manuscript at 6) (on file with author).

[129] Michael Ridge, *Play and Games: An Opinionated Introduction*, 14 PHIL. COMPASS 1, 4 (2019).

[130] For a similar and more elaborate example, see C. Thi Nguyen, *Autonomy and Aesthetic Engagement*, 129 MIND 1127, 1132 (2019).

[131] *See* Benkler, *supra* note 78, at 53.

encounters practices and goods that are produced by the subculture but the subculture itself is lively and internally contested and if one also occasionally encounters practices drawn from other subcultures, then this might provide a sufficiently diverse range of materials to attend to.

Why is it important for the members of cultural democracies to pay attention directly and spontaneously to a diverse range of cultural objects and practices? First, without widespread direct and spontaneous engagement by individuals with cultural objects and practices, it is difficult for a community to embody the value of reciprocity. When citizens never or rarely engage directly and spontaneously with cultural goods and practices, they reduce or, in the most severe cases, eliminate their co-citizens' chances to shape the shared cultural space. In the monoculture that I imagined above, the reactions of members of the community to attempts to reform their culture are largely predetermined by the existing values and habits of the members. In contrast, when we attend to a practice or object in a way that allows our attention to be directed autotelically and not according to a plan or script, it is possible that we will end up being attracted to objects or practices unlike those that we have previously been attracted to. Direct and spontaneous engagement thus provides our desires with the opportunity to "take us by surprise" and "lead[] us somewhere we hadn't imagined we would ever go . . . ."[132] The unruliness of our desires, when they rove undirected, gives other members of a community a chance to change our sense of what is good and valuable in life and culture.[133]

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[132] Amia Srinivasan, *Does Anyone Have the Right to Sex?*, LONDON REV. BOOKS (Mar. 22, 2018), https://www.lrb.co.uk/the-paper/v40/n06/amia-srinivasan/does-anyone-have-the-right-to-sex.

[133] Robert Hughes advances a similar argument, contending that the ideal of democracy entails that all citizens must have a *chance* of changing the laws of their polity. Robert C. Hughes, *Responsive Government and Duties of Conscience*, 5 JURISPRUDENCE 244, 245 (2014). For Hughes, such "responsiveness" requires only that "an argument will have a significant chance of bringing about change if it is not publicly refuted." *Id.* at 259. My

Second, when most members of a community only encounter a narrow, non-diverse range of cultural objects and practices as candidates for their attention, they are less likely to have the experience of discovering themselves to be in error about what is worthwhile. As Prof. Cass Sunstein observes, "Few of us like 'junk,' but note well: what first seems to you to fall in that category (Bob Dylan, Bach, Mozart, Taylor Swift), might turn out, after serendipitous exposure, to be among your favorites."[134]

To see why this matters for self-rule in cultural life, consider the following story told by Elaine Scarry about changing her mind about the beauty of palm trees:

> I had ruled out palm trees as objects of beauty and then one day discovered I had made a mistake. . . . Suddenly I am on a balcony and [my palm tree's] huge swaying leaves are before me at eye level . . . . It is everything I have always loved, fernlike, featherlike, fanlike, open—lustrously in love with air and light.[135]

Scarry hated palm trees for years, but she kept encountering them, and then, one day, one of these encounters led to a revelation: palm trees are not ugly but beautiful. This revelation resulted from her attention wandering over a palm tree undirected and her spontaneous reaction to that specific

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argument diverges from Hughes's because our views about what songs are good and, for that matter, what is ultimately valuable in life, should be much less influenced by reasoned argument than should be the laws of a democratic state that is bound by the requirements of public reason.

[134] SUNSTEIN, *supra* note 18, at 28.

[135] ELAINE SCARRY, ON BEAUTY AND BEING JUST 12, 16-17 (1999). Scarry uses the language of "error" to describe her experience with palms, but I do not take her to necessarily commit herself to the sort of aesthetic realism that would be implied by taking "error" to mean that she had been *objectively* wrong to hate palms. Henceforth, when I discuss "errors in beauty," I mean errors in a subjective sense: when you come to see something as beautiful (or sublime, amusing, and so forth) in a manner that leaves you surprised or shocked that you did not see it that way before.

palm tree that was different from all the reactions that she had previously had to palm trees. She did not plan this reaction and would not even have endorsed it in advance. If the range of Scarry's encounters with trees had been constricted so that she did not keep encountering palms even though she disliked them, she never would have had this experience of finding herself in error about the beauty of palms. By continuing to encounter and gaze upon a diverse range of trees, even though she hated palms, Scarry put herself in a position for her direct and spontaneous attention to be captivated by a particular palm. A range of diverse objects and practices, including those one might not like, is needed for direct, spontaneous attention to do its democratic work.

In this Part, I have described an ambitious and demanding understanding of democracy under the heading of *cultural democracy*. This conception of democracy begins with a maximally capacious understanding of the political, according to which politics is not only or even paradigmatically about the state and formal institutions. Instead, politics encompasses efforts to decide together how to live, where "how to live" is construed broadly to include all decisions that affect what lives are possible to lead in a society, even where those decisions are not routed through the formal institutions of government or the state. On this capacious understanding of democracy, the extent to which we can be said to live in a democratic culture depends on the extent to which it can truly be said of us—the people—that we make our shared culture together.

III. The Dangers of CMAI Platforms for Cultural Democracy

As we have seen, democratic culture relies on our individual direct, spontaneous engagement with a diverse range of cultural materials in a way that allows for the possible change and transformation of our cultural preferences and desires. In this Part, I contend that, given plausible assumptions about how many of their users interact with them, CMAI platforms often offer users paths that are satisfying, at least in the near term, and that perniciously appear to provide opportunities for novelty without really doing so. When this

happens, people are left with fewer opportunities to experience "being in error" in aesthetic and cultural matters because they are less likely to listen seriously to music that they do not already like.[136] Insofar as CMAI platforms succeed at their aims, our desires and commitments about which forms of life are good are apt to become more rigid and stultified, and citizens are less likely to seriously entertain one another's novel cultural proposals, weakening one of the foundations of cultural democracy.

In advancing this argument, I do not wish to overstate the uniqueness of AI. Indeed, much of what I have to say about CMAI platforms is prefigured by scholarly debates about the effects of mass media in the mid-twentieth century.[137] Furthermore, as creatures with limited attention, our exposure to information "necessarily depends upon intermediaries that are sorting, distilling and shaping that content."[138] The alternative to a world of CMAI platforms (or a world of mass media) is not "unmediated" access to information. My argument is also qualified, in that the availability of digital music streaming services with vast catalogs certainly enhances the accessibility of a diverse range of music to many users, and the algorithmic sorting of these catalogs may enhance many users' abilities to "get into" music that they have not previously encountered. My contention is merely that the widespread use of CMAI by platforms of the sort that have developed in early twenty-first century capitalist societies risks making shared cultural space marginally less democratic than it would be in a world in which CMAI technology was developed and deployed by actors with different economic motives in a different regulatory context. Throughout this discussion I will rely on the hypothetical version of Spotify mentioned above. This focus is to provide greater specificity and concreteness to my discussion

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[136] *See id. at* 29.

[137] *See infra* notes 160-162 and accompanying text. Networks of friends that share similar tastes may also give rise to similar worries. *See infra* note 153 and accompanying text.

[138] Parsons, *supra* note 10, at 2168.

rather than because my argument applies more to Spotify than other CMAI platforms.[139]

A. CMAI Platforms and the Shaping of User Taste

Based on what we know about platforms and CMAI, what can we say about the impact that the recommendations of CMAI platforms are likely to have on users' tastes? A general sense of this impact is provided by cultural critic Richard Beck's description of Spotify:

> Spotify . . . degrades the experience of listening to music. . . . The platform is a fire hose of asinine recommendations for songs you haven't heard that were only recommended to you because they're as similar as possible to songs you have. (In the words of one *Guardian* writer: "You like bread? Try toast!") In pursuit of its goal of perfect, frictionless streaming, Spotify encourages you to outsource the work of deciding what you like and dislike, and of figuring out why. In other words, it discourages listening to music as such. Not all listening requires immersive attentiveness—that's what the radio is for—but in its attempts to swallow up radio and home listening alike, Spotify turns all music into something that fills up the background while you work or exercise or scroll through Twitter. And at least radio stations have DJs. Listening to Spotify is like listening to a radio station run by the stupidest version of myself.[140]

CMAI offer paths to cultural consumption that are satisfying, at least in the near term. They seem to provide us with an opportunity for novelty and discovery without really doing so, since the culture that we take ourselves to be

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[139] *See supra* Part I.B.

[140] Richard Beck, *I Am Here to Demonize Spotify: Notes on Music #1*, N+1 (July 10, 2020), https://nplusonemag.com/online-only/online-only/i-am-here-to-demonize-spotify.

discovering has, in fact, already been picked out as fitting patterns derived from our past preferences and those of our demographic counterparts.

Whether Richard Beck's experience of Spotify is typical is the subject of empirical debate. As David Hesmondhalgh has observed, music streaming platforms are often criticized for discouraging "musical discovery and adventurousness," but empirical examinations of "what listeners actually do with streaming" have been very limited.[141] However, some of the limited, exploratory work that sociologists have conducted on the experience of users of music streaming services suggests that, for many users, their encounters with these services lessens their ability to discover new and different types of music. Reaching a preliminary finding on the basis of several exploratory focus group interviews, Nancy Weiss Hanrahan found that, among users of digital music streaming services, "discovery is oriented not toward what might be surprising, unsettling, new or different but toward the self."[142] While recognizing that fuller empirical investigation could cast doubt on this assumption, I will assume that, at least for some significant number of users, encounters with CMAI platforms are likely to have this effect.

In this section, I will attempt to construct a model of the typical user of CMAI platforms to illustrate the mechanisms through which this discovery-inhibiting effect could occur and could be widespread among platform users. Particularly, I will assume that typical users of CMAI platforms aim at the satisfaction of their first-order aesthetic preferences. I do not mean to suggest that all users are likely to encounter CMAI platforms in this way, nor do I mean to deny that—relative to a world filled with brick-and-mortar record stores—CMAI

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[141] David Hesmondhalgh, *Streaming's Effects on Music Culture: Old Anxieties and New Simplifications*, 16 CULTURAL SOCIO. 3, 15 (2021). I am grateful to Lucy O'Brien for calling my attention to Hesmondhalgh's work.
[142] *See* Nancy Weiss Hanrahan, *Hearing the Contradictions: Aesthetic Experience, Music and Digitization*, 12 CULTURAL SOCIO. 289, 297 (2018).

platforms make it far easier for users who want to do so to encounter a vast range of music.

As firms operating in the economic context of surveillance capitalism,[143] the local aim of CMAI platforms is maximizing accumulation of surveillance assets. They do this in pursuit of their global aim, namely maximizing return on capital. Spotify organizes its interface and music recommendations with the singular objective of increasing the amount of attention that users devote to the platform and the amount of harvestable data that they generate and to keep them from leaving for a competing platform.[144] Spotify does not want its users to listen to the "best" music, objectively speaking, or even to the music that they reflectively regard as the "best," but to the music that will get them to spend the most time on Spotify.[145] If Spotify recommends a song that a listener dislikes at first, it is *possible* that they will listen to it over and over again to figure out *why* they hate it—but it is more likely that they will just skip it or that as they listen to it they will feel mildly irritated, thus potentially decreasing their desire to stay logged in and listening to Spotify. Spotify aims to recommend the songs that are most likely to satisfy users' instantaneous, first-order desires: when users listen to the music recommended by Spotify, they are likely to like it, although they may not *like* that they like it.[146] On Spotify, everything you see is tailored so that

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[143] *See supra* notes 38-46 and accompanying text.

[144] *See* COHEN, *supra* note 29, at 253 (noting that, given their economic aims, platforms are largely agnostic as to the cultural and social effects of their algorithmic processes).

[145] KRUKOWSKI, *supra* note 53, at 104 (noting that platforms "want us to find what we're already comfortable with" rather than surprising us). In this respect, Spotify's music recommendations are divorced from any conception of aesthetic or musical value. *Cf.* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 17 (1976) ("The domination of profit, a structurally required standard, breaks the connection between speech and any vision, or attitude, or value for the individual or group engaged in the advocacy.").

[146] If Spotify got into the business not just of licensing music but producing its own music, either by using algorithmic "artists," *see supra* note 27, or by hiring human creators to make music, it might adopt the more ambitious

it "conforms to you," where "you" are constituted by your immediate desires.[147]

Because part of what its listeners value is the experience (or semblance) of novelty, Spotify does not just want to recommend music that its listeners already know about. Therefore, in addition to collecting data about users' past listening habits and self-reported preferences, Spotify's CMAI searches for patterns in the musical structure of new tracks and albums to recommend new music that users are also likely to enjoy.[148] In making highly personalized recommendations, Spotify might recommend thousands of different songs to a given listener over the course of a month, and these recommendations might even be entirely unique to the listener (that is, different from the set of songs Spotify has recommended to any other listener on the platform). But these unique and ostensibly eclectic recommendations will be built around the fact that, while superficially diverse, the songs have deep similarities that may not be apparent to the listener, whether at the level of musical structure or demographic appeal.[149]

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goal of encouraging its listeners to develop preferences for the sort of music that Spotify itself produced. *See* Baker, *supra* note 57, at 404 (noting that profit-oriented firms seek to cultivate "preferences for the firm's products"). To some extent, "looping" effects of this sort already exist, since there is a commercial incentive for artists to produce songs that will rack up as many listens as possible on Spotify. *See* Hahn, *supra* note 55 (noting that because Spotify counts it as a "listen" when a user listens to the first thirty seconds of a song, there has been a profusion of short songs with catchy openings).

[147] KRUKOWSKI, *supra* note 53, at 111 ("At Spotify, the dream is to provide you with music without your participation—the algorithm will know what you want."). Note here that, if your immediate desires simply are to discover new and different music, Spotify may provide substantial help in satisfying these desires. My argument is that users of platforms like Spotify are less likely to encounter truly novel music when they pursue first-order aesthetic desires *aside* from a desire to discover novelty than they would be if they used a platform operating with different economic motivations.

[148] *See supra* note 53 and accompanying text.

[149] *See id.* at 103.

As a consequence of these features, Spotify's recommendations, insofar as Spotify succeeds at being the main or only source form which its users get their music, will tend to "make people into more conservative listeners" in the sense that, over time, they are likely to have fewer novel musical experiences.[150] By building up recommendations based on our existing preferences and feeding them back to us, Spotify thus gives us a cheap and ultimately impoverished sort of pleasure.[151] Over time, such algorithmic filtering may result in users' "horizons [becoming] narrowed, and people [getting] smaller."[152]

To get a fuller sense of what distinguishes the effects of CMAI platforms on their users' preferences from other forms of cultural influence, it is worth reflecting on how the recommendations made by a service like Spotify differ from those made by human music critics addressing general audiences, and by human friends addressing one another.

Music critics do not typically aim to get their readers to listen to more of the same music that they already like; indeed, critics often exhort us to listen to music that they think we *should* like, even if they doubt that we will find this music immediately appealing. In contrast to critics, when friends recommend music to us, they are more likely to make suggestions that they think we will like and to base these suggestions on what they know about our antecedent taste. However, friends often recommend music to us not because they think we will love it right away but because they can see a path from our current preferences to the music they recommend—a path that will take time and that might require modifying our existing preferences in some ways.[153] Even when friends do aim to suggest music that will immediately please us,

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[150] Hahn, *supra* note 55.

[151] *See* COHEN, *supra* note 29, at 76 (discussing the power of "[a]lgorithmically mediated processes designed to create tight stimulus-response feedback loops" to affect users' desires and preferences).

[152] SUNSTEIN, *supra* note 18, at 225.

[153] For a description of the dynamics of encountering an unfamiliar aesthetic practice, see LOPES, *supra* note 121, at 179-80, 201-03.

they usually *also* aim to suggest music that they themselves think is *good* in some respect. When our friends recommend music that they think we will like, they are not doing so with a view to *maximize the total amount of time* we spend (however distractedly and uncritically) listening to music.[154]

Moreover, even if our friends were so eager to please and to avoid provoking us that they always suggested music to us only because they thought it matched our prior preferences, such recommendations would still result in a much more genuinely eclectic musical diet than many of us are likely to get through Spotify. The more diverse our group of friend-recommenders, the more diverse our musical diet will be, even if each friend aims to recommend music that we will instantaneously enjoy. By contrast, neither Spotify itself, nor even Spotify in conjunction with all its competitors, can generate this kind of diversity. Spotify, Pandora, Tidal, and YouTube Music all hope to do the same thing, in more or less the same way: maximize engagement to maximize profit. In the situation we have imagined, our friends similarly share a single goal—to draw on our past preferences to please us immediately. But compared to CMAIs, our friends are limited by their puny memory storage capacity and weak processing power, which means that differences among their respective idiosyncratic histories and tastes will "show up" in differences among the sets of recommendations that they each make to us. By contrast, Spotify, Pandora, Tidal, and YouTube Music could not survive in the same ecosystem without all possessing equivalently enormous catalogues, vast processing power, giant sets of user data, and powerful algorithms. Luckily, we choose our friends on rather different and more contingent grounds than we choose our music streaming services.[155]

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[154] In contrast, the effects of cliques may be more similar to the effects of CMAI platforms, insofar as a clique devoted to a very particular type of music might aim, directly or indirectly, to induce conformity in taste among its members. I am grateful to Massimo Renzo for this point.

[155] A platform that employed massive armies of human music critics to provide individualized recommendations to each of its users could, in principle, have similar effects on user preferences. But it would be

Another difference between human-generated and CMAI-generated music recommendations is that we tend to think of the former as partial, opinionated suggestions. We tend to think of human music tips as suggestions *from others* that we will have to evaluate for ourselves before we can decide whether we agree.[156] By contrast, Spotify aims for us to perceive its choices about what music we will listen to as (already) *our own*, and thus not in need of any such vetting.[157] This makes it less likely that users will step back, wonder about, and critically evaluate the recommendations.[158] This effect is exacerbated insofar as CMAI platforms trigger affective responses in audiences that further reduce the likelihood of reflective engagement.[159]

Many of the concerns that I note here about CMAI platforms have been raised in the past about mass media, which is often described as asymmetrical and univocal, in the sense that structural features of capitalism cause mass media firms to each air similar types of cultural materials.[160] However, the

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prohibitively expensive for such a platform to generate the sort of fine-grained personalized recommendations that Spotify can cheaply and instantly produce with CMAI.

[156] For an exploration of how the opacity of social media platforms can have a similar effect, see Sylvie Delacroix, Social Media Manipulation, Autonomy and Capabilities (October 13, 2020), https://ssrn.com/abstract=3710786.

[157] Manheim & Kaplan, *supra* note 2, at 109-10.

[158] *See* C. Thi Nguyen, *Echo Chambers and Epistemic Bubbles*, 17 EPISTEME 141, 144 (2020) (contending that the opacity of algorithmic filters makes it "harder for a user to successfully evaluate and epistemically compensate for such filtering"). *But see* Jon Kleinberg, Jens Ludwig, Sendhil Mullainathany & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, 10 J. LEGAL ANALYSIS 113, 145 (2018) (pointing out that, in some respects, "[f]ar from being a 'black box,'" screening algorithms "are far more transparent than humans").

[159] *See* Parsons, *supra* note 10, at 2208 (noting that the "sustained attentional stupor" that platforms sometimes seek to induce in users "might, at some point, begin to test the boundaries of what can be called genuine 'choice'").

[160] Balkin, *supra* note 21, at 10; *see* Baker, *supra* note 57, at 405-08; MAX HORKHEIMER & THEODOR ADORNO, *The Culture Industry: Enlightenment as Mass Deception*, *in* DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL

addition of CMAI and collections of large amounts of data about individual users means that, in contrast to audiences of mass media, users of CMAI platforms are given suggestions based not only on the demographic categories that they fall into but also on increasingly minute observations about their own past behavior.[161] A consequence of the specificity of targeting by CMAI is that any given piece of cultural "content" is suggested to a much smaller number of consumers than in the case of mass media (although many more pieces of content get recommended to at least some users). With broadcast television, sizable sets of users in the same broad demographic categories all get the same of recommendations. Since CMAI allows for much more personalized recommendations,[162] individuals share the culture that they are consuming with a much smaller group of people. The content that makes up users' media diets is thus (at least marginally) less likely to be the occasion for critical public discussion. For these reasons, while some of the concerns about CMAI platforms closely parallel earlier concerns about mass media, the effects of CMAI platforms on user preferences are distinctive. Critics of

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FRAGMENTS 94, 96-100 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002). *But see* DAVID RIESMAN WITH NATHAN GLAZER & REUEL DENNY, THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER 107 (abridged ed. 2001) (noting that a subculture may "have a relatively independent set of criteria which helps it maintain . . . a certain leeway in relation to the media"); *but see also* JOHN FISKE, TELEVISION CULTURE 239 (1987) (describing television as "a text of contestation which . . . allows viewers to make meanings that are subculturally pertinent to them").

[161] Tufekci, *supra* note 25, at 211.

[162] *See* B. Bodo et al., *Tackling the Algorithmic Control Crisis—the Technical, Legal, and Ethical Challenges of Research into Algorithmic Agents*, 19 YALE J.L. & TECH. 133, 140 (2017); *see also* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND SOCIETY 79 (2015) (noting that Google's search is so personalized that nobody other than Google's own engineers can track which users are seeing what results to search strings); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1029 (2014) ("The consumer . . . does not know whether the subtle difference in website layout represents a 'morph' to her cognitive style aimed at upping her instinct to purchase or is just a figment of her imagination.").

mass culture worried about listeners and viewers being made into cultural clones by mass media or having their tastes shaped by media elites. In contrast, the concern with CMAI platforms is that they will make it more likely that users' tastes will be determined by earlier versions of themselves and by other people who fall into the same minute demographic subcategories that they do.[163]

The foregoing discussion of CMAI platforms leaves us with this picture: in pursuit of their economic aims as capitalist firms and enabled by the distinctive affordances provided by the combination of CMAI technology and big data collection, CMAI platforms feed us cultural diets that maximize our attachment to and engagement with the platform. To do so, they suggest culture to us that is similar to culture for which we have revealed first-order desires in the past, and they make these suggestions in ways that diminish the likelihood that we will reflect on or reconsider these desires. In the long run and in the aggregate, such recommendations tie us down to our own past desires and/or those of our micro-demographic counterparts, making us less likely to encounter genuinely novel cultural goods and practices.

B.   The Effects of CMAI Platforms on Cultural Democracy

We are now positioned to consider the risks that CMAI platforms pose for cultural democracy. Insofar as a significant portion of many individuals' tastes are influenced by CMAI platforms, I suggest, the level of cultural democracy in a society is at least marginally reduced because predictability-reinforcing CMAI recommendations undermine the direct and spontaneous engagement with cultural goods that cultural democracy requires. When this happens, people increasingly come to form their desires and values at the behest of the "dead hand" their past selves.

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[163] *See* Beck, *supra* note 140.

1. CMAI Platforms and the Directness and Spontaneity of Cultural Encounters

One effect of the predictability-reinforcing nature of CMAI recommendations is to make it less likely that users will engage directly and spontaneously with cultural goods. From the perspective of CMAI platforms, it is a bad outcome if a listener is repelled by a song that nevertheless sticks in their head for months until, one day, they find they have come to love it (unless, of course, the song is catchy enough that the user immediately starts hate-listening to it on repeat). CMAI platforms would rather that users' cultural diets be laid out by their past preferences, or the past preferences of their demographic counterparts, because these are the preferences that the platforms can track and feed into future predictions. Spotify's audience members will listen to more songs that they are likely to instantly find pleasing, vis-à-vis audiences who listen to old-fashioned radio, for example. Insofar as CMAI recommendations are effective at shaping what users listen to, users are less likely to diverge from their first-order aesthetic preferences in their media consumption. These listeners' first-order cultural preferences are thus likely to solidify into higher-order preferences because they are less likely to have encounters with particular cultural materials that lead them into revision-prompting aesthetic experiences.[164] As this happens, users are less likely to engage directly and spontaneously with cultural materials, both because their responses are more likely to be habitual (or, in the case of listening to songs picked out by autoplay, completely passive) and because they are more likely to tune out from or skip over dispreferred materials, rather than allowing their attention to wander autotelically over such materials.

A further mechanism by which CMAI recommendations tend to calcify their users' preferences arises from users'

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[164] *See* Karen Yeung, *Five Fears About Mass Predictive Personalization in an Age of Surveillance Capitalism*, 8 INT'L DATA PRIVACY L. 258, 267 (2018) (contending that mass personalization through CMAI platforms may "foster the rise of widespread narcissism").

tendency to see algorithmic recommendations as "neutral," "unbiased," or merely "technical" representations of their own past selves, rather than as the outputs of a process whose sole purpose is to maximize profit for someone else.[165] When users see CMAI recommendations as "neutral" in this respect, and also recognize their advantages in terms of short-term preference satisfaction, they are less likely to push back on them in the way that they might push back against a friend or music critics' recommendations.[166] As a consequence, users are less likely to consider the ways in which they might critically reflect on, and perhaps intervene to change, their own desires.[167]

We might hope these effects would be counteracted by our natural impulse to seek novelty and serendipity in our cultural lives. However, CMAI platforms anticipate these impulses and seek to sate them by providing a simulacrum of spontaneity, rather than the real thing. As Max Horkheimer and Theodor Adorno observed about mass culture, "[c]hance itself is planned . . . . For the planners it serves as an alibi, giving the impression that the web of transactions and measures into which life has been transformed still leaves room for spontaneous, immediate relationships between human beings."[168] With CMAI platforms, this tendency takes the shape of recommendations for "new" materials that are in fact deeply similar to the "old" materials that the platform knows the user has already encountered and liked.[169] Thus, given their economically determined aims, CMAI platforms are likely to

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[165] *See* Manheim & Kaplan, *supra* note 2, at 133.

[166] *See* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1926-27 (2013) (arguing that the predictive rationality that platforms employ "crowds out the ability to form and pursue other kinds of agendas for human flourishing, which is indispensable both to maintaining a vital, dynamic society and to pursuing a more just one").

[167] *See* Patchen Markell, *The Rule of the People: Arendt, Archê, and Democracy*, 100 AM. POL. SCI. REV. 1, 13 (2006).

[168] HORKHEIMER & ADORNO, *supra* note 160, at 117.

[169] *See* KRUKOWSKI, *supra* note 53, at 103.

weaken the direct and spontaneous cultural engagements of members of cultural communities.

2. CMAI Platforms and the Diversity of Cultural Encounters

An additional way in which CMAI platforms interfere with cultural democracy is by making it less likely that users will encounter a diverse range of cultural objects and practices. Yochai Benkler has pointed out that the sort of content that will be communicated in a mass media market depends on the distribution of audience preferences.[170] Imagine a television market of ten million viewers, where 1,000,000 viewers prefer sitcoms to all other types of show, 750,000 prefer sports, 500,000 prefer local news, 250,000 prefer action movies, 9,990 prefer foreign movies, 9,980 prefer gardening shows, and the rest prefer less commonly liked shows.[171] We can further imagine that for most of the viewers in the market, regardless of their first-choice preferences, sitcoms, sports, and local news are "lowest common denominator" preferences, in the sense that they would prefer these programs to turning the TV off altogether.[172] If we assume (1) that each TV channel is owned by an independent competitor that wants to maximize its number of viewers and (2) that viewers are just as likely to watch one channel as another if both offer the same type of programming, Benkler observes, the sort of programming that gets broadcast in this media market will skew heavily toward programming that satisfies these lowest common denominator preferences.[173] For instance, if there are six broadcast channels, three will broadcast sitcoms (attracting 333,333 viewers each), two will broadcast sports (attracting 375,00 viewers each), and one will broadcast local news (attracting 500,000 viewers).[174] Holding our assumptions about the market fixed, only once there are 251 competing channels will it make sense for one

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[170] *See* Benkler, *supra* note 78, at 94.

[171] *See id.* at 94.

[172] *Id.*

[173] *Id.* at 95.

[174] *Id.*

channel to broadcast foreign films.[175] As Benkler notes, this example shows that "increases in competition do not necessarily lead to increases in content diversity unless the increases [in competition] are very substantial."[176] Markets such as this one thus tend to offer only a narrow range of cultural products, undermining the engagement with diverse options needed for both autonomy and democracy.[177] Benkler suggests that a partial solution to the lowest common denominator tendencies of this hypothetical media market is to vastly increase the number of channels, up to the point of there being as many channels as there are individual tastes.[178] When this happens, Benkler claims, there will be vastly more opportunities for people to participate in storytelling because more stories are being broadcast.[179]

Spotify, as we have conceived it, does indeed provide as many "channels" as there are individual tastes. In fact, there are many more "channels" than users, insofar as Spotify can make targeted recommendations to users based on their varying mood, location, or the time of day, of the week, or of the year ("summer Saturday night fever," or "energizing beats for your morning commute"). However, a slight variation of Benkler's case shows how Spotify can still give rise to the same lowest common denominator skewed media provision as the TV market that Benkler hypothesizes. Imagine a Spotify user, Spot, who, on a typical morning, has preference of 0.2 for West Coast hip hop, 0.15 for classic country, 0.15 for electronic dance music, 0.05 for Baroque chamber music, and 0.000999 for Celtic bagpipes, with the remainder of their preferences allocated to genres that Spot has less of a taste for than bagpipes. We can

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[175] *Id.*. With 251 channels, 100 would broadcast sitcoms (10,000 viewers each), 75 sports (10,000 viewers each), 50 local news (10,000 viewers each), 25 action movies (10,000 viewers each), and 1 foreign films (9,990 viewers). It is only with the 252nd channel that it is economically rational for any channel to broadcast gardening shows. *See id.*

[176] *Id.* at 95-96.

[177] *See id.* at 110.

[178] *See id.*at 97.

[179] *See id.*

further imagine that Spot has "lowest common denominator" preferences for West Coast hip hop, classic country, and electronic dance music, in the sense that, if music from any of these genres came on, Spot would enjoy it more than not listening to music at all, or at least would not go to the trouble of hitting "skip."

Although Spotify has millions or even billions of "channels," there are limits to the number of songs that it can recommend to Spot in particular, given Spot's limited resources of attention. Over the course of a morning, Spotify can only present dozens of music options to Spot (or, at most, hundreds, if Spot devotes some of the morning to scrolling through Spotify's bespoke playlists, rather than just passively listening to autoplay recommendations). Suppose that Spot never scrolls through more than 500 songs in any given three-hour period. On any given morning from 9:00 to noon, no more than 500 songs will ever get a chance to vie for Spot's limited attentional resources. To choose these 500 songs, Spotify runs the internal equivalent of a competitive market among different song recommendations. To secure a place in Spot's morning music recommendations, a recommendation must "earn its keep" by marginally increasing the odds that Spot will keep listening. Given the stipulated distribution of Spot's preferences, only after recommending more than 550 other songs to Spot over the course of the morning would it make economic sense for Spotify to recommend a bagpipe song. This means that Spotify will *never* recommend bagpipe music to Spot, let alone music that Spot has never heard of before and that thus does not even show up on their antecedent preference distribution.

If Spot really misses the occasional Wednesday morning bagpipe fix, or generally wants more obscure recommendations, we might wonder why they would not just switch to a different platform or negotiate different terms with Spotify. Of course, Spot might well be unable to do so if all the competing music streaming platforms pursue the same aim of maximizing surveillance assets (and if platforms are unwilling to negotiate bespoke contractual terms with users). Moreover, Spot might underestimate their own susceptibility to

algorithmic influence, and so might not give sufficient weight to the possibility that their preferences will be—or already have been—shaped by their encounter with Spotify.[180] Indeed, Spot may in fact end up with less taste for bagpipe music after subscribing to Spotify for a year or two. In that case, in another pernicious "looping effect," Spot would ultimately have ended up calibrating their degree of interest in bagpipe music to the frequency with which Spotify suggests it to them, rather than vice versa.[181]

One effect of this phenomenon is that a user of Spotify is less likely to be presented with music that they initially dislike, but that might grow on them if they were to give it more serious and sustained attention. However, it is often precisely such encounters with material that one dislikes that occasion turbulence and potential transformation in one's aesthetic tastes and values.[182] In a kind of subpersonal microcosm of mass media markets, Spotify thus caters to individual users' lowest common denominator preferences, in precisely the same way as Benkler's broadcast TV market caters to the lowest common denominator preferences of a large population, casting doubt on Benkler's suggestion that personalization is a panacea for the failings of broadcast TV.

It is important to acknowledge here that this diagnosis relies on an idealized analysis of Spotify and its users. Insofar as some of the associations on which Spotify relies to make recommendations track features of the real world that exhibit aesthetic judgment (like associating bands that are signed to the same record label with one another or making recommendations to Spot on the basis of what Spot's friends like), the pervasiveness of this phenomenon will be limited.[183] Similarly, if Spot has a sufficiently strong desire to find genuinely different music, this recommendation phenomenon is likely to only minimally affect Spot's aesthetic behavior.

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[180] *See id.* at 68.

[181] *See id.* at 70.

[182] *See* SCARRY, *supra* note 135, at 16-17.

[183] Many thanks to Massimo Renzo for pressing me on this point.

Nonetheless, at least relative to a platform that was less concerned to maximize its accumulation of surveillance assets, Spotify's recommendations tend to make it marginally less likely that users like Spot will directly and spontaneously engage with music.

3. Limits of the Effects of CMAI Platforms on Cultural Democracy

In suggesting that the recommendations of CMAI platforms reduce the likelihood that members of a community will directly and spontaneously engage with a diverse range of cultural materials, I do not mean to suggest that CMAI platforms cannot contribute in some ways to expanding access to cultural participation and facilitating cultural democracy. Platforms built around user-created content, such as Twitter and TikTok, certainly allow more people to publish their own stories and ideas to the world, relative to a system in which publication is controlled by the editors of a small number of mass media outlets.[184] Even platforms that rely on cultural materials not produced by their users, such as Spotify, have some potential to foster cultural democracy insofar as they more efficiently aggregate preferences of listeners than existing markets, and so create incentives for artists to make music that satisfies a wider range of consumer preferences. The overall effects of CMAI platforms on cultural democracy are thus complex, and a complete cost-benefit analysis of these effects is beyond the scope of this Article.[185] My narrower assessment is focused on the risks to cultural democracy posed by the ways in which CMAI platforms shape users' desires relative to platforms less focused on maximizing user engagement.

In actual practice, CMAI platforms are unlikely to fully turn anyone into the nightmare of the "Daily Me" imagined by

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[184] *See* Benkler, *supra* note 78, at 97.

[185] A full analysis of this question would also need to be cognizant of the "baseline comparison problem" of AI ethics, which is that "[i]t would be perverse to deprive people of vital benefits provided by [artificial intelligence] in the name of an idealized level of human service that is likely to remain beyond their reach." Tasioulas, *supra* note 1, at 75.

Cass Sunstein—someone whose entire media diet is perfectly tailored to match their preexisting preferences.[186] One reason for this is that algorithms like those used by Spotify and YouTube Music generate discontent in some users,[187] and presumably the highbrow cultural critics who dislike the phony serendipity of Spotify's algorithms would continue to hate this feature no matter how good Spotify's hypothetical algorithms got. People will get bored of Spotify's recommendations at least occasionally; people will wonder what their friends are listening to; they will hear a strange new song at a bar or coffee shop and ask who the artist is; they will go to concerts; they will read columns from critics. The cost of outrunning CMAI recommendations, at least for a moment, is relatively low—a user can simply type the name of a band or album that they want to listen to into Spotify's search bar to evade any particular recommendation that Spotify makes.[188]

Although, for these reasons, CMAI platforms' takeover of our cultural lives will never be entirely complete, we should still be concerned with the effects of CMAI platforms on our capacity for collective cultural self-rule. First, even if it is easy for users to disregard individual recommendations from CMAI platforms, directing one's attention toward something is never fully costless. A consumer cannot judge the merit of content until they have consumed it, "at which point one's time and attention has already been spent."[189] Second, even if some individual users avoid following the recommendations of CMAI platforms, if large numbers of people go along with them, this might generate significant effects for cultural democracy. Realizing the values of reciprocity and self-rule that are associated with cultural democracy requires not just that a handful of people engage directly and spontaneously with a diverse range of cultural materials but that such engagement is widespread in a cultural community, much as a

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[186] *See* SUNSTEIN, *supra* note 18, at 1.

[187] *See, e.g.*, Beck, *supra* note 140 (expressing dissatisfaction with Spotify's automated recommendations); Hahn, *supra* note 55 (same).

[188] *See* First, *supra* note 52, at 549.

[189] Parsons, *supra* note 10, at 2181-82.

robust formal political democracy requires that more than a handful of citizens vote in elections.

Even if widespread adoption of CMAI platforms' recommendations made users only *slightly* more likely to listen to music that sounds like what they have heard before, or to read stories structured like those they already love, in the aggregate this would make for a population more locked into its existing cultural preferences. Even a small, marginal stultification of this kind will be magnified over time through looping effects, and these dynamics can persist even in the face of other countervailing sources of cultural desires.[190] These concerns are further exacerbated by substantial uncertainty about the long-term effects of AI on how we think and feel.[191]

If I have succeeded in showing that we have good reason to worry about the effects of CMAI platforms on cultural democracy, we might yet wonder whether control or regulation of CMAI platforms is a matter that the state should get involved in, regardless of if it is likely to have impacts on cultural democracy. Particularly, we might think that much of what happens between CMAI platforms and consumers falls in the private domain. However, there are significant externalities to the interactions between individuals and CMAI platforms: if many users start following the recommendations of CMAI platforms and come to be less likely to engage directly and

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[190] *See* Tasioulas, *supra* note 1, at 85 (noting that one of the major ethical risks associated with AI is the possibility that we may "increasingly [be] shaped by the sorts of considerations to which automated decision-making is most sensitive"); *see also* BRETT FRISCHMANN & EVAN SELINGER, RE-ENGINEERING HUMANITY 410 (2018) (arguing that making our preferences more closely match the recommendations of algorithms might be part of the dehumanizing process of engineering ourselves to be more like machines).

[191] *See* Axel Walz & Kay Firth-Butterfield, *Implementing Ethics into Artificial Intelligence: A Contribution, from a Legal Perspective, to the Development of an AI Governance Regime*, 17 DUKE L. & TECH. REV. 180, 190 (2019); *see also* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be.").

spontaneously with a diverse range of cultural materials, this affects not only users who voluntarily enter into relationships with CMAI platforms but also all of their cultural fellows who depend on them to participate in the process of cultural self-rule. Considering these externalities, it appears possible that CMAI platforms might legitimately be regulated without giving rise to unjustified paternalism. In the following Part, I turn to the question of what shape such regulation might take.

IV. CMAI Platforms and the Law

Given the dangers that CMAI platforms pose to the cultivation of the attitudes that enable cultural democracy to flourish, how might law respond to the cultural preference-shaping effects of these platforms? In this Part, I consider some of the existing regulatory and policy approaches that have been used to address the risks associated with AI more broadly, and I contend that existing regulatory mechanisms are not well suited to address the unique risks that CMAI poses to cultural democracy.[192] I then consider a variety of proposals for new regulatory and policy mechanisms that might better address these challenges.

The line between existing and proposed regulatory mechanisms is rough; as Julie Cohen has observed, law is

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[192] Some scholars have advocated for the creation of a *sui generis* regulatory framework for the regulation of algorithms (including CMAIs), which would seek to address not only the dangers that they pose to democratic institutions, but also concerns about wrongful discrimination, the facilitation of criminal activity, and threats to the rule of law. *See, e.g.,* Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 Harv. J. L. & Tech. 353, 395-96 (2016) (proposing a *sui generis* regulatory framework for AI with a federal agency focused on regulating AI). *But see* Alicia Solow-Niederman, *Administering Artificial Intelligence*, 93 S. Cal. L. Rev. 663, 694 (2020) (arguing that "[a] domain specific, more traditional prescriptive response is a poor fit for a general use technology like AI"). Whether such a framework is advisable or not, I do not consider such proposals here, as my interest is in the substantive regulations that a polity might adopt to mitigate the risks of CMAI platforms in particular, rather than the more general question of how AI might best be regulated.

"already responding" to the transformations of our political economy wrought by the growth of digital platforms.[193] The rough distinction between existing and novel regulatory approaches is analytically helpful because many well established regulatory regimes are designed around regulatory questions that arose in an age of mass media, when there was a relative scarcity of information circulating through media platforms.[194] The more novel regulations that I survey are attempts to rethink the aims of regulation in an environment in which scarcity of attention, rather than scarcity of information, is the primary concern.

In surveying a range of possible regulatory and policy interventions to CMAI platforms, my aim is not to develop a specific legislative or regulatory proposal. Any comprehensive regulatory scheme for CMAI would take years or decades of legislative, judicial, administrative, lawyerly, and scholarly effort to come to fruition.[195] My aim is to suggest a variety of framings of possible regulatory interventions that might facilitate the design of a more effective governance regime. For this reason, I present schematic descriptions of different types of regulations that are likely to appeal to different political ideologies and explore some of the benefits and drawbacks of these varying approaches. In practice, a variety of different types of regulation are likely to be applied as part of any comprehensive effort to regulate CMAI platforms. One notable potential challenge for many of the proposed regulations that I survey—concerning their effect on free expression—is postponed until Part V.

A. *The Existing Regulatory Frameworks for CMAI Platforms*

I begin by considering ways in which antitrust law, privacy and data protection law, international human rights law, and education policy might address (and are already attempting to

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[193] COHEN, *supra* note 29, at 1-2.

[194] *See id.* at 75.

[195] *See* PASQUALE, *supra* note 162, at 91.

address) the challenges of CMAI platforms for cultural democracy.

1. Antitrust Law

Throughout the twentieth century, one important tool for the regulation of mass media was the use antitrust law to prevent the formation of media monopolies.[196] Among others, Justice Felix Frankfurter argued that such monopolies would undermine the presence of a "multitude of tongues" in the media that might promote the drawing of "right conclusions" in their competition with one another.[197] In the twenty-first century, attention has turned to ways in which antitrust law might be used to regulate horizontal and vertical monopolies and the abuse of market position by digital platforms.[198] However, efforts to use antitrust law to respond to the dominance of a small number of digital platforms remain tentative, particularly in the United States.[199] More aggressive antitrust actions by market regulators hold some promise in limiting the ability of a small number of digital platforms to

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[196] *See* Sherman Act, 15 U.S.C. §§ 1-7; *see also* Associated Press v. United States, 326 U.S. 1, 20 (1945) (upholding the constitutionality of applying the Sherman Act to the press).

[197] *See Associated Press*, 326 U.S. at 28 (Frankfurter, J., concurring).

[198] *See, e.g.*, John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1502-03 (2019) (contending that digital markets require robust regulatory interventions to maintain competition and suggesting ways in which existing antitrust law could be strengthened to ensure such competition); *see also, e.g.*, Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 299-30 (2019) (discussing ways in which E.U. and U.S. antitrust law might be used to counteract anti-competitive behavior by digital platforms); *China's Draft Anti-Monopoly Guidelines on Platform Economy*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Nov. 18, 2020), https://www.paulweiss.com/media/3980614/china-s_draft_anti-monopoly_guidelines_on_platform_economy.pdf (discussing the People's Republic of China's State Administration for Market Regulation draft Anti-Monopoly Guidelines on the Sector of Platform Economies).

[199] *See* COHEN, *supra* note 29, at 175 (noting that one barrier to aggressive antitrust action is the absence of a commonly agreed definition of "platform power").

exercise undue control over the shape of our shared cultural landscape. [200] For instance, the U.K. Competition and Markets Authority has floated the idea of requiring Google to share click and query data from its users' searches with third-party search engines.[201] Comparable interventions could prevent a small number of CMAI platforms from building up an insurmountable lead on new entrants in their predictive capabilities.

However, the dangers that CMAI platforms pose for democracy do not arise exclusively from the concentration of market power in a small number of platforms. This danger would be exacerbated if an even smaller number of platforms performed even more culture-mediating curatorial functions (for instance, if Spotify, Tidal, Deezer, and Pandora all merged). However, even without further horizontal integration, the economic conditions in which CMAI platforms operate make all of them likely to offer algorithms that have the same aim—maximizing engagement to maximize profit.[202] Even in the absence of anti-competitive agreements, there is likely to be a great deal of convergence in the sort of cultural consumption that CMAI platforms promote. Antitrust interventions such as those considered by the Competition and Markets Authority would only address this aspect of the CMAI platform problem insofar as they were sufficiently radical to

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[200] *See* K. Sabeel Rahman & Zephyr Teachout, *From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure*, KNIGHT FIRST AMEND. INST., Feb. 4, 2020, https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure (arguing that platforms should be regulated as public utilities for antitrust purposes and that targeted ads should be banned in order to "alter the revenue-generating strategy of the firms themselves").

[201] COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 367 (2020), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

[202] *See supra* note 155 and accompanying text.

change the surveillance capitalist orientation of the firms they targeted.

2. Privacy and Data Protection Law

A major focus of scholarly and regulatory attention concerning digital platforms has been data protection and privacy law, including particularly the E.U.'s General Data Protection Regulation (GDPR).[203] Discussions of data protection and privacy in connection with AI have largely focused on requirements of informed consent as a condition for certain forms of data accumulation, tracking, and classification of individuals, as well as the GDPR's limited right not to be subject to decisions based solely on automated data processing.[204] The GDPR requires that platforms collect data about users only for specified legitimate purposes, such as where the data subject has consented to the processing or where the processing is required for the performance of a contract with the data subject or for the 'legitimate interests' of the data controller or a third party.[205] For platforms to collect data about users on the basis of consent, the GDPR requires that users give "a clear affirmative act of consent" that is "freely given" and that is "specific to the various processes" that a platform's AI uses to mine data.[206]

This approach is somewhat promising for counteracting the dangers of CMAI platforms for cultural democracy. However, it is also limited for several reasons. First, many users might (and, indeed, do) willingly consent to the sort of data collection and automated processing that CMAI platforms carry out. Such consent is particularly likely given the ability of increasingly advanced CMAI technology to "exert behavioral

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[203] General Data Protection Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119).

[204] *Id.* art. 22.

[205] *Id.* art. 6.

[206] Manheim & Kaplan, *supra* note 2, at 169.

influence through . . . [hyperpersonalization]."[207] Under the GDPR individuals can consent to the collection of information about them and the use of microtargeting on them. Even in the absence of behavioral nudges, many people will do this when it comes to the Spotifys of the world because of the platforms' excellent ability to satisfy their first order aesthetic and cultural desires. The framework of privacy law, where this is conceived in terms of rights held by individuals, thus does nothing to prevent the sorts of externalities that undermine the direct and spontaneous engagement with a diverse range of cultural materials that cultural democracy requires. Even if strong data protection regulations resulted in a significant number of users refusing to consent to data collection and processing, the proportion of users who would continue to consent would likely be more than enough to generate negative externalities. More radical versions of the data protection approach might prohibit data collection, rather than just requiring informed consent, or otherwise make it truly uneconomical to collect vast quantities of data about users. Such extreme data privacy interventions, however, might themselves give rise to serious concerns about paternalistic control of platform users.[208]

3. International Human Rights Law

Insofar as cultural communities spill across national boundaries, particularly in a digital age, a regulatory approach that relies on international rather than municipal law is promising.[209] Article 27 of the Universal Declaration of Human Rights guarantees "the right freely to participate in the cultural life of the community."[210] Similarly, the International Covenant on Economic, Social and Cultural Rights guarantees "the right

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[207] Karen Yeung, *"Hypernudge": Big Data as a Mode of Regulation by Design*, 20 INFO. COMM. & SOC'Y 118, 131 (2017).

[208] *See* Baker, *supra* note 57, at 313.

[209] *See* Balkin, *supra* note 83, at 1055.

[210] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 19 (Dec. 10, 1948).

of everyone . . . to take part in cultural life."[211] While a libertarian interpretation of this right might understand it to require only the formal right to participate in culture, and a Rawlsian interpretation might understand it as involving only a fair opportunity to participate, a more substantive interpretation might take it to require real, meaningful participation by a large proportion of the populace in shaping a community's cultural life.[212] On this interpretation, such a right might be compromised by a legal system that allows CMAI platforms to operate in a cultural democracy-threatening way.

However, there are substantial limitations to this approach. First, it tells us little about how we might go about remedying the problem. "[H]uman rights [law] often fail[s] to articulate which policy mechanisms are needed to [realize] these rights."[213] Second, the Universal Declaration of Human Rights is not itself legally binding[214] and, while the United States is a signatory to the International Covenant on Economic, Social and Cultural Rights, it has never ratified it.[215] For these reasons, human rights law can play only a limited role at present in regulating the threats of CMAI platforms to cultural democracy, at least in the United States.

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[211] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 15 (entered into force Jan. 3, 1976).

[212] Writing about the Universal Declaration of Human Rights' parallel guarantee of the rights of everyone to "share in scientific advancement," Effy Vayena and John Tasioulas advance such a substantive interpretation of Article 27, according to which the right to "share in scientific advancement" is a right that everyone has "actively to participate in the scientific process." Effy Vayena & John Tasioulas, *"We the Scientists": A Human Right to Citizen Science*, 28 PHIL. TECH. 479, 481 (2015).

[213] Ewan McGaughey, *Will Robots Automate Your Job Away? Full Employment, Basic Income, and Economic Democracy*, INDUS. L.J. July 2021, doi:10.1093/indlaw/dwab010, at 41.

[214] MALCOLM N. SHAW, INTERNATIONAL LAW 34 (8th ed. 2017).

[215] *Status of Ratification Interactive Dashboard*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, https://indicators.ohchr.org (last visited Feb. 13, 2021).

4.   Education

One policy approach developed in response to concerns about the effects of mass media on culture was the cultivation of critical perspectives on media through education.[216] Particularly in the 1970s, critical media education focused on developing in primary and secondary school students a media literacy that was "part of the exercise of democratic rights and civil responsibilities."[217] A similar approach might be taken to media literacy education for CMAI platforms. Primary and secondary school curricula might include education about the risks of being nudged by CMAI platforms. For adults, education might take the form of personalized disclosures of microtargeting. (Some literature on nudges emphasizes the salutary effects that disclosing nudges can have on their ethical permissibility.[218]) However, there are limitations to this strategy too. It is unclear how great an effect awareness of the political and economic context in which CMAI platforms operate is likely to have on individuals' media consumption, given the pervasiveness of digital platforms.

B.   Novel Regulatory Interventions for CMAI Platforms

Considering the limitations of the existing legal-regulatory framework for CMAI platforms, in this subpart, I explore a variety of novel proposals aimed at helping to ensure that new entrants to shared cultural life have an opportunity to provoke "unruly" desires and that CMAI platforms do not all converge on attempting to extract the maximum amounts of advertising

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[216] *See* Renee Hobbs & Amy Jensen, *The Past, Present, and Future of Media Literacy Education*, 1 J. MEDIA LITERACY EDUC. 1, 1 (2009).

[217] *Id.* at 3.

[218] *See* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1471 (2014); *see also* Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REG. 413, 416 (2015) (arguing that transparency is a major ethical safeguard against manipulative nudging).

revenue or maximum reinforcement of citizens preexisting tastes.[219]

1. Serendipitous Nudges

Sunstein proposes that digital platforms might include a "serendipity" button that users could click to encounter an "unanticipated, unchosen" candidate for their attention that has not been suggested based on their past behavioral patterns and preferences.[220] While Sunstein's concerns are largely about the salutary effects that such serendipity buttons and "architecture[s] of serendipity" more generally might have on discourse connected to formal political institutions like elections,[221] similar interventions might operate in the cultural domain. Spotify, for instance, might add a "serendipity" button that plays at random a song that has nothing to do with a listener's past habits. It might even introduce a "challenge" button that plays a song that its CMAI predicts the user will dislike. Such interventions are a form of "libertarian" paternalism because they do not "force" users to look at suggestions other than those generated by the CMAI platform's algorithms, but do make it easier for them to escape these algorithm's effects if they want.[222] Other serendipity-promoting interventions are more technical in nature: for instance, CMAI classifiers could be made more random so that they provide recommendations with a greater range of

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[219] For this reason, I do not consider several interesting and promising proposals for the regulation of AI and digital platforms more generally, such as the thought that platforms might be conceived of as "digital information fiduciaries," where such a requirement would prohibit platforms from obtaining data from their end users by inducing trust in them only to later work against the users' interests. Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1163 (2018). Part of the distinctive challenge posed by CMAI platforms, as I have described them, is precisely that they *do not* work against their end users' first-order desires.

[220] SUNSTEIN, *supra* note 18, at 202.

[221] *Id.* at 4.

[222] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 4 (2008).

variation.[223] Interventions focused on architectures of serendipity might be adopted voluntarily by CMAI platforms seeking to cater to users' higher order desires, or they might be required by regulators.[224]

A challenge with this sort of regulatory intervention is how to discern what is actually "serendipitous." Randomly selecting a song from the entire catalog of songs that Spotify has licensed is not terribly likely to provide the conditions necessary for an experience of direct and spontaneous engagement or of aesthetic error. This is because such experiences often depend on listeners having some antecedent reason to care about a piece of music that they encounter (like the fact that a friend likes it) so that it provokes them to rethink their preferences rather than simply prompting them to turn away.[225] So, some mechanism other than purely random selection must be used to provide the sorts of "serendipitous" experiences that are likely to occasion direct and spontaneous engagement. Additionally, many users of CMAI platforms might never click on a "serendipity" button, insofar as it is still easier, from the standpoint of their preferences in the moment, to keep attending to the materials that the platform thinks will satisfy their first-order desires. Regulatory interventions focused on building opt-in "architectures of serendipity" do little to defuse concerns about negative externalities of CMAI platforms on cultural democracy.

2. Oversight Boards

Facebook has recently constituted an independent "Oversight Board" composed of legal and human rights experts with the power to review Facebook's moderation

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[223] *See* Mireille Hildebrandt, *Privacy as Protection of the Incomputable Self: From Agnostic to Agonistic Machine Learning*, 20 THEORETICAL INQUIRIES L. 83, 106 (2019) (advocating for "agonistic machine learning").

[224] Sunstein suggests that the government might attempt "only through moral suasion" to ensure that communication platforms promote democratic self-government rather than hindering it. SUNSTEIN, *supra* note 18, at 223.

[225] *See supra* note 153.

decisions and to issue decisions that are binding upon Facebook.[226] This Board has overturned automated decisions on the part of Facebook, such as its deletion of an Instagram post that pictured a female nipple as part of a breast cancer awareness campaign.[227] The Board's remit is very limited, however, in that its focus is on the application of policies already decided by Facebook and in that it focuses exclusively on which posts to take down and which to leave up, rather than on questions about the frequency with which allowed materials are presented as candidates for users' attention.[228] While an Oversight Board with such a narrow mission may serve primarily as a front to protect Facebook's reputation,[229] we might nonetheless look to the Board as a model for regulation of the cultural filtering performed by CMAI platforms. For instance, a board could be constituted to exercise oversight of how CMAIs are deployed by platforms like Spotify, with the authority to require amendments to how CMAI is used by the platforms. Such oversight might include the monitoring of algorithms to ensure that they provide sufficient experiences of "serendipity."

The institution of such oversight boards for CMAI platforms could also provide a mechanism for enforcing human rights norms as they pertain to democratic participation. The charter of Facebook's Oversight Board includes a provision

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[226] *See* Shannon Bond, *Facebook 'Supreme Court' Orders Social Network to Restore 4 Posts In 1st Rulings*, NPR (Jan. 28, 2021), https://www.npr.org/2021/01/28/961391277/facebook-supreme-court-orders-social-network-to-restore-4-posts-in-first-rulings.

[227] Case Decision 2020-004-IG-UA, Oversight Board (Jan. 28, 2021), https://oversightboard.com/decision/IG-7THR3SI1.

[228] *See* Oversight Board Charter, OVERSIGHT BD., art. 2 (last visited Feb. 13, 2021), https://oversightboard.com/governance.

[229] *See* Mark Scott, *Facebook's 'Supreme Court' Says Company Got It Wrong on Removing Content*, POLITICO (Jan. 28, 2021), https://www.politico.eu/article/facebooks-supreme-court-overturns-content-decisions-oversight-board (quoting British lawmaker Damian Collins arguing that the Oversight Board's inability to review Facebook's wider content moderation policies makes it mere window-dressing for Facebook).

stipulating that, "[w]hen reviewing decisions, the [B]oard will pay particular attention to the impact of removing content in light of human rights norms protecting free expression."[230] A similar stipulation focused on human rights norms protecting cultural participation could shape the work of a CMAI platform oversight board, thus affording a way to operationalize Article 27 of the Universal Declaration of Human Rights. Such a board might require greater human oversight of automated decision-making and might limit the use of algorithms that are built primarily around reinforcing users' existing preferences and desires.[231] Platforms might voluntarily choose to hand over authority to a board like this either to provide more hospitable digital environments for their end users[232] or to reduce the political and reputational risks that they face from being involved in politically charged content moderation decisions. Platforms are, however, unlikely to voluntarily agree to any oversight that significantly inhibits their collection of ever greater quantities of data about their users.[233] Imposing powerful oversight boards on CMAI platforms by statute or regulation may have more potential to limit platforms' ability to pursue greater user attention at all costs. Such boards are still likely to face challenges, though, since their court-like nature makes them better suited to intervene in one-off disputes involving the rights of individuals than in broader questions about the socio-cultural externalities of CMAI platforms.

3.   Public Options

One policy intervention that was deployed to respond to the dangers associated with the dominance of commercial mass media in the twentieth century was the provision of state-

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[230] OVERSIGHT BD., *supra* note 228, art. 2.1; *see also, e.g.*, Case Decision 2020-004-IG-UA § 4 (relying on International Covenant on Civil and Political Rights Article 19 on freedom of expression in overturning a Facebook moderation decision).

[231] *See* Case Decision 2020-004-IG-UA § 8.3 (faulting Facebook for the automated removal of posts without human review or appeal).

[232] *See* Balkin, *supra* note 219, at 1183.

[233] *See* COHEN, *supra* note 29, at 65.

funded alternatives, like the BBC and PBS.[234] By publicly funding broadcasters who were not motivated primarily by the aims of attention capture and revenue maximization—and who were accordingly more free to make editorial decisions based on a substantive understanding of what makes for good programing—states offered a counterweight to the effects of corporate mass media consumption on the shared cultural space of their communities.[235] This approach might be applied to CMAI platforms, too. Ethan Zuckerman, for instance, proposes the imposition of a tax on targeted advertising to fund the creation of public service digital media tools that support a diversity of platforms for the dissemination of ideas.[236]

One of the greatest challenges to public options for digital platforms is the scale of investment required. It is challenging, to say the least, for early twenty-first century states to muster the resources to compete with multinational CMAI platforms. In the 2000s, Europe briefly attempted to build a search engine to rival Google: Quaero. Quaero, however, only received public funding to the tune of €198m before it quietly shut down in 2013.[237] By comparison, Alphabet, Google's parent company, achieved a market capitalization exceeding $1.2 trillion in January 2021.[238] Even developing public alternatives to much smaller platforms like Spotify, with a January 2021

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[234] *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 179 (2006).

[235] *See* SUNSTEIN, *supra* note 18, at 196.

[236] *See* Ethan Zuckerman, *The Case for Digital Public Infrastructure*, KNIGHT FIRST AMEND. INST. (Jan. 17, 2020), https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure; *see also* PASQUALE, *supra* note 162, at 208-09 (considering the possibility of public internet firms, such as a public alternative to Google Book Search).

[237] *See* Danny Fortson, *Davids Take on Goliath of Search*, SUNDAY TIMES, Jan. 3, 2021, https://www.thetimes.co.uk/article/davids-take-on-the-google-goliath-nkp5sjq5n.

[238] *Alphabet Inc. (GOOG:US)*, Stock Quote, BLOOMBERG (Jan. 29, 2021), https://www.bloomberg.com/quote/GOOG:US.

market capitalization of $59 billion,[239] is daunting due to the head start that these firms have on collecting behavioral data that can be used to generate CMAI-based predictions about users. A better alternative might be to invest in non-CMAI platforms that provide human-curated recommendations, such as MUBI's curated movie service,[240] whose curatorial choices are based on standards independent of consumers' existing desires. For instance, we might create public bodies charged with discursively elaborating and applying disciplinary standards to the evaluation of music and formulating their own music recommendations to be presented to users of a publicly funded, non-CMAI music streaming platform. The government might hire critics and provide them with protections similar to those that academic freedom affords to academics, so as to insulate their curatorial decisions from concerns about platform revenue and about the likelihood that such recommendations will satisfy users' first-order musical preferences.[241] This might give rise to concerns about creating a state-funded musical orthodoxy, but such concerns could be addressed by fostering a large and varied ecosystem of publicly funded non-CMAI platforms, with different platforms developing their own interpretations of what is good, beautiful, or ultimately worthwhile, much as the diversity of U.S. universities enables different views of what morality requires to predominate in different institutions' philosophy departments.

Although such publicly funded digital platforms would provide a welcome alternative to for-profit CMAI platforms, they would not solve the problem of the negative externalities

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[239] *Spotify Technology SA (SPOT:US)*, Stock Quote, BLOOMBERG, Jan. 29, 2021, https://www.bloomberg.com/quote/SPOT:US.

[240] *See* Strohl, *supra* note 57. In fact, the European Union provided a small amount of funding to MUBI through its Creative Europe scheme. *See Delivering European Cinema Globally*, CREATIVE EUROPE DESK UK, 2019, https://www.creativeeuropeuk.eu/funded-projects/delivering-european-cinema-globally-2.

[241] *See* Robert Mark Simpson, *The Relation Between Academic Freedom and Free Speech*, 130 ETHICS 287, 291 (2020) (noting that academic freedom "insulates academics in their professional conduct").

for cultural democracy that come from substantial audiences adopting a CMAI platform-guided media diet. Even with substantial public investment, such platforms may attract only a fraction of the number of users that CMAI platforms do and would thus fail to prevent CMAI platforms from entrenching existing cultural preferences among broad swaths of a cultural community.

4.   User Control

A more radical intervention to address the challenges that CMAI platforms present for cultural democracy would be to change the governance structure of such platforms so that they no longer tend to pursue the aim of maximizing engagement to maximize profit. Legal scholars have proposed comparable governance reforms to guard against the possible effects of AI on employment.[242] Much as non-democratic corporate governance is likely to lead to anti-worker policies about AI that automates existing jobs,[243] non-democratic platform governance is likely to lead to anti-user policies about CMAI.

If the board of each CMAI platform included enough users and workers to prevent capital owners from commanding a majority, platforms might be less likely to pursue exclusively attention-maximizing strategies. In such a world, different CMAI platforms might design algorithmic recommendation systems with different aims. For instance, some might aim to induce genuine experiences of serendipity and discovery while others might aim to satisfy first-order desires. If publicly organized committees oversaw the design of CMAI platforms, CMAI would tend to nudge citizens in a larger range of directions and would thus be less likely to produce a consolidation of taste that would be inimical to cultural democracy. Given the likely effects of such a user control scheme on the profitability of CMAI platforms, the scheme would, presumably, need to be imposed on platforms by regulators rather than adopted voluntarily.

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[242] *See* McGaughey, *supra* note 213, at 41.

[243] *See id.* at 37-39.

A concern with user control of CMAI through election of user representatives to CMAI platform boards is that it might contribute to, or at least fail to address, the tendency of CMAI platforms to promote cultural orthodoxy.[244] If user representatives were elected on a majoritarian basis, small groups of users might never get represented. To alleviate this concern, CMAI platforms might grant greater control of cultural filtering to subcultural groups, each with their own independent, non-market aesthetic standards for cultural goods.[245] Through a structure analogous to Facebook's Oversight Board, but with more power to intervene in the operation of CMAI-facilitated cultural filtering, we might empower such groups to intervene in the sort of recommendations that CMAI platforms make. For instance, Spotify might give a group of hardcore punks oversight of a certain subset of punk music recommendations. This Collegium of Punks could review and discuss the music being recommended, deciding where recommendations should be amended. In doing so, they would likely disagree with one another about the nature and value of punk, which would lead to schisms and the creation of further, sub-subcultural oversight boards. Such disagreements and schisms would be possible because each participant would bring their own contestable, interpretive concepts of what punk music is and should be to their oversight task.

A potential problem with user control, both in the form of elected user oversight and group participation rights of oversight over CMAI recommendations, is that such control might be abused to promote narrower, more orthodox conceptions of the good.[246] However, these dangers might be reduced if content regulation were "well designed to increase

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[244] *Cf.* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (discussing the dangers of orthodoxy "in politics, nationalism, religion, or other matters of opinion").

[245] *Cf.* Cohen, *supra* note 44, at 149 (noting that platforms can facilitate the emergence of communities and subcultures).

[246] Benkler, *supra* note 78, at 73.

the diversity of options perceivable by individuals in society."[247] Furthermore, we should not underestimate the possibility that profit motives are just as likely as democratic empowerment to lead to abuses of control, or more so.[248]

V. CMAI Platforms and Free Expression

A basic principle of liberal respect is that "[t]he adult should be free to choose when and if she wants to be educated or transformed and free to choose the materials or instructors or activities that she believes will best perform these roles."[249] If we accept this principle, we might wonder how we can justify legal and political interventions that are designed precisely to reorganize individuals' first-order preferences about culture and art. To address this question, I turn my attention in this Part to free expression and the First Amendment.

Many of the regulatory interventions that I have surveyed in Part IV, including all those that involve the imposition of legal mandates on CMAI platforms, are likely to run afoul of contemporary U.S. courts' interpretations of the First Amendment as unconstitutional restrictions of the free speech rights of platforms. Indeed, there are legitimate reasons to worry about state involvement in decisions about what cultural content is filtered down to the attention of cultural

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[247] *Id.*

[248] *See What Tumblr's Ban on "Adult Content" Actually Did*, ELEC. FRONTIER FOUND. (Dec. 2018), https://www.eff.org/tossedout/tumblr-ban-adult-content (explaining that Tumblr's ban on nudity and "adult content" resulted from corporate risk-aversion); *see also* Dylan M. Austin, *Your Post Has Been Removed for Being Queer*, CHOSEN MAG. (June 13, 2018), http://www.chosenmag.com/your-post-has-been-removed-for-being-queer/2018/6/13/your-post-has-been-removed-for-being-queer (noting that queer content generates less revenue for platforms than does more mainstream content); Kelsey Ables, *Tumblr Helped a Generation of LGBTQ+ Artists Come of Age*, ARTSY (June 29, 2019), https://www.artsy.net/article/artsy-editorial-tumblr-helped-generation-lgbtq-artists-age (explaining that before Tumblr's ban on "adult content," it provided a thriving space for queer artists to share their work).

[249] Baker, *supra* note 57, at 403.

participants.[250] However, given the current dominance of digital platforms and the concentration of AI research in private hands, we also have very good reason to worry about the state's under-involvement in the regulation of capital-heavy culture industries.[251] This Part argues that the growth of CMAI platforms and an accompanying decline in cultural democracy is likely to give rise to precisely the sort of orthodoxy of opinion that the First Amendment seeks to guard against.[252] First Amendment doctrine, as it has so far been developed in the late twentieth and early twenty-first centuries, is ill-equipped to address these challenges.

I suggest several ways in which our thinking about the law of free expression might shift to deepen our commitment to substantive democratic values. In doing so, I aim to show how the Constitution's "ultimate goal" of producing "not merely . . . democratic procedures but a democratic culture" might best be achieved with respect to CMAI platforms.[253] In presenting an account of how we might best approach the regulation of CMAI platforms in keeping with our values of free speech, my aim is not to give the best description of current First Amendment law, but rather to offer the best normative interpretation of the First Amendment in keeping with the

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[250] Balkin, *supra* note 219, at 1153 (noting that as well as targeting speakers directly, nation states "now target the owners of private infrastructure, hoping to coerce or coopt them into regulating speech on the nation state's behalf").

[251] *See* danah boyd & Kate Crawford, *Critical Questions for Big Data: Provocations for a Cultural, Technological, and Scholarly Phenomenon,* 15 INFO. COMM. & SOC'Y 662, 674 (2012).

[252] *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) ("The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . .").

[253] Balkin, *supra* note 19, at 173. This approach is compatible with Yochai Benkler's autonomy-promoting approach to interpreting the First Amendment in the context of an information economy, insofar as autonomy and democracy are closely linked moral and political goals. *See* Benkler, *supra* note 78, at 29; *see also id.* at 55-56 (noting the close connection between the values of democracy and autonomy in this context).

democratic values embedded in the Constitution.[254] While articulating a full theory of the normative foundations of free expression law is well beyond the scope of this Part, I hope to indicate the outline of how a democracy-centered approach to free expression—which I hope many readers will find intuitively compelling—might interpret the First Amendment in disputes about the constitutional legitimacy of regulating CMAI platforms.

A. The First Amendment of Mass Media

In regulating television broadcasters in the twentieth century, governments sought to respond to risks similar to some of those that I have identified with CMAI platforms. Particularly, scholars and regulators expressed concerns about broadcasters reducing the range of views in circulation in public discourse. Only a limited number of people could "speak" in the age of mass media, in the sense that only "the most powerful voices" could, even in principle, publish their opinions in venues that would reach a wide audience.[255] In response to some of these problems, media regulators adopted a variety of regulatory strategies like the Federal Communication Commission's twentieth century Fairness Doctrine, which required broadcasters to provide "coverage of issues of public importance" that "fairly reflect[ed] differing viewpoints"[256] and which was largely designed to ensure sufficient levels of production of certain types of information.[257]

The FCC's Fairness Doctrine might have been thought to abridge the First Amendment rights of broadcasters, in that it was a content-based speech regulation. However, the Supreme Court upheld the Doctrine on the ground that the scarcity of broadcast frequency gave the government a right to "to put restraints on licensees in favor of others whose views should be

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[254] *See* Shiffrin, *supra* note 78, at 284.

[255] Balkin, *supra* note 76, at 439.

[256] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973).

[257] *See* Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5045 (1987).

expressed on this unique medium."[258] While this rationale applies to TV channels broadcasting over the air on a limited spectrum of frequencies, it does not apply to cable TV broadcasters due to the multitude of channels that can be carried on cable.[259] Since the advent of the Internet, courts have upheld limited "neutrality" regulations imposed on providers of communications infrastructure.[260] However, in the contexts where courts have upheld such regulations there is still, in contrast to daily newspapers, "bottleneck" monopoly power exercised by a cable or broadband provider in the form of the physical telecommunications connection through which cable or Internet traffic flows.[261] Such a "bottleneck" rationale does not apply to Internet service providers who do not control the telecommunications infrastructure,[262] let alone to digital platforms like search engines, social media platforms, and streaming media services where there is, as a practical matter, no scarcity of "channels" on which such platforms can be "broadcast."[263]

At the same time that the scarcity rationale for regulation of media companies disappeared, First Amendment

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[258] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1980).

[259] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) [hereinafter *Turner I*]; *see also* Time Warner Entm't v. FCC, 240 F.3d 1126, 1139 (D.C. Cir. 2001) (limiting the FCC's authority to impose antitrust restrictions on cable carriers on First Amendment grounds).

[260] *See Turner I*, 512 U.S. at 649 (finding that a "must carry" provision for cable operators is not necessarily a content-based speech regulation); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 224-25 (1997) [hereinafter *Turner II*] (finding that "must carry" provisions for cable TV providers can be permissible under the First Amendment); U.S. Telecom Ass'n. v. FCC, 825 F.3d 674, 741-42 (D.C. Cir. 2016) (finding that some network neutrality regulations for broadband Internet providers are permissible under the First Amendment because broadband providers do not exercise editorial judgment).

[261] *See Turner I*, 512 U.S. at 656.

[262] *See* Comcast Cablevision of Broward Cty. v. Broward Cty., 124 F. Supp. 2d 685, 698 (S.D. Fla. 2000) (holding that *Turner I* does not apply to Internet access because there is no comparable "bottleneck").

[263] *See* Balkin, *supra* note 21, at 31.

jurisprudence shifted more and more toward privileging the speech of the "owners of the means of communication."[264] For instance, in *Sorrell v. IMS Health Inc.*, the Court found that a regulation prohibiting the sale, disclosure, and marketing use of public records about individual doctors' prescribing practices violated the First Amendment.[265] The Court noted that while the sale and marketing use of these records might allow for "harassing sales behaviors" by pharmaceutical companies hounding physicians, enduring such speech "is a necessary cost of freedom."[266] These doctrinal developments have been supported by scholarly celebration of libertarian approaches to the regulation of digital information platforms.[267] This ownership-privileging approach to the First Amendment makes it highly unlikely that the more aggressive regulatory interventions targeting CMAI platforms—such as imposing meaningful oversight boards on platforms or regulating CMAI recommendations to encourage architectures of serendipity—would survive constitutional scrutiny today.

Even if First Amendment doctrine had not shifted in the late twentieth and early twenty-first centuries toward greater protection of the proprietary interests of the owners of the means of communication, the First Amendment doctrine

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[264] COHEN, *supra* note 29, at 99-100; *see also* Balkin, *supra* note 21, at 3 (arguing that freedom of speech is "the key site for struggles over the legal and constitutional protection of capital in the information age").

[265] 564 U.S. 552, 579-80 (2011).

[266] *Sorrell*, 564 U.S. at 575.

[267] *See, e.g.,* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism,* 105 CALIF. L. REV. 335, 360 (2017) (defending "information libertarianism" with respect to information platforms); James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129, 1140-41 (2013) (arguing that digital information platforms should largely be exempt from antitrust law as applied to their data collection activities on First Amendment grounds); Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 895-96 (2012) (arguing that the First Amendment protects search engines against applications of antitrust law to their search functions).

developed in the context of twentieth century mass media would be poorly suited for the regulation of CMAI platforms. The normative underpinning of the scarcity rationale that the Court found in *Red Lion Broadcasting Co. v. Federal Communications Commission* to justify the FCC's Fairness Doctrine was a concern with "preserv[ing] an uninhibited market-place of ideas in which truth will ultimately prevail."[268] Drawing on Justice Holmes's metaphor of the marketplace of ideas,[269] mid-twentieth century First Amendment doctrine emphasized the role of free speech protections in promoting the triumph of truth over falsehood.[270]

For two reasons an interest in promoting truth is a difficult fit for the regulation of CMAI platforms. First, with respect to judgments of relevance, there is typically no clear, unbiased standard that can be invoked to show that one result is truly more relevant than another.[271] This is one reason that courts have resisted allowing tort suits over the ranking of websites in Google's search results to proceed.[272] Furthermore, expression about what is culturally, ethically, or aesthetically good is highly contentious, and courts have long been reluctant to wade into questions that require resolving disputes about aesthetic value, describing any attempt to do so as a

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[268] 395 U.S. 367, 390 (1980).

[269] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[270] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (noting that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"); *see also* Balkin, *supra* note 83, at 1088 (noting that "commercial speech doctrine appropriately focuses on what can be proven false and misleading"); Cohen, *supra* note 29, at 76 (discussing the prevalence of Holmes's marketplace metaphor in contemporary neoliberal interpretations of the First Amendment).

[271] *See* Gillespie, *supra* note 24, at 175.

[272] *See* Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003); *see also* e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) (distinguishing a case in which whether a firm "did in fact violate Google's policies" could be "proven true or false" from *Search King*).

"dangerous undertaking" for judges.[273] In *Metromedia, Inc. v. San Diego*, Justice White went so far as to proclaim that "esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose."[274] Courts have similarly been reluctant to involve themselves in judgments about ultimate value, like determinations of whether or not a system of belief qualifies as religious.[275] Preferring some forms of aesthetic expression over others is often thought by courts to impermissibly violate the principle that the state should remain neutral in debates about what is ultimately good.[276] These concerns are amplified with respect to regulation of CMAI platforms by the doctrine that sees editorial decisions, including decisions about what material to exclude from a platform or publication, as deserving strong First Amendment protection.[277] While this doctrine evolved in the context of the editorial decisions of newspapers,[278] courts have held that it applies to the "editorial decisions" of search engines to rank certain search results above others or to exclude websites from a set of search results altogether.[279] When combined with the withering of the scarcity doctrine as a rationale for regulation,

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[273] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[274] 453 U.S. 490, 510 (1981) (plurality opinion) (evaluating the constitutional permissibility of municipal regulations of billboards); *see* Brain Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 414 (2017).

[275] *See* Seeger v. United States, 380 U.S. 163, 165-66 (1965) (refusing to read a distinction between religious views and "essentially political, sociological, or philosophical views" into a statute relating to exemptions from military conscription).

[276] *See* Soucek, *supra* note 274, at 456 (commenting on United States v. Playboy Entm't Grp., 529 U.S. 803 (2000)). *But see id.* at 382 (arguing that the government is already deeply involved in the regulation of aesthetic matters and that courts should acknowledge and embrace its role).

[277] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 381 (1984) (holding that "the expression of editorial opinion . . . lies at the heart of First Amendment protection").

[278] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[279] *See* Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003).

courts' focus on promoting truth and maintaining neutrality with respect to aesthetic, cultural, and ethical judgements is likely to undercut the constitutionality of almost all regulatory interventions that might effectively protect against the risks that CMAI platforms present for cultural democracy.

B.   A CMAI Platform-Appropriate Interpretation of the First Amendment

Considering the restrictiveness of current First Amendment doctrine, confronting the threats that CMAI poses to democratic culture will require a new understanding of the First Amendment. It would be unfortunately perverse of the First Amendment to prohibit the most effective regulation of CMAI platforms when the point of such regulatory interventions would be to counteract the threats—of cultural orthodoxy and of diminishing the liveliness of expressive exchanges—that have long been celebrated as the reason that we need the First Amendment.[280]

What interpretation of the First Amendment might courts adopt to better promote the values embodied in the First Amendment? Some scholars have suggested that we might think about digital platforms on the model of historical public forums.[281] In *Marsh v. Alabama*, which held that a company-owned town's prohibition on a Jehovah's Witness distributing religious pamphlets on the streets of its business district violated the First Amendment, the Court emphasized that ownership of property does not necessarily entail absolute dominion over speech on that property.[282] "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed

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[280] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[281] *See* Geoffrey R. Stone, *Reflections on Whether the First Amendment Is Obsolete*, KNIGHT FIRST AMEND. INST. (Nov. 1, 2017), https://knightcolumbia.org/content/reflections-whether-first-amendment-obsolete (considering the possibility that *Marsh* could be extended to digital platforms).

[282] 326 U.S. 501, 505-06 (1946).

by the statutory and constitutional rights of those who use it."[283] This doctrine was considerably expanded in *Amalgamed Food Employees Local 590 v. Logan Valley Plaza, Inc.*, in which the Court extended *Marsh* to privately owned shopping centers, holding that "the roadways provided for vehicular movement within [a] mall and the sidewalks leading from building to building" were "the functional equivalents of the streets and sidewalks of a normal municipal business district" and so constituted a historical public forum even though there were other public roads nearby where protests and other speech could take place.[284] The Court restricted further expansion of *Marsh* in *Lloyd Corporation, Ltd. v. Tanner*, in which the Court held that a privately owned mall could prohibit Vietnam War protestors from handing out leaflets because there were other nearby venues where the protests could also be carried out.[285]

In keeping with the narrow approach of *Lloyd Corporation*, the Court held in *Manhattan Community Access Corp. v. Halleck* in 2019 that media providers are not public forums under the state action doctrine because they do not perform functions that "the government [has] traditionally and exclusively performed."[286] According to this view, the fact that a private owner opens up a forum for public speech does not make them a state actor.[287] Applying *Manhattan Community*

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[283] *Marsh*, 326 U.S. at 506.

[284] 391 U.S. 308, 319 (1968).

[285] 407 U.S. 551, 564-66 (1972). Although the Court restricted the scope of *Marsh* in *Lloyd Corporation*, in *Pruneyard Shopping Center v. Robins*, the Court held that states could interpret their state constitutions to provide more expansive free speech rights on private property without violating the Fifth Amendment prohibition on takings. 444 U.S. 74, 81 (1980).

[286] 139 S. Ct. 1921, 1928-29 (2019) (holding that an entity operating a public access channel on a cable system is not a state actor for First Amendment purposes); *see* Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436, 442 (E.D. Pa. 1996) (holding that AOL's email service was disanalogous to the company town in *Marsh* because "AOL has not opened its property to the public by performing any municipal power or essential public service and, therefore, does not stand in the shoes of the State").

[287] *Manhattan Cmty. Access*, 139 S. Ct. at 1930.

Access Corp., courts have held that digital platforms like Twitter are not historical public forums.[288]

While there is no reason to think that the present Court has any interest in reviving *Marsh*, there are reasons to think that returning to and strengthening *Marsh* would lead to a more normatively attractive First Amendment doctrine.[289] Particularly, we might consider extending *Marsh* to digital platforms insofar as access to platforms operated in reliance on CMAI is necessary to participate in a shared cultural space. It is true that "[t]here is no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter."[290] However, we might reconceive the function of Twitter and other digital platforms under more general descriptions; in doing so, we might think of platforms like Twitter as more continuous with historical public forums. There were not vast and sprawling privately owned malls before the mid-twentieth century, but this did not prevent the Court in *Logan Valley* from holding that sidewalks in a mall were functionally equivalent to the sidewalks in a public business district and so constituted a historical public

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[288] *See* Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018); *see also* Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception,* 15 WASH. J.L. TECH. & ARTS 36, 61 (2019) (arguing that the public function of the First Amendment does not extend to digital platforms); Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete (arguing that *Marsh* does not apply to digital platforms because they are not acting like government in all but name).

[289] As Benjamin Jackson has pointed out, under *Pruneyard*, 444 U.S. 74, it may be possible for state supreme courts to interpret state constitutions to treat digital platforms as traditional public forums. *See* Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook,* 44 N.M. L. REV. 121, 158 (2014).

[290] *Knight First Amendment Inst.*, 302 F. Supp. 3d at 574.

forum.[291] *Marsh* concerned free speech rights in a company owned town,[292] but many of us effectively spend much of our cultural lives hanging out in privately owned digital malls, even if we do not live in digital company towns.

While some scholars have suggested potential applications of *Marsh* to digital social networks that provide outlets for storytelling by their users and resemble community bulletin boards,[293] it may be more difficult to extend *Marsh* to CMAI platforms like Spotify that do not rely heavily on user-created content. However, we must consider the function of CMAI platforms as part of the totality of our cultural system rather than in isolation. The whole enterprise of collective cultural creation where cultural ideas are shaped and instantiated is a public one. In *Marsh*, the Court held that "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."[294] For free speech rights to realize their value, speakers and listeners must inhabit a cultural and political landscape that develops their own views of what forms of life are valuable and fulfils their communicative duties of direct and spontaneous engagement with diverse cultural materials. If we aim to prioritize not just the rights of a narrow class of speakers but also the rights of listeners and thinkers, broadly understood, in our normative theory of the First Amendment, we should be open to regulatory interventions that seek to ensure that the overarching aims of CMAI platforms do not undermine individuals' direct and spontaneous engagement with diverse cultural materials.[295]

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[291] Amalgamed Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968).

[292] Marsh v. Alabama, 326 U.S. 501, 508-09 (1946).

[293] *See* Jackson, *supra* note 289, at 144.

[294] *Marsh*, 326 U.S. at 508-09.

[295] *See* Shiffrin, *supra* note 78, at 283 (articulating a "thinker-based" approach to free speech).

This is not to suggest that the government is justified in dictating the precise editorial choices that platforms make, for this would itself run afoul of the First Amendment goal of counteracting cultural orthodoxy. However, it can regulate the *structure* of the platforms with a view to ensuring that our total cultural environment resembles a democratic community rather than a company town. As the Court held in *Red Lion Broadcasting* when it upheld the FCC's Fairness Doctrine, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial" to realizing the value of the First Amendment.[296]

My suggestion that CMAI platforms are appropriately treated as public forums through an extension of *Marsh* thus does not mean that specific suggestions of cultural materials that CMAI platforms make can be censored. It does mean that the structure of CMAI platforms can be regulated to promote democratic values. For instance, some of the regulations surveyed in Part IV that would involve the imposition of legal requirements on CMAI platforms that did not directly dictate what content they could feature but that would instead modify their governance structures or limit the significance of a profit-motive to their operations might be authorized by this approach to the First Amendment. Such a First Amendment framework is appropriate for the cultural democracy-promoting regulation of CMAI platforms because it is not so much the individual CMAI recommendations that threaten to interfere with cultural democracy rather than CMAI platforms' overarching tendency to offer recommendations in a way that promotes the entrenchment of their audience's existing

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[296] 395 U.S. at 390; *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the Frist Amendment."); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 194 (1997) (holding that Congress has an "interest in preserving a multiplicity of broadcasters" even if there are other mediums through which people can also access information).

preferences.[297] While some commentators have suggested that extending *Marsh* to digital platforms would make it difficult or impossible for platforms themselves to regulate content, severely limiting their ability to "fight not only spam but also trolling, flooding, abuse, and myriad other unpleasantries,"[298] my approach does not raise such difficulties any more than *Logan Valley* entailed that a record shop situated in the Logan Valley Mall could not prohibit competitors from standing in its aisles offering to sell different records than those offered by the shop. In keeping with the aim of *Marsh* and *Logan Valley*, my approach suggests that the First Amendment should protect the public infrastructure that allows for direct and spontaneous engagement with diverse materials.

The approach that I suggest here partly accords with Jack Balkin's suggestion that we should not "impose a rigid distinction between public and private power" when it comes to digital platforms.[299] However, for Balkin, an ideal world is one in which platforms "come to understand themselves" as having robust obligations to preserve and promote the values of free expression.[300] Given what we know about the economic motivation of firms, this seems optimistic to the point of naiveté. Given the political economy in which they operate,[301] CMAI platforms are only likely to undertake such changes as the result of regulatory interventions. Regulatory interventions can hardly rest on a hope that firms will one day awaken to a deep understanding and acceptance of their role in promoting democratic values. Instead, they must change the structural incentives that motivate such firms, either by changing their

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[297] On this account, concerns about aesthetic neutrality need not prevent regulation of CMAI platforms, because "insofar as the worry about aesthetic judgment is based on the danger of government orthodoxy, outsourcing the judgment to elites is hardly a solution." Soucek, *supra* note 274, at 462-63.

[298] Wu, *supra* note 288; *see* Balkin, *supra* note 219, at 1194-95.

[299] *See* Balkin, *supra* note 219, at 1194.

[300] *Id.* at 1209 ("From the standpoint of free speech values, the best solution would be for large international infrastructure owners and social media platforms to change their self-conception.").

[301] *See supra* notes 38-46 and accompanying text.

governance structures or by restricting the sort of activities that they can carry out in pursuit of maximizing engagement to maximize profit.

It is not an open-and-shut case that the regulatory interventions mentioned in Part IV would survive First Amendment scrutiny, even under the expansive interpretation of *Marsh* that I have advanced here. The First Amendment framework that I propose, however, offers a way to think about the permissibility of proposed regulations of CMAI platforms that provides hope for realizing the principle that people "belong in the normative center of all public power."[302]

Conclusion

This Article has attempted to bridge the divide between two growing literatures, one concerning cultural democracy and another concerning the risks that artificial intelligence creates for democracy. Specifically, I have provided the first study of the unique ways in which algorithmic filtering can threaten cultural democracy, distinct from the threats posed more broadly by the consolidation of control and power in digital platforms. I have argued that democratic culture relies on individuals' direct, spontaneous engagement with diverse conceptions of the good, objects of beauty, and bearers of other aesthetic values. Such engagement must allow for the possibility of changing one's views about what is ultimately important and worthwhile. Using Spotify as an example, I have suggested that CMAI platforms pose a danger for cultural democracy insofar as they reduce the frequency with which individuals engage with culture directly and spontaneously, relative to the frequency with which they would do so were CMAI platforms to operate in a different economic and political context. I have further contended that existing regulatory structures are ill suited to protecting robust cultural democracy from the dangers of CMAI platforms. I have proposed a range of regulatory interventions that might better

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[302] Christian Djeffal, *AI, Democracy, and the Law*, *in* THE DEMOCRATIZATION OF ARTIFICIAL INTELLIGENCE: NET POLITICS IN THE ERA OF LEARNING ALGORITHMS 255, 280 (A. Sudmann ed., 2019).

address these challenges, not by eliminating CMAI technology or the digital distribution of cultural materials but by altering the economic aims of CMAI platforms. While many of the interventions I have discussed would likely be found to fail First Amendment scrutiny given the approach to free speech rights that U.S. courts adopted in the twenty-first century, I have argued that a normatively adequate First Amendment doctrine would be more welcoming of appropriate regulation of CMAI platforms and their effects on the preferences of members of democratic cultural communities.