CHRONICLES OF INTERNET OPENNESS: THE BRAZILIAN CASE STUDY

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In 2014, a data profiling company, Cambridge Analytica, gained access to the private data profiles of 50 million Facebook users. Through promotional offers that compensated users for taking a personality quiz, the company obtained personal data from users' profiles and their Facebook "friends." These Facebook users were unaware their data had been hijacked and that their information would be sold to Donald Trump's 2016 presidential campaign. Allegedly, the data was used by that campaign to manipulate their voting interests.

While this data was apparently used to influence the U.S. presidential elections, data obtained in a similar fashion could have also influenced electoral outcomes in other countries. One example is the 2018 Brazilian presidential elections. After disclosure of the U.S. breach, Brazilian prosecutors revealed that they were opening an investigation into whether Cambridge Analytica also improperly harvested data from millions of Brazilian internet users. Considering this data was apparently used to aid the winner of Brazil's 2018 elections, the far-right Jair Bolsonaro, the political divisiveness caused by Cambridge Analytica's data harvesting is sure to have a profound and lasting impact.

While this anecdote relates to data privacy issues in the Americas, it also speaks to broader issues of transnational internet governance. Concern over the data privacy of domestic internet users, in the wake of an increasingly interconnected world, was one of the motivating factors that led the Brazilian government to implement its landmark "Internet Bill of Rights," the Marco Civil da Internet (MCI) in 2014, the same year as

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the Cambridge Analytica breach. Based on democratic values that seek to advance internet openness, the MCI provides detailed guidelines aimed at promoting the civil right to internet access, net neutrality, and data privacy. This Article chronicles the implementation and efficacy of Brazil's recent internet laws to demonstrate that changing times call for a reassessment of open values in internet governance. Such values are likely to have meaningful implications beyond the Brazilian context.

INTRODUCTION

> We are at a stage in our history when we urgently need to make fundamental choices about values, but we trust no institution of government to make such choices. —Lawrence Lessig[1]

In 2014, a data profiling company, Cambridge Analytica, gained access to the private data profiles of millions of Facebook users.[2] Through a seemingly innocuous offer that paid American Facebook users to take a personality quiz, the company was able

1. Lawrence Lessig, CODE: AND OTHER LAWS OF CYBERSPACE 8 (1999).

2. Zeynep Tufekci, *Facebook's Surveillance Machine*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html [https://perma.cc/R9B3-2DED].

to obtain the private information of users' profiles and their Facebook "friends." While only 270,000 people actually installed the application in return for an offered fee, the resulting data hack, coupled with data obtained from the profiles of each of the users' friends, meant that the sum total of harvested data reached upwards of 50 million users.[3] Most of these users (i.e., all but the 270,000 that had downloaded the application) had no idea that their data had been hijacked. Consequently, they were completely unaware that their data would be sold to Donald Trump's 2016 U.S. presidential campaign and allegedly used by that campaign to manipulate their voting interests.[4]

After this data "breach" was exposed in 2018, Facebook responded by claiming that there was in fact no breach at all because the platform routinely allows researchers to access user data for limited purposes.[5] Facebook did, however, suspend the account of Cambridge Analytica and demanded that Cambridge Analytica delete any data obtained from the application in question.

Because Facebook records all users' browsing histories, along with every click and "like" made on the site, the vast amounts of data obtained in the Cambridge Analytica example is indeed troubling. While this data was allegedly used to influence the 2016 U.S. presidential election, it is equally troubling that data obtained in a similar fashion may have also influenced the 2018 presidential elections in Brazil.[6] Shortly after disclosure of the breach in the United States, Brazilian prosecutors revealed they were opening an investigation into whether Cambridge Analytica improperly harvested the personal data of millions of Brazilians through a partnership with its representative in that country, *Ponte Estrategia*.[7] The

3. *Id.*

4. Matthew Rosenberg et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/AMH6-TDPT] (alleging Cambridge Analytica employed "psychographic modeling techniques" that enabled them to "identify the personalities of American voters and influence their [voting] behavior").

5. Tufekci, *supra* note 2.

6. David Biller, *Cambridge Analytica's Brazil Partner Suspends Deal Amid Scandal*, BLOOMBERG (Mar. 21, 2018), https://www.bloomberg.com/news/articles/2018-03-21/cambridge-analytica-s-brazil-partner-suspends-deal-amid-scandal [https://perma.cc/YG59-QLHQ].

7. Ricardo Brito, *Brazil Prosecutors Open Investigation into Cambridge Analytica*, REUTERS (Mar. 21, 2018, 3:40 PM), https://www.reuters.com/article/us-

political polarization surrounding Brazil's 2018 presidential election was eerily similar to the polarization that accompanied the 2016 election in the United States.[8] Considering this improperly-obtained data was allegedly used to aid both Donald Trump's successful U.S. presidential bid[9] and Brazil's 2018-elected President, Jair Bolsonaro, Cambridge Analytica's data harvesting will have a profound and lasting impact.

While the Cambridge Analytica anecdote relates specifically to the global salience of data privacy in social media use, it also speaks to the broader issues of transnational internet governance.[10] Indeed, concern over the data privacy of internet users in Brazil was merely one of the motivating factors which led to the country's implementation of the landmark "Internet Bill of Rights," the *Marco Civil da Internet* (Civil Rights Framework of the Internet, or "MCI") in 2014, the same year of the Cambridge Analytica breach.

The Cambridge Analytica anecdote links internet governance issues in the United States to those in Brazil. These two countries share similar online governance trajectories in other instances too. Most notable are the policy interventions employed by their law makers. In the last decade, for instance,

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facebook-cambridge-analytica-brazil/brazil-prosecutors-open-investigation-into-cambridge-analytica-idUSKBN1GX35A [https://perma.cc/SJK4-T94J].

8. *See* Letícia Cesarino, *On Digital Populism in Brazil*, POLAR: POL. & LEGAL ANTHROPOLOGY REV. (Apr. 15, 2019), https://polarjournal.org/2019/04/15/on-jair-bolsonaros-digital-populism/ [https://perma.cc/M38J-ETA3].

9. Rosenberg et al., *supra* note 4.

10. According to science and technology studies scholar Laura DeNardis, internet governance involves a broadly conceived orientation that takes shape in four areas: (1) critical internet resources, (2) intellectual property rights, (3) communication rights, and (4) security. Critical internet resources relate to internet protocol address space and management. Intellectual property rights refer to ownership interests in trademarks, patents, and copyrights. Communication rights, conversely, involve freedom of speech, freedom of expression, freedom of association, as well as data privacy concerns. Meanwhile, because of the open and worldwide aspect of the internet, DeNardis notes that security involves a wide variety of concerns and must include input from national governments, the private sector, individual users, and technical communities; *see* Laura DeNardis, Protocol Politics: The Globalization of Internet Governance 14–19 (2009). Because this Article addresses regulatory provisions that relate to internet access, net neutrality, online privacy, and intermediary liability, the internet governance discussion herein concerns to the communications rights aspect of DeNardis' definition. For an analysis of the significance of the communications rights (and policymaking) aspect of internet governance, *see* Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 Fed. Commc'ns L. J. 205 (2010).

progressive political regimes in both countries enacted federal legislation which promoted more extensive internet access, broadband deployment, and net neutrality. Such legislation, coupled with the privacy concerns outlined in the Cambridge Analytica example, has impacted communications rights in internet governance.[11] Because digital communications rights implicate freedom of speech, freedom of expression, freedom of association, and online privacy concerns, this aspect of internet governance has become increasingly salient worldwide. Moreover, because the MCI provides guidelines affecting internet access, net neutrality, online privacy, and intermediary liability, Brazil is one of the few countries to enact democratic legislation that effectively regulates digital communications rights, which makes it an ideal locale to chronicle one nation's regulatory strategy amidst increasing concerns over transnational internet governance.

"Law reflects values."[12] Indeed, the word "value" comes from the Latin root "*valeo*," which means to be strong, well or healthy; to have worth.[13] In a democratic society, then, values are what gives regulation of the internet its substance or worth. Historically, certain fundamental values[14]—including individual user freedom and freedom of information access—are embedded in the internet's architecture and ideology.[15] Although these values were never fully embraced through comprehensive legislation in the United States, a more robust set of online governance values were adopted in Brazil when it created a new regulatory framework for the internet, the MCI, in 2014.

In response to calls to advance regulatory schemes for the internet, this Article examines the Brazilian path to internet governance. It argues the changing digital landscape of contemporary times requires a reassessment of internet values. In the current political climate, advancing democracy through

11. *See* DeNardis, *supra* note 10, at 20.

12. *See* Rana Foroohar, *Lina Khan: 'This isn't just about antitrust. It's about values'*, FIN. TIMES (Mar. 29, 2019), https://www.ft.com/content/7945c568-4fe7-11e9-9c76-bf4a0ce37d49 [https://perma.cc/8C46-PHHC] (discussing how shifting values often elicit a corresponding shift in laws).

13. *Value*, ONLINE EPITYMOLOGY DICTIONARY, https://www.etymonline.com/word/value [https://perma.cc/4LYH-YB6W].

14. I use the term "values," "principles," and sometimes "ideals" to describe the theoretical underpinnings that guide the internet laws in question, most notably the MCI.

15. *See generally* DeNardis, *supra* note 10.

internet governance means a more thorough consideration of contemporary issues, like data appropriation and disinformation,[16] that are often facilitated by internet openness. A lack of consideration for the changing political and digital dynamics of contemporary times, challenges the democratic values upon which laws like the MCI were founded.

Through an experience-based approach,[17] this Article chronicles the implementation and efficacy of Brazil's recent internet laws, most notably the MCI. It examines Brazil's national ambitions in internet law and how transnational legal theory affects the lived experiences of specific governmental locales and institutions. Accordingly, this Article proceeds in three Parts. Part I introduces the history, political background, and purpose of Brazil's visionary internet law, the MCI. Given the "disjunctive" nature of Brazil's democratic project,[18] this section examines how such a pioneering internet law came into existence in one of the world's most inequitable countries.[19] After exploring the MCI's background, this Part posits that the MCI

16. This Article defines "disinformation" as the spread of false information with the intent to deceive or mislead. Accordingly, "misinformation" refers to information that may be false or inaccurate but is not generally intended to mislead. "Fake news" is thus an umbrella term that includes both disinformation and misinformation. *See* David Nemer, TECHNOLOGY OF THE OPPRESSED: INEQUALITY AND THE DIGITAL MUNDANE IN THE FAVELAS OF BRAZIL (forthcoming 2022); *see also* Milton Mueller, *Misinformation about Disinformation?*, INTERNET GOVERNANCE PROJECT (Feb. 25, 2021), https://www.internetgovernance.org/2021/02/25/misinformation-about-disinformation/ [https://perma.cc/DH2L-CMQY].

17. Although not ethnographic in the traditional sense, this Article is both informed and inspired by 18 months of fieldwork conducted in São Paulo and, primarily, Rio de Janeiro, Brazil. As employed herein, ethnography involves an experienced-based inquiry that explores the MCI's background and history, the institutional structures that promote the MCI, and the relational possibilities created by the MCI's brand of democratic online regulation. For similar, contemporary examples of the term "ethnography" see, for example, ETHNOGRAPHIES OF NEOLIBERALISM (Carol Greenhouse ed., 2010).

18. *See, e.g.*, Teresa P.R. Caldeira & James Holston, *Democracy and Violence in Brazil,* 41 COMPAR. STUD. SOC'Y & HIST. 691 (1999); Teresa P.R. Caldeira, City of Walls: Crime, Segregation and Citizenship in Sao Paulo 2-3 (2000); James Holston, Insurgent Citizenship: Disjunctions of Democracy and Modernity in Brazil 3–4 (2008).

19. *See* Damian Platt, NOTHING BY ACCIDENT: BRAZIL ON THE EDGE (2020); Julie Ruvolo, *Why Brazil is Actually Winning the Internet,* BUZZFEED (June 29, 2014), https://www.buzzfeed.com/jruv/why-brazil-is-actually-winning-the-internet?utm_term=.vwAKjGMEvm - .pvaG6A5lDp [https://perma.cc/5T6F-UWYR].

was founded upon democratic principles that seek to maintain internet openness in Brazil.

Part II introduces the values of internet governance. Historically, internet governance and infrastructure has been guided by certain fundamental values.[20] Drawing upon theory from cyberspace law's renaissance man,[21] Lawrence Lessig, this section examines how these values help promote the democratic standards that have existed since the origins of cyberspace. Part II also explores Lessig's idea of code. Along with values, code helps advance the internet's foundational principles of openness, neutrality, and decentralization.[22] Although scholars suggest that Lessig's theory is not infallible,[23] his strong influence on two of the MCI's principal founders demonstrates his theory remains valuable in the Brazilian context.[24]

While Parts I and II are theoretical in nature, Part III examines the MCI in practice. Employing the example of Brazil's recent trend towards "digital populism,"[25] this Part investigates how disinformation and divisive social media movements undermine the democratic norms of the MCI, which contributed to the rise of Jair Bolsonaro, Brazil's extremist far-right President.[26] The Article continues with a discussion of contemporary Brazilian internet laws that supplement the MCI. Finally, the Article concludes by offering viable solutions to Brazil's complicated issues with internet governance and disinformation.

I. DEMOCRACY AND INTERNET GOVERNANCE IN BRAZIL

In 2014, Brazil adopted the MCI, one of the world's most democratically debated expressions of digital rights, to become

20. *See generally*, DENARDIS, *supra* note 10, at 2.

21. Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 Wis. L. Rev. 743, 746 (2000).

22. *See id.* at 4; DENARDIS, *supra* note 10, at 2.

23. Schwartz, *supra* note 21, at 746.

24. *Cf. infra*, p. 28 (explaining Lessig's ties to Gil and Lemos); *See generally infra*, Part II.B–C (explaining the history and development of the MCI).

25. Cesarino, *supra* note 8.

26. David Nemer, *Whatsapp is Radicalizing the Right in Bolsonaro's Brazil*, HUFFPOST (Aug. 16, 2019, 8:00 AM), https://www.huffpost.com/entry/brazil-jair-bolsonaro-whatsapp_n_5d542b0de4b05fa9df088ccc [https://perma.cc/U5FE-PEXD].

codified into law.[27] The MCI is championed as a visionary "Internet Bill of Rights." It establishes guidelines for openness, net neutrality, freedom of expression, data privacy, promotes technological innovation, and limits the liability of intermediaries.[28] Through its various provisions, the MCI seeks to foster democratic internet governance in Brazil, a country known for its great economic and social inequality,[29] among other more favorable attributes. Yet, because the internet is a global telecommunications network, it must inherently transcend international boundaries. Democratic internet laws, like the MCI, must therefore strike a balance between the transnational function and integrity of the web and advancing the domestic goals countries have as sovereign territories. Viewed as a democratizing influence in Brazil,[30] navigating this paradox is one of the many challenges facing internet laws like the MCI.

A. Brazil in Context

Brazil has a population of approximately 210 million people and, as of 2016, had an internet penetration rate of 59 percent.[31] As of 2016, roughly 86 million Brazilians lacked internet access.[32] Meanwhile, Article 4 of the MCI promotes "the right of Internet access to all."[33] Through enacting the MCI, the Brazilian government has seemingly envisioned universal

27. Katitza Rodriguez & Larissa Pinho, *Marco Civil da Internet: The Devil in the Detail*, ELEC. FRONTIER FOUND. (Feb. 25, 2015), https://www.eff.org/deeplinks/2015/02/marco-civil-devil-detail [https://perma.cc/3CX6-E6MH].

28. CARLOS AFFONSO PEREIRA DE SOUZA ET AL., UNDERSTANDING BRAZIL'S INTERNET BILL OF RIGHTS (1st ed. 2015), https://itsrio.org/wp-content/uploads/2015/11/Understanding-Brazils-Internet-Bill-of-Rights.pdf [https://perma.cc/2Y6R-2MBN].

29. CALDEIRA, *supra* note 18, at 2–3; HOLSTON, *supra* note 18, at 3–4.

30. *See* Jeffrey Omari, *Digital Access Amongst the Marginalized: Democracy and Internet Governance in Rio de Janeiro*, 41 POL. & LEGAL ANTHROPOLOGY REV. 277, 280 (2018).

31. *Internet Usage in Brazil—Statistics and Facts*, STATISTA (July 13, 2021), https://www.statista.com/topics/2045/internet-usage-in-brazil [https://perma.cc/JH47-PA2P]; *see also Internet user penetration in Brazil from 2015 to 2025*, STATISTA, https://www.statista.com/forecasts/292757/brazil-internet-user-penetration [https://perma.cc/9MCN-AYAS] (last visited Dec. 1, 2021).

32. *Internet Users by Country (2016)*, INTERNET LIVE STATS (July 16, 2016), https://www.internetlivestats.com/internet-users-by-country/ [https://perma.cc/4326-3ZP3].

33. LEMOS ET. AL, *supra* note 28, at 23–24.

internet access as a core feature of their attempt to overcome decades of societal inequalities and help achieve a more authentic democracy.[34] Promoting universal internet access for its citizenry underscores the fact that, as legislation, the MCI is an idyllic model of democratic internet governance. As I argue elsewhere, however, the disjunctive nature of Brazil's democratic project reveals corresponding disjunctions in implementing the MCI's objectives.[35]

Brazil's democracy is relatively new; the country endured a military dictatorship from 1964 until 1985 and subsequently adopted a constitution in 1988.[36] Since that time, respect for civil rights, justice, and the rule of law has not frequently accompanied the country's constitutional democracy.[37] Since the dictatorship, both civilian and state-sanctioned violence has increased considerably because of privatization, police abuses, segregation of cities, and destruction of public services.[38] As a result, Brazil's political institutions often "counteract democratic tendencies and help sustain one of the world's most unequal societies."[39] Social scientists have used the term "disjunctive democracy" to describe these contradictory processes, which value the expansion of political citizenship at the expense of civil citizenship.[40]

By codifying a civil right of internet access,[41] the MCI's legislators presumed that all Brazilians have equal rights as

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34. *See* Omari, *supra* note 30, at 283 (noting how one of the aims of the MCI is to mitigate socioeconomic inequality in Brazil).

35. *See generally id*.

36. Jeffrey Omari, *Democracy and Digital Technology: Internet Governance and Social In/exclusion in Rio de Janeiro* (Sept. 2018) (Ph.D. dissertation, UC Santa Cruz) (on file with eScholarship.org), https://escholarship.org/uc/item/6fx857q5#main [https://perma.cc/T7DL-FGDE].

37. TERESA CALDEIRA, CITY OF WALLS: CRIME, SEGREGATION, AND CITIZENSHIP IN SÃO PAULO 105 (2000).

38. *Id*.

39. *Id.* at 52.

40. *Id.* at 40; *see also* HOLSTON, *supra* note 18, at 271.

41. Noteworthy is the recent U.S. Supreme Court decision, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). (In *Packingham*, the Court struck down a statue that prohibited registered sex offenders from accessing social media platforms such as Facebook and Twitter. In his majority opinion, Justice Kennedy argued that preventing "access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." Scholars have argued that this decision provides a First Amendment right of access to social media platforms in the U.S. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598,

citizens.[42] The legislatures' presumption was fair because citizens of a particular nation are generally considered equal under the law.[43] This presumption calls to mind the theory of Brazilian legal scholar Ronaldo Lemos, who argues that civil rights in the real world should grant corresponding civil rights in the digital world.[44] As it relates to civil rights, however, it is important "to distinguish the formal level of theoretical universality from the substantive level of exclusionary and marginalizing practices."[45] Such is the case in Brazil because scholars have questioned whether the country's marginalized citizens have any civil rights at all.[46]

Attempting to mitigate inequality through technological governance is an innovative reform measure in a democracy that is characterized as disjunctive.[47] Since inequality rates in Brazil's largest cities remain among the highest worldwide,[48] the MCI was part of an effort by the progressive Worker's Party (or "PT") to help mitigate decades of social and economic inequalities plaguing Brazil since before the start of its military dictatorship.[49] The PT controlled the Brazilian presidency from 2003 until 2016. During that time, the party passed legislation

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1611 (2018). (Afterward, governments in Brazil and the United States have recently acknowledged the fundamental importance of internet access to the values of online governance in a democratic society).

42. *See* DANIEL ARNAUDO, Igarapé Inst., BRAZIL, THE INTERNET AND THE DIGITAL BILL OF RIGHTS: REVIEWING THE STATE OF BRAZILIAN INTERNET GOVERNANCE 4 (Apr. 25, 2017) https://igarape.org.br/marcocivil/assets/downloads/igarape_brazil-the-internet-and-the-digital-bill-of-rights.pdf [https://perma.cc/5GRL-HYE4] (stating Brazil is "governed by the democratic norm of equal access to information online").

43. Renato Rosaldo, *Cultural Citizenship, Inequality, and Multiculturalism, in* LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS 27, 27 (William V. Flores & Rina Benmayor eds., 1997).

44. Ronaldo Lemos, *Artigo: Internet brasileira precisa de marco regulatório civil,* UOL NOTICIAS (May 22, 2007, 9:13 PM), https://tecnologia.uol.com.br/ultnot/2007/05/22/ult4213u98.jhtm [https://perma.cc/8TLS-VEPM] (arguing that legislators must understand the similarities and correspondence between the real world and cyberspace when contemplating regulation of the internet).

45. Rosaldo, *supra* note 43, at 27.

46. *See generally* CALDEIRA, *supra* note 18; Caldeira & Holston, *supra* note 18; HOLSTON, *supra* note 18.

47. *See generally* HOLSTON, *supra* note 18.

48. Ei-Lyn Chia, *Sharing São Paulo: Harnessing Collaborative Forces Through Productive Housing Cooperatives in Repúplica, in* URB. SOL.: METRO. APPROACHES, INNOVATION IN URB. WATER AND SANITATION, AND INCLUSIVE SMART CITIES 56, 57 (Wilson Center 2016).

49. Omari, *supra* note 30, at 277.

and social policies[50] aimed at lifting millions of Brazilians out of conditions of extreme poverty.[51] The MCI is part of that mitigating effort. Examining the MCI's legislative history and policy implications reveals the challenges encountered in advancing a democratic internet law that has broad implications at local, national, and international levels.

B. History and Political Background of the MCI

Understanding the history of the PT is one of the keys to understanding how the MCI became the legislation that it is today. Established under the tenets of democratic socialism during the final years of Brazil's military dictatorship in 1980, the PT was founded by a diverse group of militants—left-wing academics, artists, and trade unionists—who were opposed to the military government.[52] Luiz Inácio Lula da Silva (widely known as "Lula"), a former trade unionist himself, was a founding member and ran for Brazil's highest office three times under the PT banner before his presidential breakthrough in 2002.[53] Through a campaign that stressed alleviating the longstanding state of poverty and despair experienced by the vast majority of Brazilian people, Lula won the hearts of the masses by pledging to eliminate extreme hunger and help mitigate inequality through progressive legislation and policies aimed to benefit the country's marginalized.[54]

"In addition to his promise to curb socioeconomic inequalities, Lula's administration insisted upon fiscal restraint, controlling inflation, and advancing free-market exchange".[55] In many ways, Lula's policies exhibited the neoliberal[56] characteristics of that era and can be described as

50. Inclusive PT programs such as *Fome Zero* (Zero Hunger), *Bolsa Familia* (Family Allowance), and *Minha Case, Minha Vida* (My House, My Life) sought to bridge societal divides through financial incentives that fought hunger and provided education and housing to low-income Brazilian families. *See id.*

51. Omari, *supra* note 36, at 25–26.

52. Aaron Shaw, *Insurgent Expertise: The Politics of Free/Livre and Open Source Software in Brazil*, 8 J. INFO. TECH. & POL. 253, 258 (2011).

53. Omari, *supra* note 36, at 20.

54. *Id.* at 26.

55. *Id.*

56. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) ([neoliberal] "[a] theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms

"economic pragmatism with a human face . . . accompanied by an effort to renew foreign policy so that it may become an adequate external support for domestic aspirations of social and economic development."[57] Lula appealed to Brazil's poor by pledging to end hunger and enticing local and international business with his free-market promises. He thus showed the savvy necessary for his own political success and for the sustained success of the PT.

At the same time, Lula's administration also embraced nonproprietary intellectual property ("IP") strategies that advanced the free software approach of the emerging digital era.[58] In the decade prior to Lula's election, Brazil's information technology ("IT") industry was "dominated by export-oriented, neoliberal development policies designed to support the privatization of knowledge-based goods, as well as the growth of multinational firms in the [country's] domestic market."[59] Yet, as a result of the values of the PT's political and technological experts—many of whom were radicalized during their opposition to Brazil's military regime—an open-source ideology emerged within the Brazilian state, giving rise to state-led access to knowledge and open source code within the country.[60]

In 2003, Lula appointed the iconic musician, Gilberto Gil, as Brazil's Minister of Culture.[61] Gil, whom Lawrence Lessig counseled on openness and internet governance, believed that "a world opened up by [digital] communications cannot remain closed up in a feudal vision of property."[62] During Gil's tenure as Minister of Culture, he advanced an effort that sought to establish an internet music repository, which might one day contain "every Brazilian song ever recorded, all downloadable for free."[63] The support of free software ideologies by Gil and the Lula administration demonstrates the PT's innovative technological values in matters of online governance. These

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and skills within an institutionalized framework characterized by strong private property rights, free markets, and free trade.").

57. Marcu Faro de Castro & Maria Izabel Valledão de Carvalho, *Globalization and Recent Political Transitions in Brazil*, 24 INT'L POL. SCI. REV. 465, 485 (2003).

58. Shaw, *supra* note 52, at 254.

59. *Id.*

60. *Id.*

61. Omari, *supra* note 36.

62. Julian Dibbell, *We Pledge Allegiance to the Penguin*, WIRED (Nov. 1, 2004, 12:00 PM), https://www.wired.com/2004/11/linux-6/ [https://perma.cc/2Y34-BK33].

63. *Id.*

same technological values were at the core of the PT's push for the MCI under the presidency of Lula's successor, Dilma Rousseff.[64]

Lula's national success with inclusive policies like *Fome Zero* (Zero Hunger), along with his ability to temper the discourse of these institutional provisions and appeal to international markets, paved the way for his successor, Dilma Rousseff (widely known as "Dilma"):[65]

> Although Dilma was from an upper middle-class family, her background as a socialist guerilla who was captured and tortured while fighting against the military dictatorship in the 1970s endeared her to the masses of Brazil's poor and working class.66 This background made for an ideal alliance when she teamed with Lula and the PT in 2000.[67]

"During Lula's presidency, Dilma was among the PT's elite and served as Lula's Chief of Staff in the years immediately preceding her presidential election in 2010."[68] "She was narrowly elected to a second term in 2014."[69] "However, as with many high-level Brazilian politicians and executives during this era, Dilma would be caught in the broad web of the *lavo jato*[70] investigations."

During these investigations, allegations surfaced regarding a wide range of corruption at the Brazilian oil company, *Petrobras*.[71] Because Dilma was a board member of *Petrobras* during the time of the alleged corruption, she became a subject of the ongoing inquiry.[72] While no direct evidence implicating

64. Omari, *supra* note 38, at 26.
65. *Id.* at 27.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* (*Operação Lava Jato* (Operation Car Wash) is the name of an ongoing federal criminal investigation in Brazil. The probe initially involved money laundering, but has morphed into an expansive investigation involving *Petrobras*, Brazil's largest public oil company headquartered in Rio de Janeiro. Executives from the oil company allegedly accepted bribes in return for rewarding inflated contracts to several of Brazil's largest construction firms. Because the investigation challenges a long system of impunity for the elite, the corruption scandal has grown to implicate many of the most prominent politicians and executives in Brazil and Latin America more broadly).
71. *Id.*
72. *Id.*

Dilma in the *lavo jato* has been made public, her presidency was suspended in April 2016—just two years after she signed the MCI into law—when the Brazilian Congress voted to impeach her on charges of manipulating the country's budget.[73] At the conclusion of the trial, in August 2016, the Brazilian Senate voted in favor of her impeachment for breaking budgetary laws.[74]

Dilma Rousseff was formally impeached and removed from office on August 31, 2016.[75] In May of 2016, on her final day in office,[76] Dilma signed a decree that broadly implemented the norms of the MCI.[77] Although the MCI had been signed into law two years earlier in April 2014, the Brazilian government took its time to determine how the legislation would best be applied and regulated.[78] The culmination of that process was Dilma signing the May 2016 decree amidst the turmoil of her forthcoming impeachment proceedings, an action that shows that the MCI was highly regarded by both Dilma and the PT.[79]

Dilma's removal from office meant the end of the PT's 13-year reign atop Brazil's highest office, a time when PT policies uplifted the country's economy and raised millions out of poverty.[80] After Dilma's impeachment, vice-president Michel Temer took office.[81] Temer, a member of the Brazilian Democratic Movement Party ("PMDB"), swiftly implemented harsh austerity measures that countered many of the progressive PT initiatives aimed at mitigating inequality. Budgets for progressive PT programs that improved the lives of many impoverished Brazilians were slashed or cancelled

73. Jonathan Watts, *Dilma Rouseff: Brazilian Congress Votes to Impeach President,* THE GUARDIAN (Apr. 18, 2016, 2:16 PM), https://www.theguardian.com/world/2016/apr/18/dilma-rouseff-congress-impeach-brazilian-preisdent [https://perma.cc/6N94-3G58].

74. Omari, *supra* note 36, at 27–28.

75. *Id.* at 28.

76. To be clear, Dilma was officially removed from office on August 31, 2016; she was suspended from her presidential duties at the commencement of her impeachment trial in May 2016. *See, e.g.*, *Brazil President Dilma Rousseff Removed From Office by Senate*, BBC NEWS (Sept. 1, 2016), https://www.bbc.com/news/world-latin-america-37237513 [https://perma.cc/93V4-4E78].

77. ARNAUDO, *supra* note 42, at 7.

78. *Id*. at 6.

79. *Id*. at 8.

80. *See* Omari, *supra* note 36, at 29.

81. *Id.* at 28.

outright.[82] The shift in governmental policies indicates fundamental differences between Temer and those of his predecessor. The MCI remains legislatively intact. However, in November 2018 the country elected the far-right Jair Bolsonaro. With his election, the future of the MCI remains uncertain. Understanding the MCI's dynamic political origins helps us appreciate its past and may be the key to forecasting that law's future.

C. Origins of the MCI

In an influential 2007 editorial, Brazilian legal scholar Roberto Lemos established the basis for internet governance by arguing that lawmakers could not define internet crimes in Brazil's criminal code without acknowledging the corresponding digital rights and responsibilities of individual citizens, businesses, and governmental bodies.[83] To develop this concept, Lemos and a team of researchers from the Center for Technology and Society at Rio de Janeiro's Fundação Getúlio Vargas Law School partnered with Brazil's Ministry of Justice to create the legislation that would become the MCI.[84] Lemos—along with the other scholars, legislators, and civil society representatives tasked with crafting Brazil's internet law—became known as *O Comitê Gestor da Internet* (The Brazilian Internet Steering Committee or "CGI").[85] The CGI sought to establish the fundamental guidelines necessary for maintaining a free and open internet, which fosters continuous innovation, economic and political development, and a strong, culturally vibrant civil society.[86]

Since internet governance is a "multilayered system of administration and operational oversight,"[87] the principles of internet governance developed by Lemos and his colleagues were the result of a multistakeholder process—a strategy that includes a range of diverse experts working collaboratively to meaningfully respond to the governance issues presented. As a result, consultation for the original version of the MCI included

82. Watts, *supra* note 73; *see also id.* at 28.
83. Lemos, *supra* note 44.
84. ARNAUDO, *supra* note 42, at 5.
85. *See id.*
86. *See id.*
87. DeNardis, *supra* note 10, at 226.

contributions from civil society, academics, internet companies, and the tech sector.[88] This forward-thinking method of multistakeholder policymaking has been lauded by U.S. legal scholars who argue that traditional tech policymaking often places too much emphasis on engineering and economic principles, at the expense of social and political concerns associated with a vibrant civic life.[89] Yet, because of the inequitable way that citizenship rights are granted to Brazil's disadvantaged, it appears that even strategies like the MCI's multistakeholder approach fail to fully consider such sociopolitical concerns.[90]

In 2009, with the hopes of advancing an internet law that would provide a free, open, and robust network to promote security, advance economic development, and strengthen civil society, the group of researchers introduced their ten guiding principles of internet governance.[91] These principles would go on to inform and inspire legislation that would eventually become the MCI.[92] As provided by the CGI website,93 the principles are outlined as follows:

1. *Freedom, privacy, and human rights*: The use of the internet must be driven by the principles of freedom of expression, individual privacy and the respect for human rights, recognizing them as essential to the preservation of a fair and democratic society.

2. *Democratic and collaborative Internet governance*: Internet governance must be exercised in a transparent, multilateral, and democratic manner, with the participation of the various sectors of society, thereby preserving and encouraging its character as a collective creation.

3. *Universal Internet Access*: Access must be universal so that it becomes a tool for human and social development, thereby contributing to the formation of an inclusive and nondiscriminatory society, for the benefit of all.

88. Omari, *supra* note 30, at 279.

89. Sylvain, *supra* note 10, at 208.

90. Omari, *supra* note 30, at 277.

91. ARNAUDO, *supra* note 42, at 2.

92. *Id.* at 3; *see PRINCIPLES FOR THE GOVERNANCE AND USE OF THE INTERNET*, CGI.BR, https://www.cgi.br/principles/ [https://perma.cc/C9MC-XEDG].

93. CGI.BR, *supra* note 92.

4. *Diversity*: Cultural diversity must be respected and preserved, and its expression must be stimulated, without the imposition of beliefs, customs or values.

5. *Innovation*: Internet governance must promote the continuous development and widespread dissemination of new technologies and models for access and use.

6. *Network neutrality*: Neutrality of the network filtering or traffic privileges must meet ethical and technical criteria only, excluding any political, commercial, religious, and cultural factors or any other form of discrimination or preferential treatment.

7. *Unaccountability of the network*: All action taken against illicit activity on the network must be aimed at those directly responsible for such activities, and not at the means of access and transport, always upholding the fundamental principles of freedom, privacy, and the respect for human rights.

8. *Functionality, security, and stability*: The stability, security and overall functionality of the network must be actively preserved through the adoption of technical measures that are consistent with international standards and encourage the adoption of best practices.

9. *Standardization of interoperability*: The Internet must be based on open standards that facilitate interoperability and enable all to participate in its development.

10. *Legal and regulatory environments*: The legal and regulatory environments must preserve they dynamics of the internet as a space for collaboration.

In 2011, a bill based on these principles was introduced for consideration to the Brazilian legislature. The MCI was held up in the Brazilian Congress for a few years because Brazil's telecom lobby challenged the bill's provisions on net neutrality, corporate data retention, and intermediary liability.[94] However, the MCI was made a constitutional priority by the Brazilian government after Edward Snowden's disclosure of U.S. espionage. Snowden revealed that the United States conducted high-level spying campaigns on Brazilian executives and government officials, wiretapped Brazil's network infrastructure, and orchestrated digital surveillance efforts in Brazil.[95] Former President Dilma Rousseff harshly criticized the U.S. spying in a September 2013 address to the UN, calling it a

94. *See* ARNAUDO, *supra* note 42, at 5–6.

95. *Id.* at 5.

breach of democracy and international law. Moreover, Dilma called for internet governance based on "open, multilateral and democratic governance, carried out with transparency by stimulating collective creativity and the participation of society, governments, and the private sector."[96] Motivated in part by these spying disclosures, the Brazilian government finally enacted the MCI in April of 2014.[97] When the bill was formally signed into law at the inaugural NETmundial[98] meeting in São Paulo, Dilma signaled to the world that the Brazilian government considered the MCI not only a structure for internet governance in Brazil, but also hoped that the law's principles would also serve as a global template for internet regulation.[99] Thus, while the MCI seeks to address national issues of democracy and inequality in Brazil, it also speaks to broader, transnational issues of "open" internet governance.

D. "Open" Internet Governance

On the national stage, examining Brazil's brand of internet governance sheds light upon whether democratizing the internet will enhance its national democracy more broadly. On the international stage, the MCI offers a framework in which to investigate a visionary model of open internet governance.[100] However, to understand the gravity of the MCI's idealistic provisions, it is necessary to comprehend what is meant by "openness." As it pertains to the internet, scholarship on

96. Statement by former Brazilian President Dilma Rouseff, at the opening of the general debate of the 68th Session of the United Nations General Assembly (Sept.
24, 2013), http://gadebate.un.org/sites/default/files/gastatements/68/BR_en.pdf [https://perma.cc/GAV8-UEB9].

97. ARNAUDO, *supra* note 42, at 6.

98. *NETmundial: The Beginning of a Process*, NETMUNDIAL.BR, https://netmundial.br/about/ [https://perma.cc/VP62-MQBN] (explaining that the NETmundial Initiative is an NGO that consists of a global, multistakeholder network of academics, politicians, and activists that seek to create a collaborative platform for worldwide internet governance issues) (last visited Mar. 2, 2022).

99. Karla Soares, *Dilma sanciona Maro Civil da Internet durante o NET Mundia, em São Paulo,* TECHTUDO (Apr. 23, 2014), https://www.techtudo.com.br/noticias/noticia/2014/04/dilma-sanciona-marco-civil-da-Internet-durante-o-net-mundial-em-sao-paulo.html [https://perma.cc/943T-FLHF].

100. Jeffrey Omari, *Is Facebook the Internet? Ethnographic Perspectives of Open Internet Governance in Brazil*, 45 LAW & SOC. INQUIRY, 1093, 1098–99 (2020).

openness has two aspects: ideological and technical.[101] Ideologically, openness represents the liberal views of those engineers, computer programmers, and entrepreneurs who are "intimately involved with the programming and design of [the internet's] technical infrastructures."[102] From a technical standpoint, openness indexes the legal and technical structure of the web itself. This legal and technical structure consists of the internet's core protocols (i.e., laws or rules) and architecture that "gives the internet its present order [and] how it should be ordered in the future."[103] These dual characteristics of openness therefore inform tech parlance relevant to governance of the internet.

While social scientists posit that openness is both ideological and technical in nature, legal scholars reach a similar conclusion through a different analysis. For instance, Lawrence Lessig believes code enables internet regulation.[104] This code, however, consists of both the regulations and the humans that create such regulations. According to Lessig, code is law, and represents the technical "instructions or control built into the software and hardware that constitutes" the internet.[105] At the same time, Lessig argues that it is those humans who create code that represent the ideological side of the openness duality.[106] Similar to this legal discourse, social science scholarship contends that through open code and ideology, technology can help advance the foundations of democracy.[107] Indeed, the open values of the MCI stem from the leftist political leanings of Brazil's PT, who embraced open-source strategies when rebuilding Brazil's democracy, long before the MCI's enactment.

The dual aspects of openness are also embodied in the MCI. The principles of internet governance embraced in the MCI encompass the values of human rights, democratic governance, universal internet access, and net neutrality. These principles

101. *See* Christopher Kelty, *Geeks, Social Imaginaries, and Recursive Publics*, 20 Cultural Anthropology 185, 187 (2005).

102. *Id.* at 185.

103. *Id.* at 186.

104. *See* LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, *supra* note 1, at 58.

105. Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 Chi.-Kent L. Rev. 1405, 1407 (1999).

106. *See id.* at 1408.

107. Kelty, *supra* note 101, at 188.

are incorporated in the MCI through provisions such as Article 27, which provides:

> [P]ublic initiatives to promote digital literacy and use of the Internet as a social tool should: 1) promote digital inclusion, 2) seek to reduce inequalities in access and use of communication technologies, especially between different regions of the country, and 3) foster production and dissemination of information technology and communication content.[108]

In its attempt to advance a right to internet access, promote an inclusive digital society, and further online privacy, among other provisions, the MCI embraces the dual aspects of openness by advancing a technical structure and ideology that promotes the free circulation of ideas. Moreover, Article 9 of the MCI protects net neutrality in Brazil and explicitly states that all web traffic must be treated identically, without regard to source, destination, or content.[109] The MCI's net neutrality guidelines are based on the principles of internet governance established by the CGI, which state "filtering or traffic privileges must meet ethical and technical criteria only, excluding any political, commercial, religious and cultural factors or any other form of discrimination or preferential treatment."[110] Prior to the MCI's approval in 2014, one of the more contentious debates in approving the legislation focused on its network neutrality regulations. Lobbyists from Brazil's private telecommunications companies argued that such companies should be able to manage web traffic as they saw fit.[111] However, the telecommunications companies were met with heavy resistance from Brazilian civil society, academia, the tech sector, and congressional allies who all wanted a democratically managed internet with equal access for all.[112]

Because the regulatory characteristics of net neutrality promote the internet users' freedom of choice in online content, applications, services, and devices,[113] such characteristics are

108. *See*, Omari, *supra* note 30, at 280.
109. *See* ARNAUDO, *supra* note 42, at 40.
110. CGI.BR, *supra* note 93.
111. ARNAUDO, *supra* note 42, at 6.
112. *See id.*
113. *See* Luca Belli & Primavera De Filippi, *General Introduction: Towards a Multistakeholder Approach to Net Neutrality*, *in* NET NEUTRALITY COMPENDIUM:

consistent with the technical aspects of openness. Moreover, "net neutrality corroborates the decentralized and open architecture of the internet, deflating entry barriers to the 'free market of ideas', and thus setting a level playing field for any user to participate in the development of the internet ecosystem."[114] Through its open design principles, the internet and its tradition of net neutrality therefore furthers a level digital playing field, which is pivotal for freedom of expression, access to knowledge, and democratic participation.

Like openness, net neutrality is more than just a concept or idea. It also reflects the original architectural choices that foster the internet's open, decentralized network structure, which promotes user creativity and digital innovation.[115] Because internet traffic cannot be influenced by discriminatory delivery mechanisms, net neutrality protects online freedom of expression and individual user choice regarding access to online content.[116] For these reasons, the framers of the MCI insisted upon incorporating strong net neutrality protections into the legislation.[117]

E. Openness in Brazil

Traditionally, the internet has been a platform that facilitates open communication through linking, building, and sharing. Users may, for instance, freely further the transmission of information, data, or other forms of knowledge via the various means available on the network. Furthermore, cultural movements such as Creative Commons ("CC") and Access to Knowledge ("A2K") support open transmissions and are at the forefront of attempting to counteract conventional intellectual property structures in the online realm.[118] These movements are designed to shift IP power structures away from corporate elites and towards individuals.[119] Scholars argue that this shift

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HUMAN RIGHTS, FREE COMPETITION AND THE FUTURE OF THE INTERNET 1, 2–3 (Luca Belli & Primavera De Filippi eds., 2015).

114. *Id.* at 3.

115. *Id.* at 2.

116. *Id.* at 3.

117. *See* ARNAUDO, *supra* note 42, at 6.

118. Alexandra Lippman & Mary Murrell, *Opening Up Copyright*, 30 Anthropology Today, 1, 1–2 (2014).

119. *Id.*

promotes the public good.[120] Moreover, these alternatives to the status quo provide more flexibility in accessing IP by reserving only *some* rights to the author/creator, as opposed to *all* rights.[121] As a result, these movements frequently come into conflict with conventional IP laws.

Conceptually, the qualities of openness, decentralization, and nondiscrimination, which index both these IP alternatives and open internet values, resonate with what digital activists in Brazil term *cultura livre* (free culture).[122] According to Brazilian legal scholars Pedro Mizukami and Ronaldo Lemos, *cultura livre* is "a loosely organized movement that seeks to apply free software strategies to the broader realm of cultural production."[123] Examples of Brazil's open-source tendencies can be seen through both the PT's embrace of open-source ideology and through the normative standards of the MCI. Moreover, recent Brazilian cultural practices also demonstrate a national desire for open access in the digital realm.

A tangible example of *cultura livre* is found in Brazil's *tecnobrega* phenomena. Hailing from the state of Pará, in Brazil's northeastern region, *tecnobrega* (or "cheesy techno") is an electronic music genre that involves sampling and remixing U.S. popular music with original music from Brazilian producers.[124] The sampled recordings that fuel *tecnobrega* are used without the permission of their owners and are generally considered a violation of applicable copyright laws.[125] Yet, while legally suspect, *tecnobrega* represents an example of "open business"—a business model that generates revenue with flexible or very little IP protection.[126] Although it may be cheesy, as the name implies, disadvantaged urban youth have mobilized large informal economies around *tecnobrega's* nonconventional distribution methods, which feature young street vendors who produce and distribute CDs at minimal prices. These CDs are

120. *Id.*

121. *Id.*

122. Alexandra Lippman, *Cannibalizing Copyright?: Vernacularizing Open Intellectual Property in Brazil,* 30 ANTHROPOLOGY TODAY, 11 (2014); Pedro N. Mizukami & Ronaldo Lemos, *From Free Software to Free Culture: The Emergence of Open Business*, *in* ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY AND DEVELOPMENT 13, 17 (Lea Shaver ed., 2010).

123. Mizukami & Lemos, *supra* note 122, at 17.

124. Lippman, *supra* note 122, at 12.

125. Jeffrey Omari, *Mix and Mash: The Digital sampling of Music has Stretched the Meaning of the Fair Use Defense*, 33 L.A. Law. 35, 35 (Sept. 2010).

126. Mizukami & Lemos, *supra* note 122, at 17.

then used as advertisements for well-attended street parties through which both the vendors and producers reap profits from entrance fees and selling CDs. In places like Belem, *tecnobrega* is an economic force "employing thousands of people and moving millions of dollars every month."[127] As an example of *cultura livre*, the open business model supported by *tecnobrega* has provided social and economic opportunities for many of Brazil's disadvantaged youth.

In addition to Brazil's *tecnobrega* phenomenon, recent scholarship reveals Brazil's open-source tendencies by showing the country has a reputation "for actively supporting alternatives to intellectual property and copyright law."[128] As evidence of this claim, scholars also rely on the open IP practices of *funk carioca*—a thriving genre of funk music from Rio de Janeiro—where musicians "cannibalize"[129] IP by appropriating copyrighted music without securing the necessary licenses.[130] Additionally, because open business models like *tecnobrega* and *funk carioca* do not rely on revenue from IP rights, they are considered inspirations for nonproprietary, "open" methods of trade and commerce.[131] While Brazil's open business model thrives in the absence of IP enforcement,[132] it is important to note that the open production and distribution systems upon which these genres rely are "backed by social norms."[133] Mizukami and Lemos posit "the absence of players seeking effective enforcement of intellectual property rights and the absence of a strong copyright culture are the dominant factors of an environment in which a new, different cultural industry has been able to evolve."[134]

127. *Id.* at 20.

128. Lippman, *supra* note 122, at 11; *see also* Shaw, *supra* note 53, at 254.

129. Lippman, *supra* note 122, at 14 (metaphorically referencing piracy as cannibalism —"an unauthorized, radical form of creative consumption." This reference stems from Brazilian cosmology to demonstrate the way "native Brazilians had eaten the culture of colonists, seizing what they respected and ingesting it in order to produce an even stronger synthesis." Embraced by proponents of free culture in Brazil, the cannibalism metaphor is employed to suggest that contemporary Brazilian digital culture builds upon this mythical national tradition).

130. *See* Lippman, *supra* note 122, at 14.

131. *See* Mizukami & Lemos, *supra* note 122.

132. *Id.* at 14.

133. *Id.* at 26.

134. *Id.* at 27.

As examples of Brazilian free culture, both *tecnobrega* and *funk carioca* are innovative musical and cultural phenomena backed by social norms and values that rest outside of the IP status quo. Moreover, they demonstrate that the idea of openness serves a political ethic whose boundaries extend well beyond the world of traditional IP. Based on a critique of neoliberal policy prescriptions and privatization, supporters of open IP alternatives employ its progressive practices to further knowledge-based socioeconomic equality and as critical resistance to corporate power.[135] The opening brought upon by these IP alternatives suggests a way of reimagining democracy through technological innovation and regulation of the internet. Furthermore, these genres demonstrate a societal embrace of the open ideology that is advanced by the MCI.

II. INTERNET GOVERNANCE VALUES

Since the turn of the century, internet laws have evolved haphazardly, lacking any form of universal organization or governance. In 2014, when Brazil implemented its own visionary brand of internet governance in the MCI, it authored a democratic framework of internet regulation that could serve as a model for online governance in other nations.[136] The MCI also furthers democratic digital governance by regarding internet access as a requisite for civil rights.[137] Because Brazil is one of the only countries in the world to enact comprehensive internet legislation, it provides a useful contemporary backdrop in which to examine internet governance values. In previous work, I have shown how the open values of the MCI elicit disjunctions in Brazilian internet access[138] and challenge the closed, proprietary ideals of the transnational tech community.[139] Drawing upon these examples, I now chronicle the MCI to assert that a strong internet constitution is insufficient to maintain democratic values in online governance given the changing digital and political landscape of contemporary times.

135. *See id.*; *see also* Shaw, *supra* note 52.
136. Omari, *Digital Access Amongst the Marginalized*, *supra* note 30.
137. *See id.* at 277.
138. *Id.* at 282
139. Omari, *Is Facebook the Internet?*, *supra* note 100, at 1095.

Prominent legal scholars have outlined the values necessary for democratic internet governance.[140] However, because Lawrence Lessig counseled notable Brazilian lawmakers and politicians on the "virtues of internet-powered cultural sharing" in the early 2000s,[141] I draw from Lessig's theory, which was seemingly a prime consideration when Brazilian legislators drafted the MCI.

Lessig has strong ties to two prominent Brazilians lawmakers who helped spearhead that country's open source and internet governance movements: Gilberto Gil and Ronaldo Lemos. Gil, a celebrated musician and Brazil's former Minister of Culture, collaborated with Lessig on open-source matters related to Brazilian popular music during the early 2000s.[142] Lemos, a highly-regarded Brazilian lawyer and legal scholar, completed an LLM from Harvard Law in the early 2000s, while Lessig was on Harvard Law's faculty. Shortly after his graduation from Harvard, Lemos returned to Brazil and began lobbying for democratic regulation of the internet.[143] As a result, Lessig's theoretical influence on Lemos is apparent.

Lessig promoted values of (1) open evolution—which allows the internet to evolve however the people choose—and (2) universal standing—a principle that provides for open participation on the platform.[144] While critiqued as idealistic by some scholars,[145] these values relate to the internet's established traditions of openness, neutrality, and decentralization.[146] To maintain its traditions, these values must play a central role in internet governance.

While promoting these values, Lessig famously argued that, on the internet, "code is law."[147] He also acknowledges that internet governance comes through code but is not simply code.[148] For Lessig, such governance is comprised of code —the instructions or control built into the software and hardware that

140. *See, e.g.*, Lessig, *Open Code and Open Societies*, *supra* note 104, at 1408.

141. Dibbell, *supra* note 62.

142. *See id.*

143. *See, e.g.*, Lemos, *supra* note 44.

144. Lessig, *Open Code and Open Societies*, *supra* note 105, at 1414–19.

145. *See* Schwartz, *supra* note 21, at 744–45.

146. *See, e.g.*, Luca Belli, *End-to-End, Net Neutrality and Human Rights, in* NET NEUTRALITY COMPENDIUM: HUMAN RIGHTS, FREE COMPETITION AND THE FUTURE OF THE INTERNET 13, 23 (Luca Belli & Primavera De Filippi eds., 2015).

147. *See* LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, *supra* note 1, at 6.

148. *Id.*

constitutes the internet— and the humans that regulate code.[149] The internet's human regulators often operate in very different ways based on their values and worldview. As an example of these changing values, Lessig predicted how changing global dynamics would impact the internet in the course of its lifespan.[150] During the internet's fledging stage in the mid-1990s, for instance, it was difficult to verify a person's online identity because the internet was a space that protected privacy and anonymity. Since that time, however, the demands of commerce, along with the rise of digital surveillance, have caused a shift in values. Over the years, it has become increasingly simple to identify individuals online. During this time, the internet has in many ways transitioned from a global telecommunications network to a global network of surveillance and control.[151] Certain principles, such as privacy and anonymity, have thus been compromised because of the changing values reflected in the internet's code.

Similar to these values, Brazil's MCI is based on principles of internet governance that aim to provide a free, open, and robust network, while promoting security, advancing economic development, and strengthening civil society. Despite relying on idealistic values, Lessig ultimately suggests that balance is key.[152] Ideological extremes are unnecessary; open and closed can coexist. To advance democracy, a goal promoted by the MCI, internet governance must find this balance between openness and closure. Indeed, in our current geopolitical climate, balance means respecting the internet's traditions, while also modifying those traditions to accommodate shifting global norms.

A. Prescription

The dawn of the internet era saw the emergence of a global telecommunications network enabled by underlying electronic and digital infrastructures of unprecedented bandwidth. This infrastructure created a new information age that transcended territorial boundaries and borders. Moreover, it produced a

149. *See id.* at 6.

150. *See id.* at 207–08.

151. Hearsay Culture, *Show #256, May 20*, STAN. CTR. FOR INTERNET AND SOC'Y, at 08:25 (May 20, 2016), http://cis-static.law.stanford.edu/podcasts/20160429-Levine-256-Cogburn.mp3 [https://perma.cc/47C3-9SGY].

152. Lessig, *Open Code and Open Societies, supra* note 105, at 1419.

disordered geopolitical landscape that challenged the status quo of numerous commercial industries. The world as we knew it was thus made increasingly more complex and unpredictable by emerging technologies brought on by this network and its infrastructure, known as the internet. To be certain, the emerging technologies facilitated by the internet consist of social media, digital surveillance, robotics, and biomedical enhancement technology.[153] These domains are likely to shape the human experience for the foreseeable future, and in doing so, create advanced social, moral, and political resources. These resources invite new possibilities for human action while foreclosing others. In dealing with the digital era and its emerging technologies, scholars have cautioned against faith in "technological solutionism"—a pathology that seeks to use technology to solve society's problems[154]—and promoted "technomoral virtues"—"new alignments of our existing moral capacities, adapted to a rapidly changing environment that increasingly calls for collective moral wisdom on a global scale."[155] Because aggregated moral choices in the tech world routinely affect the daily well-being of people across the globe, numerous other species and generations not yet born,[156] the need for principled governance of the internet remains paramount. Indeed, laws based upon principles, virtues, or values govern human life. For values in internet governance, I draw from Lessig for his connections to Brazil and because he has "combined a computer scientist's awareness of software and silicon with a law professor's knowledge of legal theory and practice."[157]

The key to maintaining values in internet governance, and the formula for successful governance of any kind, is balance.[158] In this regard, Lessig suggests there must be a balance between the private property interests in cyberspace and that of the commons.[159] Just as real-world governance gives significance to

153. SHANNON VALLOR, Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting 3 (2016).

154. *See, e.g.*, EVGENY MOROZOV, To Save Everything, Click Here: The Folly of Technological Solutionism, at xv (2013).

155. VALLOR, *supra* note 153, at 10.

156. *Id.* at 3.

157. Schwartz, *supra* note 21, at 746.

158. LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, *supra* note 1, at 186—87; *see also infra* p. 33 and note 165.

159. *Id.*

a public sphere (e.g., public parks, state parks, sidewalks, etc.), there must also be an emphasis placed on a commons in the digital world.[160]

Lessig identifies the values of open evolution and universal standing as necessities to preserving a digital commons.[161] He claims that the internet's governors have traditionally been liberals, meaning the governors are neutral about the objectives to which anyone may use the web. In order to maintain the neutrality and openness that is inherent in the internet commons, Lessig argues that the network must maintain an end-to-end design and transparent modularity.[162] The effect of these open-evolution components is that no single individual can control how the system will evolve. With open evolution the internet may evolve down a particular path, but that path stems from a collective effort made available through decentralized governance. In this tradition, the value of openness—whether it be open software, open business, or open code—is the creativity of a single individual can be made available to the public to work out any flaws or shortcomings. The value of open evolution therefore promotes a democratic, bottom-up evolutionary practice, which (in theory) promotes freedom and flexibility on the network.

According to Lessig, the more complicated value of universal standing relates to the code of open-source software, which remains free for individuals to take, modify, and use.[163] No licenses are required; no permission is needed. However, while formal power is rejected, authority is not. Code may be openly accessible, however, only the code of those who earn authority through their expertise will be recognized. Similar to the values of democracy, universal standing promotes open entry to the

160. *See* Patricia J. Williams, *Why Everyone Should Care about Mass E-carceration: The Social Costs of Constant Surveillance are Greater than We Might Think*, THE NATION (Apr. 29, 2019), https://www.thenation.com/article/archive/surveillance-prison-race-technology/ [https://perma.cc/5HA3-4B58] (suggesting a more practical and contemporary take on balance in digital governance: "Someplace between digital prisons and digital playpens are the apps, cameras, and microphones that govern us all… our mental and constitutional health requires a degree of protected thought-space in order for us to become self-reflective, responsible, and aware… Without that most basic allowance of autonomy, we will have capitulated to a civic practice of nothing less than totalitarianism.").

161. Lessig, *Open Code and Open Societies*, *supra* note 105, at 1419.

162. *Id.* at 1414—15.

163. *Id.* at 1418.

authority of code (i.e., the rule of law) in the world of cyberspace.[164] Regardless of race, color, gender, class, or national origin, (in theory) anyone may put their code up for selection.

Despite relying on these two values, Lessig ultimately embraces the idea that private property and the commons can––and indeed must—coexist in cyberspace.[165] Balance is key. Extremes are unnecessary. Open and closed can coexist. As a result, protecting the values of the internet means that democratic internet governance must find this balance between openness and closure. In the Brazilian context, I suggest that balance means maintaining certain provisions of the MCI's open regulatory model (e.g., access as a civil right and net neutrality), while curbing the openness of other provisions (e.g., intermediary liability). This prescription is discussed in the Conclusion.

B. Code and its Critiques

Underlying the internet's values is its code. Because Lessig is a constitutionalist, he suggests that liberty is built by setting society upon a strong constitution.[166] Although he is a lawyer, Lessig does not mean "constitution" as in a legal text. Rather, by constitution, Lessig means an architecture, or a way of life, "that structures and constrains social and legal power, to the end of protecting fundamental *values*—principles and ideals that reach beyond the compromises of ordinary politics."[167] The constitution must define values that a space should guarantee. Because Lessig believes that such constitutional values are built through time, and not merely found or discovered, he argues that liberty in cyberspace will not simply emerge.[168] Indeed, while founded upon democratic values, Lessig envisioned a more ominous future for cyberspace.[169] In his claim that "the liberty present at cyberspace's founding will vanish in the future", he argues that "the invisible hand of cyberspace is building an architecture that is quite the opposite of what it was at cyberspace's birth."[170] According to Lessig, this architecture will

164. *Id.* at 1419.
165. *Id.*
166. LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, *supra* note 1, at 5.
167. *Id.*
168. *Id.*
169. *Id.* at 5—6.
170. *Id.* at 6.

inevitably become one that perfects control.[171] The internet's fundamental values of openness, neutrality, and decentralization will not necessarily remain in its future.

Lessig contends that if the traditions of cyberspace are to survive—and if its foundational values are to remain—"we must understand how this change happens and what we can do in response."[172] In order to understand this change, we must comprehend the obscure regulator of cyberspace, code.[173] Just as we must understand how laws regulate the real world, in cyberspace we must understand how code regulates "how the software and hardware that make cyberspace what it is *regulate* cyberspace as it is."[174] He asserts that we can build, architect, or code cyberspace to protect the internet's fundamental values, or build, architect, or code cyberspace to allow those values to disappear.[175]

Scholars have criticized Lessig extensively for his claim that "code is law." Here, in an effort to demonstrate that Lessig's theory of code and internet governance values are not infallible, I offer a brief survey of the critiques of Lessig's theory. I start this overview with Tim Wu, who claims that Lessig is off base in his assessment of code because Lessig's assessment fails to consider compliance—a pivotal issue at the intersection of code and law.[176] Wu suggests analyzing code as a facet of interest group behavior where the coder "redesigns behavior for legal advantage."[177] In this vein, Wu employs the examples of copyright law and peer-to-peer filesharing to support his claims that the effects of code as regulation is misunderstood. According to Wu, such effects "are categorically different from the fundamental challenge to the legal system that some [i.e., Lessig] had imagined, and analytically distinct from the concept that code is a form of regulation."[178]

While Wu argues that Lessig's analysis of code fails to consider the central issue of legal compliance, Viktor Mayer-Schonberger focuses his critique on Lessig's conception of markets and technology by arguing that a fundamental flaw in

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Tim Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 681 (2003).
177. *Id.* at 682.
178. *Id.* at 682—83.

Lessig's theory is his overly simplistic assessment of the relationship between technology and society.[179] Mayer-Schonberger claims Lessig's view that markets drive technology is linear and one dimensional.[180] Mayer-Schonberger uses the examples of podcasts and cookies to illustrate that Lessig's view of this relationship is too deterministic and fails to fully capture the complexities of technological innovation.[181]

Meanwhile, legal scholar Paul M. Schwartz lauds Lessig for his code-related views on open source, intellectual property, and constitutional law.[182] However, he takes exception to Lessig's theory of code as it relates to information privacy.[183] Specifically, Schwartz challenges Lessig's "property-based and technological solutions to [internet] privacy" by examining the benefits and burdens of creating property rights in personal information.[184]

Although not overly critical of Lessig's code theory, Jonathan Zittrain offers a slightly more nuanced take on Lessig's approach to openness in the digital era.[185] In contending that the internet's openness is responsible, at least in part, for its explosion, Zittrain suggests that the benefits of openness are a part of the internet's "generativity"–its ability "to produce unanticipated change through unfiltered contributions from broad and varied audiences."[186] At the same time, according to Zittrain, openness is the cause of current digital threats related to privacy and online security.[187] These threats contribute to what Zittrain calls the "generative dilemma."[188] Generative systems like the internet often ensure unpredictable change, which is their profound dilemma. One Brazilian example of this type of generative dilemma is illustrated in Section III that follows.

Based on values of governance that resemble those outlined by Lessig, Brazil's MCI serves as a representative example of an

179. Viktor Mayer-Schonberger, *Demystifying Lessig*, 2008 Wis. L. Rev. 713, 745—46 (2008).

180. *Id.* at 739.

181. *Id.* at 740.

182. Schwartz, *supra* note 21, at 746.

183. *Id.*

184. *Id.* at 744—45.

185. JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET: AND HOW TO STOP IT 196 (2008), http://nrs.harvard.edu/urn-3:HUL.InstRepos:4455262 [https://perma.cc/RC86-DCRM].

186. *Id.* at 70.

187. *Id.* at 60—61.

188. *Id.*

internet constitution that aims to protect internet openness. In doing so, the Brazilian model of internet governance provides an example of the effects of openness in contemporary times. As I discuss in the following section, the open regulatory model of the MCI also provides an opportunity. An opportunity to scale back on the openness of its more problematic provisions and provide an example of a more balanced approached in online governance.

III. DIGITAL POPULISM AND THE MCI

After the country's presidential elections in November 2018, many Brazilians expressed a shock similar to that experienced by U.S. voters after the election of Donald Trump in 2016.[189] This shock was the result of the "digitally-mediated" election of Brazil's far right-wing Jair Bolsonaro and his surprising political ascent, fueled by supporters who lived in a different electoral world.[190] Brazilian commentators have noted how Bolsonaro supporters operated within huge Whatsapp[191]

189. Cesarino, *supra* note 8.

190. *Id.*

191. The significance of messaging applications like Whatsapp —the Facebook-owned messaging application— and the mobile-phone promotions that make these applications popular with so many Brazilians cannot be overstated. In Brazilian *favelas* (informal, low-income communities) and other underprivileged neighborhoods, owning an internet-enabled mobile phone is fairly common. Indeed, recent estimates indicate that more than 85 percent of favela residents now have mobile phones; *see, e.g.*, Laura Keating, *Google and Microsoft Map Uncharted Favelas in Brazil*, TECH TIMES (Sept. 26, 2014), http://www.techtimes.com/articles/16556/20140926/microsoft-and-google-map-uncharted-favelas-in-brazil.htm [https://perma.cc/4ENN-AV3H]. However, many mobile phone users in these communities cannot afford the data plans offered by cellphone carriers and therefore rely on free Wi-Fi or other promotions that offer free, limited access to the web; *see* DAVID NEMER & MICHAEL TSIKERDEKIS, *Political Engagement and ICTs: Internet Usage in Marginalized Communities*, 68 J. ASS'N INFO. SCI. & TECH. 1539, 1539 (2017). Additionally, because Brazilian mobile phone carriers generally charge high rates for sending and receiving standard short message service (SMS) messages, Brazilian mobile phone users have historically not indulged in intensive text messaging. However, because of the surge in smart-phone use and the emergence of zero-rating promotions, text-messaging habits in Brazil have increased dramatically in recent years. Mobile phone users are now more inclined to send texts through messaging applications like Whatsapp. As of March 2015, Whatsapp was the most popular mobile phone application in Brazil and was used by 70% of the country's smart-phone users; *See All About Whatsapp in Brazil*, TECH IN BRAZIL (Mar. 6, 2015), https://techinbrazil.com/all-about-whatsapp-in-brazil [https://perma.cc/F48F-4H37]. Current estimates indicate that nearly 120 million Brazilians —more than half of the country's population— use Whatsapp for "nearly everything." *See* Nemer, *supra* note 26.

networks that were intentionally isolated from Brazil's mainstream public sphere.[192] These Whatsapp networks circulated various kinds of pro-Bolsonaro digital content (e.g., short and long texts, memes, audiovisual files, and links to extreme right-wing websites) and were closed to anyone who was unsupportive.[193] This closure created a digital polarization that enabled online behavior to be "effectively converted into offline election results."[194] Brazilian journalists who reported on these digital networks coupled with the consistency of their underlying recursive patterns reveal that these groups were indeed formed intentionally, and not spontaneously—as some Bolsonaro supporters argued.[195]

Scholars have termed this closed mechanism of building digitally-mediated political hegemony "digital populism."[196] Because Brazil's digital populism was mediated through smartphones and Whatsapp—neither of which were widespread during the country's previous presidential elections—its reach was unprecedented and included Brazilians who "did not care about politics before [Bolsonaro] came along."197 Moreover, this recursive digital populism has changed the meaning of politics in Brazil, which now embraces "a variety of emergent, digitally-mediated forms of individual and collective attitudes and identities, including a redefinition of what it means to be right-wing and conservative."[198] Indeed, because anyone with an internet connection may participate, digital populism has redefined the meanings of political representation and democracy in Brazil.

A. Intermediary Liability Issues

The digital populism enabled by platforms like Whatsapp has indeed been a source of controversy in Brazil. By removing civil liability for internet content providers, commentators have argued that the MCI is a culprit in Brazil's recent surge in

192. Cesarino, *supra* note 8; Nemer, *supra* note 26.
193. Cesarino, *supra* note 8.
194. *See id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*

extremism.[199] Critics specifically point to the intermediary liability provisions found in Articles 18 and 19 of the MCI.[200] Article 18 addresses internet services providers ("ISPs") and grants an exception to ISPs regarding intermediary liability. This provision notes that "the internet [service] provider shall not be subject to civil liability for content generated by a third party." Moreover, Article 19 of the MCI addresses internet application providers (excluding ISPs) and states "in order to ensure freedom of expression and to prevent censorship, an internet [service] provider shall only be subject to civil liability for damages caused by virtue of content generated by third parties if, after specific court order, it does not take action, according to the framework and technical limits of its services and within the time-frame ordered, to make the infringing content unavailable."[201]

Like § 230 of the Communications Decency Act ("CDA")[202] in the United States, these provisions place civil liability for internet content on internet users, and not on application or service providers. Removing these types of intermediary liability exemptions would provide for a cause of action against services like Whatsapp that, through their tremendous influence, help facilitate digital populism.[203] However, as noted in the text of

199. Marcelo Thompson, *O Marco Civil da Internet Ajudou a Eleger Bolsonaro*, Intercept Brasil (Oct. 29, 2018, 9:02 PM), https://theintercept.com/2018/10/29/marco-civil-ajudou-eleger-bolsonaro/ [https://perma.cc/V7YX-BLW8].

200. *Id.*

201. *Marco Civil da Internet – "Brazilian Civil Rights Framework for the Internet"*, WILMAP (Apr. 23, 2014), https://wilmap.stanford.edu/entries/marco-civil-da-internet-brazilian-civil-rights-framework-internet [https://perma.cc/HED2-9PY4].

202. The CDA has been interpreted to mean that operators of internet services shall not be deemed publishers or distributors of information and thus are not civilly liable for the content of third parties who use their services. This interpretation creates broad immunity for many internet service providers operating within the United States. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997). Moreover, this provision is thought to provide private online platforms (e.g., Facebook, Whatsapp, Twitter, etc.) with the ability to self-govern the content that appears on their sites. Similar to the MCI, the aim of § 230 is to both foster "Good Samaritan" behavior by encouraging platforms to actively remove offensive content, and to protect the free speech of users by avoiding censorship. *See* Klonick, *supra* note 41.

203. As of February 2014, WhatsApp had 450 million users globally. *See, e.g.*, Adrian Covert, *Facebook Buys WhatsApp for $19 Billion*, CNN TECH (Feb. 19, 2014), http://money.cnn.com/2014/02/19/technology/social/facebook-whatsapp/index.html [https://perma.cc/9HA4-KN8A]. Indeed, as of March 2015,

Article 19 cited above, these provisions are intended to safeguard freedom of expression and prevent censorship. For these reasons, similar intermediary liability provisions have been adopted in other countries. In support of similar intermediary liability provisions in the United States, a Federal Appellate Court has noted:

> The specter of tort liability in an area of such prolific speech would have an obviously chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[204]

As stated by the 4th Circuit in the quote above, placing civil liability on ISPs or other intermediaries for the tortious online conduct of their users has the potential to chill or censor the speech of millions of internet users. For these reasons, legislators in the United States have sought intermediary liability carveouts, like § 230 of the CDA. For similar reasons, Brazilian legislators have weighed the values of human rights and democratic governance implicated by these free speech interests and included comparable intermediary liability exclusions in the MCI. In this instance, the cost of promoting the values of democratic internet governance appears to be the unfortunate rise of digital populism, which is a direct threat to the very same democratic values that the MCI seeks to advance.

Brazilian legislators, like those in the U.S.,[205] have struggled with how to find a balance between internet users' free speech rights and the intermediaries' right to police their platforms.[206] Because these issues are transnational in scope, optimists in both countries argue that online platforms broadly advance digital speech and help further democratic values and

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the text-messaging application was the most popular mobile-phone application in Brazil and was used by more than 70% of that country's smart-phone users. *See, e.g.*, *All About WhatsApp in Brazil*, *supra*, note 191.

204. Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

205. For an in-depth overview of recent § 230 cases, *see* Eric Goldman, *Ten Worst Section 230 Rulings of 2016 (Plus the Five Best)*, TECH & MARKETING L. BLOG (Jan. 4, 2017), http://blog.ericgoldman.org/archives/2017/01/ten-worst-section-230-rulings-of-2016-plus-the-five-best.htm [https://perma.cc/9927-5C53].

206. *See generally* Klonick, *supra* note 41.

culture,[207] while the more pessimistic approach—adopted by scholars like Lessig[208]—cautions against the unchecked power of large corporations in regulating the internet as it relates to intermediary liability. Meanwhile, realists urge that the issues caused by these platforms in relation to intermediary liability exemptions, such as rampant hate speech and digital populism, should be addressed through a narrower reading of these statutory carveouts.[209] Indeed, because internet intermediaries wield such regulatory power in the context of online speech, scholars have termed them "the New Governors" of cyberspace.[210]

B. The "Fake News" Bill

In addition to its intermediary liability carveouts, providing a right to internet access, and protecting net neutrality, the MCI also advances human rights by guaranteeing a right to privacy in online communications. According to Article 7 of the MCI, the right to privacy is defined as "inviolability and secrecy of the flow of their communications through the internet, except by court order, as provided by law."[211] This provision was a direct response to Edward Snowden's disclosures of National Security Agency ("NSA") spying in Brazil.[212] Although the Snowden disclosures motivated the MCI's privacy precepts, the MCI still lacks the necessary language for the protection of user data.[213] The protection of such data depends upon further regulation.[214]

Such regulation has recently been adopted. In 2018, the Brazilian government ratified the *Lei Geral de Proteção Pessoais* ("LGPD"),[215] a comprehensive data protection law that provides a framework for sharing, collecting, storing, and handling personal data managed by various organizations. Modeled after

207. *See, e.g.*, Melody Patry, *Brazil: A New Global Internet Referee?* Index (June 2014), https://www.indexoncensorship.org/wp-content/uploads/2014/06/brazil-internet-freedom_web_en.pdf [https://perma.cc/3UYP-R66Q];Klonick, *supra* note 41.

208. *See supra* text accompanying notes 168—71.

209. Klonick, *supra* note 41, at 1614.

210. *See, e.g.*, Klonick, *supra* note 41.

211. ARNAUDO, *supra* note 42, at 40.

212. *Id.* at 40.

213. *Id.* at 33.

214. Rodriguez & Pinho, *supra* note 27.

215. *See generally* LGBD BRASIL, https://www.lgpdbrasil.com.br/ [https://perma.cc/7SNQ-R6MF] (describing the main objectives of the new law).

the EU's General Data Protection Regulation ("GDPR"), the LGPD seeks to provide clarity in Brazil's data protection realm, which is currently experiencing great legal uncertainty. There has been recent debate regarding the use of personal data for digital contact tracing in relation to the COVID-19 pandemic.[216] Amidst concerns over this pandemic, Brazilian privacy experts and other industry stakeholders view the LGPD as a tool that could help ensure the responsible use of personal data by the Brazilian government.[217] Despite the current need for this regulatory framework, it appears the LGPD will not go into effect until late 2021 because of a provisional measure that delays the law's applicability.[218]

Against this laudable backdrop of internet legislation and those concerns presented by digital populism and the Cambridge Analytica example noted above comes the Brazilian government's latest attempt at online governance: its so-called "Fake News Bill."[219] While Article 2 of the draft legislation notes that it must remain in compliance with both the MCI and LGPD, as it currently stands the bill's ambiguity challenges the freedom of expression and privacy safeguards enacted by its internet governance predecessors.

For instance, the bill contains provisions that require platforms to monitor users' identities by requiring that users provide identification and a valid mobile phone number. Linking mobile phone numbers to social media accounts provides the potential for the unauthorized surveillance of internet users.

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216. *The Impact of Postponing Brazil's Data Protection Law*, Wilson Ctr. (May 4, 2020), https://www.wilsoncenter.org/blog-post/impact-postponing-brazils-data-protection-law [https://perma.cc/UR9H-TMR8].

217. *Brazil to Postpone National Data Protection Law Amid COVID-19*, NAT'L L. REV. (Apr. 16, 2020), https://www.natlawreview.com/article/brazil-to-postpone-national-data-protection-law-amid-covid-19 [https://perma.cc/R7WA-Z5UP]; *Brazilian President Delays Applicability of LGPD Sanctions, but Other Provisions Remain Uncertain*, Nat'l L. Rev. (June 17, 2020), https://www.natlawreview.com/article/brazilian-president-delays-applicability-lgpd-sanctions-other-provisions-remain [https://perma.cc/9MVJ-HW9Y].

218. *Brazilian President Delays Applicability of LGPD Sanctions, but Other Provisions Remain Uncertain*, NAT'L L. REV. (June 17, 2020), https://www.natlawreview.com/article/brazilian-president-delays-applicability-lgpd-sanctions-other-provisions-remain [https://perma.cc/FSB5-Z65H].

219. Katitza Rodriguez and Seth Schoen, *5 Serious Flaws in the New Brazilian "Fake New" Bill that Will Undermine Human Rights*, ELEC. FRONTIER FOUND. (June 29, 2020), https://www.eff.org/deeplinks/2020/06/5-serious-flaws-new-brazilian-fake-news-bill-will-undermine-human-rights [https://perma.cc/FZ63-MQM6].

Moreover, Brazil's vulnerable populations rely heavily on mobile phones to access the internet. These populations often lack the financial resources to maintain uninterrupted mobile phone service. By preventing users without mobile phone accounts from using social networks, the bill would likely hinder internet access for Brazil's vulnerable populations. Such requirements run counter to the principles of the MCI—which promote privacy, democracy, and universal internet access—and also to the safeguards of the LGPD, which seeks to advance data minimization and risk prevention in processing and storing personal data.[220] This ID provision was met with much uproar from civil rights organizations, academics, and even the social media platforms themselves, yet it remains in the Senate-approved version of the bill.[221]

Other provisions are just as troubling. For example, the Senate-approved bill orders social media platforms to track and store the chain of forwarded communications of Brazilian internet users. These messaging chains were a major issue in Brazil's 2018 election cycle.[222] During this time, messaging chains on Whatsapp became a powerful tool for spreading misinformation, most notably among Bolsonaro supporters.[223] The bill's monstrous data collection requirement—which would affect millions of Brazilian internet users—could easily be misused for political gain, to track reporters or journalists, or to reveal the sensitive communication details of individuals, groups, and their various associations.

The bill's critics have lobbied for substantive changes that would protect the values of data privacy, freedom of association, and universal internet access embedded in both the MCI and LGPD. However, as it currently stands, the bill overlooks these concerns and does little to address those individuals and organizations who finance the spread of fake news across social media platforms in Brazil. This failure suggests that the MCI, coupled with subsequent Brazilian internet laws, will likely prove unsuccessful in curbing the spread of misinformation by organizations like Cambridge Analytica.

220. *See* Patry, *supra* note 207.
221. Rodriguez & Schoen, *supra* note 219.
222. Nemer, *supra* note 26.
223. Cesarino, *supra* note 8.

CONCLUSION

As the Cambridge Analytica anecdote demonstrates, data privacy and appropriation implicate broader concerns over transnational internet governance. Despite these concerns, few countries have enacted comprehensive legislation that attempts democratic regulation of the internet. With its codification of the MCI in 2014, Brazil offers one example of a case in point. This Article therefore set out to examine the implementation and efficacy of the MCI. It began with an overview of the history, political background, and purpose of the MCI. The Article then explored the values of internet openness and how these values date back to the origins of cyberspace. It also explored Lawrence Lessig's role in promoting open internet values and his influence on the MCI's founding fathers. Consequently, this Article argued that in the current digital and political landscape purely open values are no longer practical to advance democracy in the online realm.

Both Cambridge Analytica and the recent examples of digital populism represent current global trends in social media that challenge the values of internet openness. This Article argues further that advancing democracy means that internet governance must find a balance between openness and closure. In the Brazilian model, this Article suggests a balanced approach that maintains certain provisions of the MCI's open regulatory framework—such as the civil right of internet access and protection of net neutrality—while limiting the openness of other provisions, namely the MCI's intermediary liability carveouts. Indeed, a broad array of remedies exists for the harms caused by the content posted to internet platforms by third parties.[224] Applying such remedies would help mitigate the instances of digital populism in Brazil. Moreover, because the MCI serves as a model for internet regulation in other nations,[225] adopting such measures would serve as a template for other countries to draw from and, if necessary, to improve upon.

The impact of the Cambridge Analytica narrative evokes concerns over data appropriation and data privacy. Meanwhile, the Brazilian case of digital populism elicits related concerns over the spread of disinformation and divisive trends in social

224. *See* Eric Goldman, *Content Moderation Remedies*, MICH. TECH. L. REV. (Forthcoming 2021).

225. Soares, *supra* note 99.

media. These examples reflect a central concern of democratic regulation of the internet. Established to address these matters, Brazil's MCI seeks to play a central role such internet regulation. Legislation like the MCI, which are based upon open values that are no longer pragmatic given the current digital and political landscape, should seek to find a balance between openness and closure. Modest changes to its open provisions would help provide this balance without completely compromising the law's democratic values.