

Platform Federalism: How to Countervail Platform Power

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ABSTRACT

Platforms wield too much power over social media. That concentration is not the vision Congress had when it enacted Section 230 and made user control “the policy of the United States.” The two dominant responses to this problem both fail. Platform neutrality undermines the user speech interests it purports to protect by disabling governance. Platform responsibility seeks to align platform rule with the public interest through procedural and reporting requirements. By focusing on how, while ignoring who governs, its indirect mechanisms capitulate to platform rule.

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This Article argues for a different response: countervail platform power by building collective user power. Drawing on the structural constitution, it offers platform federalism as a prototype for dividing governance authority between platform-wide and community tiers. User communities would gain primary authority; platforms would retain enumerated powers and enforcement against specified community-level transgressions. A platform compact reached through collective bargaining would set the boundary between these authorities, and intermediary-liability protections could be conditioned on the creation of this structure. Platform federalism promises neither a panacea nor an escape from the politics of content moderation. It offers a more democratic structure for platform governance by dividing platform power.

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I.

INTRODUCTION

It matters who has power over social media. A few “new governors” make decisions that determine what is allowed or removed, amplified or restricted for users around the world.¹ Most people, even those who disagree fundamentally about politics, believe this is too much power.² Such concentration opens the

1. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1663 (2018) (coining term to “capture[] the power and scope these private platforms wield through their moderation systems and lends gravitas to their role in democratic culture”).

2. 78% of U.S. respondents (84% of Democrats and 74% of Republicans) in a 2024 poll agreed with the statement that “social media companies have too much power and influence in politics.”

doors for bargaining, swaying, and coaxing that threaten the public's control over government.³ This is not the vision Congress had when it passed “the law that created the Internet.”⁴ Legislators assumed that Section 230 would allow each user to make their own decisions, but the tools to do so never materialized, and platforms gained dominance instead.⁵ This Article argues that to address this concentration and empower users—the established policy of the United States⁶—the law must provide users with the means and structures to deliberate and govern *collectively*.

Instead, the cross-divide consensus about the need to rein in the new governors has led to what this Article describes as two opposing regulatory projects: platform neutrality and platform responsibility. This opposition reflects broader ideological concerns.⁷ Both projects, however, are flawed attempts to respond to platform power.⁸

Platform neutrality, on the one hand, seeks to eliminate power. It divests platforms of authority over the public sphere by relying on versions of common carriers, public accommodations, and anti-discrimination law. Texas's attempt at legislating neutrality was repudiated by the Supreme Court, though commentators debate whether the rebuke was of perceived illicit motivation, or the entire project.⁹ There is a more fundamental flaw, however: there can be no social media without content moderation, as scholars have long and repeatedly emphasized, and universalizing viewpoint neutrality jeopardizes free speech.¹⁰

Platform responsibility, on the other hand, seeks to tame power. It is sophisticated about social media governance and acknowledges that content moderation is needed. It aims not to abolish platform power but to realign it, drawing on administrative law and related scholarship on private regulation. This is the preferred strategy of leading scholarship, and the one adopted by influential

MONICA ANDERSON, PEW RSCH. CTR., AMERICANS' VIEWS OF TECHNOLOGY COMPANIES (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/04/PI_2024.04.29_VIEWS-of-Tech-Companies_REPORT.pdf. This is up from 72% in 2020. Monica Anderson, *Most Americans Say Social Media Companies Have Too Much Power, Influence in Politics*, PEW RSCH. CTR. (July 22, 2020), <https://www.pewresearch.org/fact-tank/2020/07/22/most-americans-say-social-media-companies-have-too-much-power-influence-in-politics/>. The 2024 report is the latest available.

3. See Eugene Volokh, *Free Speech and Private Power*, 138 HARV. L. REV. F. 43, 65 (2024) (“[P]rivate entities offer tempting targets for governments to co-opt — the larger and more influential, the more tempting.”); Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 93 U. CHI. L. REV. 781, 788–89 (2026).

4. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

5. See *infra* notes 28–33 and accompanying text.

6. See 47 U.S.C. § 230(b)(3) (establishing U.S. policy “to encourage the development of technologies which maximize user control”).

7. See Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 305 (2021).

8. See *infra* Part III.

9. See Kyle Langvardt & Alan Z. Rozenshtein, *Beyond the Editorial Analogy: First Amendment Protections for Platform Content Moderation After Moody v. NetChoice*, 6 J. FREE SPEECH L. 1, 30 (2025); *Moody v. NetChoice, LLC*, 603 U.S. 707, 741.

10. See *infra* Part III.A.

European Union legislation. While platform responsibility is also complicated by *Moody v. NetChoice*,¹¹ its problems are deeper. This project seeks to control platform power through obligations designed to align platform decision-making with the public interest. But, as this Article shows, the framework underlying platform responsibility—new governance regulation—is ill-suited to tame platform power. The goal setting assumed for regulatory delegation cannot be reconciled with the First Amendment in a way that will meaningfully constrain platform power. In fact, unmoored responsibility surrenders authority to platforms.¹²

These competing approaches thus cast social media governance as an intractable dilemma: either dismantle platform power and forfeit governance, or preserve governance by submitting to platform rule. The dilemma mirrors “the great difficulty” with which constitutional democracy has long grappled: protecting rights and pursuing values requires state power, which can also threaten those same rights and values.¹³

This Article threads through the dilemma with the constitutional strategy that platform regulation has overlooked: it confronts and channels power by redistributing it. It draws on that “central organizing principle of the structural constitution”¹⁴ and extends it to platform governance. It builds on the approach of countervailing power¹⁵ by enabling collective user organizing as an answer to platform power, transferring to users authority that is now concentrated in the hands of a few platform executives.¹⁶

As scholars who have taken a greater interest in the structural constitution have insisted, formal diffusion may pass power through to actors who become doers rather than deciders.¹⁷ This is a point that platform interoperability and unbundling proposals should heed. Such proposals aim to create countervailing power by promoting competition and consumer choice, but show no interest in structures to support user decision-making. Section 230 offers a cautionary tale:

11. Cf. Langvardt & Rozenshtein, *supra* note 9, at 29 (“At its broadest, the opinion appears to foreclose almost any government effort to structure online discourse.”); *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707, 741–42 (2024) (“On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana.”).

12. See *infra* Part III.B.

13. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

14. Daryl J. Levinson, Foreword, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016).

15. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551 (2021) (“[T]his approach is concerned with the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth.”).

16. See *infra* Part IV.

17. Cf. Levinson, *supra* note 14, at 84.

it likewise did not concern itself with how power was to pass through to users without organizing. Power instead passed to the new governors.

This Article explores countervailing power by organizing collective decision-making, rather than just aggregated consumer choice. As its prototype,¹⁸ it explores *platform federalism* as a framework for “split[ting] the atom” of platform governance.¹⁹ It would divide governance into two levels: platform-wide (“federal”) and community (“local”). User communities would gain primary authority over content policies, ranking algorithms, and interface affordances. Platforms would retain limited power over system-wide matters, act to enforce enumerated categories of content policies, and police compact-infringing communities. This division would be established through a platform compact, reached through collective bargaining between users and the platform. To incentivize platform adoption, intermediary liability immunity would be conditioned on adopting this framework. Federalism provides a governance structure, which platform neutrality lacks, and redistributes platform power, which platform responsibility aggrandizes. While commentators have borrowed from various parts of public law, they have overlooked the body that directly and characteristically regulates political power: the constitutional law of structures. Part II explores a functional catalog of prerogatives enjoyed by the platforms and outlines an account of platform power as political power. Part III documents how neutrality and responsibility fail. Part IV defends collective user organization as countervailing power and discusses neighboring approaches to platform regulation. Part V puts forward platform federalism.

II.

LOOKING FOR POWER IN PLATFORM GOVERNANCE

There is no shortage of investigations into platform power. As might be expected, there is no single accepted definition or conceptual account of platform power.²⁰ In antitrust law, discussions have naturally revolved around platform market power.²¹ Antitrust law scholars today contest the notion of platform power and its abuse; the discussions have folded into broader conversations about the goals and scope of antitrust law.²² Not unrelatedly, law and technology scholars have also explored platform power,²³ and, building on contributions from other fields, are exploring the power over infrastructures enjoyed by

18. See *infra* Part IV.A.

19. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (describing federalism as “split[ting] the atom of sovereignty”).

20. JULIE E. COHEN, *BETWEEN TRUTH AND POWER* 175 (2019).

21. Cf. Elettra Bietti, *Consent as a Free Pass: Platform Power and the Limits of the Informational Turn*, 40 PACE L. REV. 310, 383 (2020) (“The traditional view [of platform power] is illustrated by the understanding of market power in traditional antitrust law.”).

22. See, e.g., Lina Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017); Kenneth A. Bamberger, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051 (2017); Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1958–67 (2021).

23. See COHEN, *supra* note 20, at 174–78.

platforms.²⁴ Some of the manifestations of power that legal scholars of platform governance have drawn attention to have careers that long predate social media and go beyond even the lofty umbrella of information technology.²⁵ And, of course, the observation that social media companies wield power did not escape legal scholars who have studied content moderation.²⁶ So why insist on power?

One good reason is that it still matters to most people—on both sides of the political divide.²⁷ The main contenders for regulation fail to grapple with platform power. Although much ink has been spilled on the subject, this Article makes the case that much insight is to be found in turning over a rather conspicuous stone: constitutional law. Scholars and reformers have, in fact, turned to public law principles for guidance. But their attention to administrative law and constitutional rights has not accounted for how those mechanisms are premised on the constitutional structure.

This Part starts by locating the sources of platform power, which is underwritten by legislation that professes the interests of users, who nonetheless are left disempowered in social media governance. Next, a partial catalog of the functional prerogatives held by platforms sketches the domain of possibility. This Part then argues that the power amassed by platforms *is* political power, not a means of influencing politics. The body of law that forthrightly treats power as the object of regulation offers much insight into platform governance, as we then consider. This Part concludes with an initial, high-level exploration of how the two main projects of social media reform have neglected structural constitutional law.

A. *The Digital Third Estate and the Sources of Platform Power*

Passed to promote the internet as “a forum for a true diversity of political discourse,” Section 230 created a distinctive legal structure: immunity for platforms and a corresponding limitation on users’ ability to seek relief from them.²⁸ Concededly, it was overall a vision assigned the government only a

24. See K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018); Julie Cohen, *Infrastructuring the Digital Public Sphere*, 25 YALE J. L. & TECH. (SPECIAL ISSUE) 1 (2023).

25. See generally LAURA DENARDIS, *PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE* (2009); DAVID SINGH GREWAL, *NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* (2008).

26. See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018); Klonick, *supra* note 1; Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27 (2019).

27. See ANDERSON, *Americans’ Views of Technology Companies*, *supra* note 2, at 4.

28. 47 U.S.C. § 230(a)(3) (outlining a legislative finding). Cf. Cohen, *supra* note 20, at 73 (commenting on platform entitlements “entailing disempowerment on the part of . . . users . . .” in the context of personal data, relying on Hohfeldian jural correlatives). Hohfeld identified “disability” as the correlative to “immunity”—use of the term “to talk about situations that do not involve mental or physical impairment” has been criticized. Doron Dorfman, *Disability as Metaphor in American Law*,

limited role.²⁹ But Congress did not envision anyone cloaked in the garb of governors; it was instead one of diffusing power to users.

Congress was very much interested in “maximiz[ing] user control,” which it established as policy of the United States.³⁰ Congressional debate records show that the consideration of Section 230 also focused on third-party tools. The most discussed topic was filtering content inappropriate for children, and members who spoke insisted that they supported the Cox-Wyden amendment, which became Section 230, because it chose “online family empowerment” (the original title given to the section) instead of government regulation. That was a central theme because the Cox-Wyden amendment also included a provision against regulations by the Federal Communications Commission, which ended up dropped in the conference committee.³¹ Measures by providers themselves were mentioned, but third parties’ were just as often, if not more.³² Yet the user control tools faded into obscurity, and platforms amassed power over the digital public sphere.³³

This disconnect between Section 230’s democratic aspirations and its practical effects reveals what we might call the platform Third Estate:³⁴ users provide the legitimizing foundation for platforms’ legal protections yet possess little power. The resolution of this paradox lies in reconsidering the conditions under which platforms receive their legal benefits.

Analysis usually focuses on First Amendment and Section 230 protections separately and thus emphasizes that rolling back intermediary immunity would not impact platforms’ constitutional entitlements.³⁵ Yet considering the entire edifice of platform authority enables understanding the combination of both

170 U. PA. L. REV. 1757, 1759; *id.* at 1771 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44 (1913)).

29. Cf. Jeff Kosseff, *What Was the Purpose of Section 230? That’s a Tough Question*, 103 B.U. L. REV. 763, 772 (2023) (contending that legislative history is unclear on role of government regulation).

30. 47 U.S.C. § 230(b)(3) (establishing policy “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services.”).

31. Kosseff, *supra* note 29, at 770.

32. Cf. 141 Cong. Rec. 22045 (1995) (statement of Rep. Cox) (“[T]echnology is very quickly becoming available, and in fact *every one of us will be able to tailor what we see to our own tastes.*”) (emphasis added); *id.* (statement of Rep. Wyden) (commenting on “reasonably priced software that blocks out the pornography on the Internet”). See also *id.* at 22046 (statement of Rep. White) (noting “developing technology that will allow a parent to sit down and program the Internet”); *id.* (statement of Rep. Lofgren) (mentioning “giving parents the tools”); *id.* at 22047 (statement of Rep. Goodlatte) (approving of amendment’s enabling “parents to make the . . . decisions”).

33. See Deirdre K. Mulligan & Kenneth A. Bamberger, *Allocating Responsibility in Content Moderation: A Functional Framework*, 36 BERKELEY TECH. L.J. 1091, 1145 (2022).

34. Cf. EMMANUEL JOSEPH SIEYÈS, *WHAT IS THE THIRD ESTATE?* (S. E. Finer ed., M. Blondel trans., 1964) (1789).

35. See Jeff Kosseff, *A User’s Guide to Section 230, and a Legislator’s Guide to Amending It (or Not)*, 37 BERKELEY TECH. L.J. 757, 789–91 (2022); Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (2018).

statutory and constitutional protections that underpins platforms' gubernatorial prerogatives.³⁶

Seen from that perspective, the question is not only whether platforms have First Amendment editorial rights, but how non-First Amendment law enhances those rights in the service of free speech values.³⁷ If Section 230 is indeed the law "that created the Internet,"³⁸ then platforms' authority as the "new governors" cannot be said to rest only in their First Amendment rights. This then places platform power not as entrenched doctrine, but within the reach of regulation, with the lever of subsidies.³⁹

B. A Functional Catalog of Platform Power

To understand what countervailing power can achieve, a functional approach will be useful.⁴⁰ The approach here will be neither taxonomic nor exhaustive. It is guided by the project of countervailing power and hence emphasizes those aspects that seem more promising. To understand what powers users could have, we look at the powers platforms now wield.

1. Power to Moderate (At Scale)

The most salient manifestation of platform power has been content moderation. Platforms moderate when they suspend a sitting President's account,⁴¹ or restrict reporting and other content related to the child of a presidential candidate.⁴² They also moderate when they remove posts, label content, add warnings restricting its visibility, or demonetize it.⁴³ Platforms make untold numbers of moderation decisions every day.⁴⁴

36. Cf. Mulligan & Bamberger, *supra* note 33, at 1097 (advocating "zooming out by considering together any legal regimes that structure[] the governance of online expression").

37. Cf. Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302 (2021) (surveying "the many local, state, and federal laws that work to protect the same interests that the Free Speech and Press Clauses of the First Amendment protect").

38. See generally KOSSEFF, *supra* note 4.

39. Cf. Jack Balkin, *To Reform Social Media, Reform Informational Capitalism*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 253 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) (defining the surplus of protection beyond the First Amendment as regulatory subsidy). See *infra* Part V.F.1.

40. Cf. COHEN, *supra* note 20, at 270 (endorsing a functional approach).

41. See Chinmayi Arun, *Facebook's Faces*, 135 HARV. L. REV. F. 236, 236–37 (2022).

42. Elizabeth Dwoskin, *Facebook and Twitter Take Unusual Steps to Limit Spread of New York Post Story*, WASH. POST (Oct. 15, 2020), <https://www.washingtonpost.com/technology/2020/10/15/facebook-twitter-hunter-biden/>.

43. See Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 23–40 (2021).

44. This discussion takes the narrow sense of content moderation, or "hard" moderation, which refers to use proscribed by platform-set content policies and by the law. See Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 BIG DATA & SOC'Y 3 (2020).

Platforms moderate at scale; theirs is an industrial model of moderation.⁴⁵ The only way content moderation works is by relying on automated systems to identify, triage, and act on infringing content, with armies of contractors in this content moderation loop. Moderation at scale is sometimes treated as an inherent platform capability and contrasted with, for instance, community governance. For example, Tarleton Gillespie's foundational work distinguishes platforms from early online communities; to him, the "self-government possible in such quaint forums is untenable with the scale social media has taken."⁴⁶ But this conflates the tools with their wielders.

2. *Power to Curate*

Platforms curate content. Social media feeds once generally distributed content posted by accounts a user followed, sorted in reverse chronological order. But this subscription model was superseded by a network model, which distributed and ranked content reposted by an account followed by a user. Today, the main social media platforms rely heavily on algorithmic models that distribute and rank content based on predictions made by machine learning recommendation systems (often incorporating features of the other models).⁴⁷

The main platforms generally rely on engagement predictions, though that is not the only possible metric.⁴⁸ Platforms optimize for engagement as a proxy for user utility.⁴⁹ This engagement optimization has long concerned scholars and practitioners. For instance, moral psychology research has shown that outrage is heavily rewarded on social media. As such, engagement optimization supercharges divisive content and can contribute to affective polarization and to the spread of misinformation.⁵⁰

There is now an active and promising area of research exploring alternative methods to engagement-based ranking systems. Practitioners employed by

45. See generally ROBYN CAPLAN, DATA & SOC'Y, CONTENT OR CONTEXT MODERATION? ARTISANAL, COMMUNITY-RELIANT, AND INDUSTRIAL APPROACHES (2018), <https://datasociety.net/library/content-or-context-moderation/>.

46. See TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 76 (2018).

47. ARVIND NARAYANAN, KNIGHT FIRST AMEND. INST. AT COLUMBIA UNIV., UNDERSTANDING SOCIAL MEDIA RECOMMENDATION ALGORITHMS 9–12 (Algorithmic Amplification and Society, 2023), https://s3.amazonaws.com/kfai-documents/documents/4a9279c458/Narayanan—Understanding-Social-Media-Recommendation-Algorithms_1-7.pdf.

48. See *id.* at 18–22.

49. See Gerald L. Adams III & Jane R. Bambauer, *Curation as Competition, Curation as Vice*, 78 FLA. L. REV. (forthcoming 2026) (manuscript at 2, 27) (on file with the author).

50. See Steve Rathje, Jay J. Van Bavel & Sander van der Linden, *Out-Group Animosity Drives Engagement on Social Media*, 118 PROC. NAT'L ACAD. SCI. U.S. AMERICA (2021); Jordan Carpenter, William Brady, Molly J. Crockett, René Weber & Walter Sinnott-Armstrong, *Political Polarization and Moral Outrage on Social Media*, 52 CONN. L. REV. 1107 (2021); Killian L. McLoughlin, William J. Brady, Aden Goolsbee, Ben Kaiser, Kate Klonick & M. J. Crockett, *Misinformation Exploits Outrage to Spread Online*, 386 SCIENCE 991 (2024).

platform companies have also explored these alternatives.⁵¹ Platforms have experimented with these alternatives. For example, in 2023, Meta decided to change the method for weighing political content on the News Feed, pivoting away from engagement metrics for such content.⁵² Meta announced such content would not be ranked according to predicted engagement (e.g. reshares and comments),⁵³ but on the basis of a system that learned from “item surveys” that asked users whether they saw individual pieces of content as “informative, worth their time or meaningful to them.”⁵⁴ But the change was temporary. In January 2025, along with other changes that received far more attention, Meta announced that it would revert to weighing engagement for political content.⁵⁵

3. *Power to Set Defaults*

Even when platforms create user controls, they set defaults. This can be consequential, given that most users do not choose another option.⁵⁶ To remain with the example of political content on Meta, in September 2024, Meta offered users an option to see more or less of this content, with the default set to less.⁵⁷ As part of its major policy changes in January 2025, the company said that it had previously demoted politics “based on the feedback our users gave us that they wanted to see less of this content,” but that it now saw this as “a pretty blunt approach”; Meta did not, however, go as far as to remove the political content user control, instead describing “a more personalized approach so that people *who want to see* more political content in their feeds can.”⁵⁸ Rather, what Meta did was change the default option—now, more political content is shown to users.⁵⁹

51. See generally TOM CUNNINGHAM, SANA PANDEY, LEIF SIGERSON, JONATHAN STRAY, JEFF ALLEN, BONNIE BARRILLEAUX, RAVI IYER, MOHIT KOTHARI, BEHNAM REZAEI, SANJAY KAIRAM & SMITHA MILLI, RANKING BY ENGAGEMENT AND NON-ENGAGEMENT SIGNALS (2024), <https://arxiv.org/abs/2402.06831>; *Learnings from Industry*, 1551 ANNALS N.Y. ACAD. SCIS. 19 (2025).

52. See Anna Stepanov, *Reducing Political Content in News Feed*, META: NEWSROOM (Feb. 10, 2021), <https://about.fb.com/news/2021/02/reducing-political-content-in-news-feed/> (Update on April 20, 2023).

53. See Jeff Horwitz, *Broken Code: Inside Facebook and the Fight to Expose Its Harmful Secrets* 290 (2023).

54. Stepanov, *supra* note 52.

55. Joel Kaplan, *More Speech and Fewer Mistakes*, META: NEWSROOM (Jan. 7, 2025), <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/>.

56. Cf. Cunningham, Pandey, Sigerson, Stray, Allen, Barrilleaux, Iyer, Kothari, Rezaei, Kairam, & Milli, *supra* note 51, at 27 (“For most platforms, user ranking controls have low uptake, with a few percent of users at most.”).

57. See Stepanov, *supra* note 52.

58. Kaplan, *supra* note 55 (emphasis omitted).

59. Stepanov, *supra* note 52.

4. *Power to Err*

Content governance is impossible to get right all the time.⁶⁰ Indeed, “given the sheer enormity of the undertaking, most platforms’ definition of success includes failing users on a regular basis.”⁶¹ While content moderation systems are the most obvious mechanism platforms deploy to prevent, find, and correct mistakes, ranking can also be seen as a content moderation system. Good policies and ranking priorities should minimize mistakes, definitionally, by showing less violative content to users,⁶² and by setting norms users can proactively observe.⁶³ Since at least January 2019, recommender systems have also been adapted to penalize content that is estimated to be infringing.⁶⁴ Companies described this as a reduction or demotion strategy for “borderline content” that is favored in content distribution regardless of where the policy line is set. Thus, the entire edifice is “probabilistic.”⁶⁵

The fact that content moderation is “impossible,” however, does not say much about how platforms should be treated or whether they should receive special protections. The reason platforms are given immunity from intermediary liability cannot be that their business is impossible to get right all the time—most businesses can probably argue the same. That immunity instead reflects a societal judgment that social media should exist despite its problems. In James Grimmelman’s encapsulation, to err is platform.⁶⁶ As he shows, the premise must be that the ledger of errors still favors immunity. In their prolific scholarship, Danielle Citron and Mary Anne Franks have questioned an overall positive balance as justifying the cost that marginalized groups have paid as a

60. Evelyn Douek, *Governing Online Speech: From “Posts-as-Trumps” to Proportionality and Probability*, 121 COLUM. L. REV. 759, 792 (2021).

61. GILLESPIE, *supra* note 46, at 197.

62. Meta publishes prevalence metrics, a percentage figure that estimates the presence of violating content from samples of content views, maintaining that views are a better indicator of “impact on the community.” See *Prevalence*, META: TRANSPARENCY CTR. (Mar. 6, 2025), <https://transparency.meta.com/en-us/policies/improving/prevalence-metric>. This was recommended in BEN BRADFORD, FLORIAN GRISEL, TRACEY L MEARES, EMILY OWENS, BARON L PINEDA, JACOB N SHAPIRO, TOM R TYLER & DANIELI EVANS PETERMAN, JUST. COLLABORATORY, YALE L. SCH., REPORT OF THE FACEBOOK DATA TRANSPARENCY ADVISORY GROUP 43 (2019), https://law.yale.edu/sites/default/files/area/center/justice/document/dtag_report_5.22.2019.pdf.

63. Cf. Jisu Kim, Curtis McDonald, Paul Meosky, Matthew Katsaros & Tom Tyler, *Promoting Online Civility Through Platform Architecture*, 1 J. ONLINE TRUST & SAFETY 1, 14–16 (2022) (reporting results from a study that tested exposure to content guidelines); J. Nathan Matias, *Preventing Harassment and Increasing Group Participation Through Social Norms in 2,190 Online Science Discussions*, 116 PROC. NAT’L ACAD. SCI. 9785 (2019).

64. Cf. Tarleton Gillespie, *Do Not Recommend? Reduction as a Form of Content Moderation*, SOC. MEDIA + SOC’Y, Aug. 19, 2022, at 3.

65. Mike Ananny, *Probably Speech, Maybe Free: Toward a Probabilistic Understanding of Online Expression and Platform Governance*, KNIGHT FIRST AMEND. INST. COLUM. U. (Aug. 21, 2019), <https://knightcolumbia.org/content/probably-speech-maybe-free-toward-a-probabilistic-understanding-of-online-expression-and-platform-governance>.

66. See generally James Grimmelman, *To Err Is Platform*, in THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY (David E. Pozen ed., 2020).

result.⁶⁷ That closer look at the distribution of error costs suggests a step back: if errors will be made, *who* should get to make them?

5. *Power to Design*

Platforms also shape speech through affordances—that is, the kinds of actions and interactions that platforms’ designs make available to users.⁶⁸ Early on, scholars discussed profiles and friends lists on social networking websites.⁶⁹ Affordances both enable and limit user possibilities. Users can repost on X, but they cannot repost comments on Instagram.

Platforms sometimes make design changes to encourage use, such as when Facebook aggregated emoji reactions with its old-fashioned Like button.⁷⁰ But platforms have also made changes to discourage certain uses and aid policy enforcement.⁷¹ How affordances shape user behavior is complex. For instance, when Twitter (now X) increased the limit from 140 to 280 characters per post, it saw an improvement in civility metrics, but a “decrease in empathy and respect.”⁷²

These design changes are often implemented through recommendation systems. In January 2018, Mark Zuckerberg announced a shift in content ranking policies.⁷³ In the years leading up to the announcement, Facebook had tweaked how it weighed and distributed content in response to various pressures, which ranged from media organizations’ concerns with underperforming content to broader issues with the prevalence of disinformation on the platform. In an effort to surface more reputable news content, the Instant Articles feature, which allowed users to read news content without the need to open a link, was given

67. See Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 67 (2020).

68. Cf. Samer Faraj & Bijan Azad, *The Materiality of Technology: An Affordance Perspective*, in MATERIALITY AND ORGANIZING: SOCIAL INTERACTION IN A TECHNOLOGICAL WORLD 251–54 (Paul M. Leonardi, Bonnie A. Nardi & Jannis Kallinikos eds., 2012) (tracing conceptual development of affordances in technology studies); Marco Deseriis, *Rethinking the Digital Democratic Affordance and Its Impact on Political Representation: Toward a New Framework*, 23 NEW MEDIA & SOC’Y 2452, 2455 (2021) (distinguishing features, functionalities, and affordances).

69. Cf. Danah Boyd, *Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications*, in A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 42–44 (Zizi Papacharissi ed., 2011).

70. See HORWITZ, *supra* note 53, at 78.

71. Cf. Matthew Katsaros, Kathy Yang & Lauren Fratamico, *Reconsidering Tweets: Intervening During Tweet Creation Decreases Offensive Content*, 16 PROC. INT’L AAAI CONF. ON WEB & SOC. MEDIA 477, 484 (2022) (reporting results of a study on effects of prompting users to reconsider offensive tweets before posting).

72. Kokil Jaidka, Alvin Zhou & Yphtach Lelkes, *Brevity Is the Soul of Twitter: The Constraint Affordance and Political Discussion*, 69 J. COMM’N 345, 363 (2019).

73. See Mark Zuckerberg, *One of Our Big Focus Areas for 2018 Is Making Sure the Time We All Spend on Facebook Is Time Well Spent*, FACEBOOK (Jan. 11, 2018), <https://www.facebook.com/zuck/posts/10104413015393571>.

more weight in distribution.⁷⁴ Video was also emphasized, particularly Live Video, a broadcasting feature that Meta had introduced as it responded to then fast-growing services such as Periscope and Snapchat. Media organizations selected as partners were given cash advances to defray video production costs.⁷⁵ But Meta began noticing a sizable decline in user engagement that made it worry that such a trend would ultimately hurt its business by making the platform less attractive for creators and driving users away from what Zuckerberg described as “a passive experience.”⁷⁶

Zuckerberg then determined that it was time to overhaul the Facebook News Feed; user engagement would be given more weight, even if it came at the cost of average time spent on the platform.⁷⁷ The new metric Meta was optimizing for, referred to as “Meaningful Social Interaction” (MSI), stressed engagement such as resharing posts or commenting on them, as well as emoji reactions.⁷⁸ The company decided to remove the weight of “angry” reactions after internal research showed those reactions to be correlated with policy violations.⁷⁹

6. *Power to Govern, Locally, Globally, Universally*

Platforms prefer global policies and structures; local differentiation creates administrative costs and may compromise the user experience.⁸⁰ Platforms do make content unavailable as a result of legal requests, but such content is typically geo-blocked (made unavailable in that jurisdiction), as opposed to policy-violating content, which is globally restricted.⁸¹ New regulation such as

74. See James Meese & Edward Hurcombe, *Facebook, News Media and Platform Dependency: The Institutional Impacts of News Distribution on Social Platforms*, 23 NEW MEDIA & SOC’Y 2367, 2369–70 (2021); Rasmus Kleis Nielsen & Sarah Anne Ganter, *Dealing with Digital Intermediaries: A Case Study of the Relations Between Publishers and Platforms*, 20 NEW MEDIA & SOC’Y 1600, 1601 (2018) (examining Facebook Instant Articles alongside Google Accelerated Mobile Pages).

75. See Mat Honan, *Why Facebook and Mark Zuckerberg Went All in on Live Video*, BUZZFEED NEWS (2016).

76. See Zuckerberg, *supra* note 73.

77. See *id.* (“[B]y making these changes, I expect the time people spend on Facebook . . . will go down.”); HORWITZ, *supra* note 53, at 81.

78. Jeremy B. Merrill & Will Oremus, *Five Points for Anger, One for a ‘Like’: How Facebook’s Formula Fostered Rage and Misinformation*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/>.

79. See *Reducing the Impact Angry Reactions Have on Ranking Levers* (Sept. 4, 2020), FBARCHIVE (May 15, 2023), <https://fbarchive.org/user/doc/odoc92278w32>; HORWITZ, *supra* note 53, at 304.

80. Cf. Klonick, *supra* note 1, at 1642, n.306 (“Facebook ‘realized that the nature of the product made regional rules untenable.’”) (quoting Charlotte Willner, Former Safety Manager, User Operations, Facebook); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 554–55 (2022) (noting tradeoffs between applying global policies and respecting local contexts).

81. Cf. Arun, *supra* note 41, at 240–41.

the Digital Services Act aspires to change curation more broadly,⁸² but thus far the norm has been that moderation at scale is only available for the enforcement of platform content policy. Design is likewise global, but platforms sometimes make country-specific changes. Such changes are subject to asymmetries in geopolitics and global markets.⁸³

C. Platform Amassment of Political Power

The point of this partial catalog is not to suggest that every exercise of platform power has been abusive, or, indeed, that platform power has not served users.⁸⁴ As David Beetham observes, to recognize those who are powerful in society, one need not say that their power serves no interests but their own. It is in fact their dominance “which ensures that general social needs or interests, including those of the subordinate, can only be met on terms acceptable to them. . . .”⁸⁵

Nor is it the case that power over social media ought always to be lamented. Some uses of power are inevitable; power to design precedes social media, for instance. Some are not, but hardly anyone would want decisions to come out differently; that is the upshot of “lawful but awful content.”⁸⁶

Instead, the point is that, through the exercise of this bundle of powers over their platforms, companies amass political power. Social media’s centrality to public debate can hardly be overstated.⁸⁷ Platform dominance of this media is not just a means to political power; it *is* political power—the power to influence processes of individual and public opinion formation.⁸⁸

This political power matters even when those wielding it do not perceive themselves as political actors. To return to Meta and the Meaningful Social

82. Cf. MARTIN HUSOVEC, PRINCIPLES OF THE DIGITAL SERVICES ACT 294 (2024) (noting recommendation system design requirements potentially resulting from risk management obligations, in addition to explicit transparency requirements); FOLKERT WILMAN, SAULIUS LUKAS KALÉDA & PAUL-JOHN LOEWENTHAL, THE EU DIGITAL SERVICES ACT: A COMMENTARY 272 (2024) (suggesting recommender systems may be required to reduce reach of disinformation, including when it does not rise to the level of illegality).

83. See Arun, *supra* note 41, at 247–51 (discussing content moderation decisions).

84. Cf. Adams III & Bambauer, *supra* note 49, at 37–39 (claiming that oligopolist platforms compete for users through curation quality and that this relationship “has been mutually beneficial”); but see C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 398–410 (1997) (arguing against interpreting media consumption as properly identifying consumer preferences).

85. DAVID BEETHAM, THE LEGITIMATION OF POWER 86 (2d ed. 2013) (1991).

86. See generally Daphne Keller, *Lawful but Awful? Control over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. ONLINE (2022).

87. Cf. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2016) (noting that “the ‘vast democratic forums of the Internet’ in general, and social media in particular” are the “most important places . . . for the exchange of views”) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

88. See Natali Helberger, *The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power*, 8 DIGIT. JOURNALISM 842, 845 (2020); cf. C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 8 (2006), <https://doi.org/10.1017/CBO9780511810992> (arguing that distribution of communicative power is an end in itself).

Interaction (MSI) metric: Meta took comfort in having adopted a content-quality measure that purported not to reflect executives' normative judgments about what content is valuable.⁸⁹ Internal research, however, found that "publishers and political parties were reorienting their posts toward outrage and sensationalism."⁹⁰ MSI impacted not just unwitting users and strategic actors hacking their way into the News Feed, but also the very work of media organizations. The pressure on the media to produce "algorithm-ready" articles shows how democratic institutions are transformed through platform power.⁹¹

Other transformations that worry researchers are deeper still. Research has emphasized that platforms prioritizing user engagement can bolster moral outrage, often with deleterious societal consequences.⁹² It has also shown how the microcelebrity logics foisted on users by social media harm democratic politics by creating a prism distorting our sense of the environment, inducing us to see the partisan out-group as more extreme than it actually is, in a vicious self-reinforcing cycle.⁹³

Such findings point to social media having a role in furthering affective polarization, that is, the escalation of animosity between political parties that is distinct from ideological or issue-based polarization: rather than a deepening of disagreement over policy positions, affective polarization refers to a more pervasive in-group/out-group hostility that sorts identities along cultural, social, and partisan lines.⁹⁴ Under this interpretation of the available evidence, this dynamic is driven not by insulation from opposing views but by conflict with them: platforms throw us into a national political war rather than sealing us off into homogeneous echo chambers.⁹⁵ Other findings have raised the possibility

89. HORWITZ, *supra* note 53, at 82 ("[Meta] considered people's engagement to be a good proxy for how much value they derived from a post.").

90. Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, WALL ST. J. (Sept. 15, 2021), <https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215>.

91. See Theresa Josephine Seipp, Natali Helberger, Claes de Vreese & Jef Ausloos, *Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law*, 11 DIGIT. JOURNALISM 1542, 1550–52 (2023) (discussing platform "opinion power" as interfering with editorial decision-making); CHRISTOPH BUSCH, INGE GRAEF, JEANETTE HOFMANN & ANNABELLE GAWER, EXPERT GRP. FOR THE OBSERVATORY ON THE ONLINE PLATFORM ECON., EUR. COMM'N, UNCOVERING BLIND SPOTS IN THE POLICY DEBATE ON PLATFORM POWER 21–22 (2021), https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=73962.

92. See M. J. Crockett, *Moral Outrage in the Digital Age*, 1 NATURE HUM. BEHAVIOUR 769, 770 (2017); William J. Brady, M. J. Crockett & Jay J. Van Bavel, *The MAD Model of Moral Contagion: The Role of Motivation, Attention, and Design in the Spread of Moralized Content Online*, 15 PERSPECTIVES ON PSYCH. SCI. 978, 987 (2020).

93. See CHRIS BAIL, *BREAKING THE SOCIAL MEDIA PRISM* 53, 82–83 (2021).

94. See Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129 (2019); Lilliana Mason, *Losing Common Ground: Social Sorting and Polarization*, 16 FORUM 47, 49 (2018).

95. See Petter Tömborg, *How Digital Media Drive Affective Polarization Through Partisan Sorting*, 119 PROC. NAT'L ACAD. SCI., 10 (2022).

that affective polarization may drive social media use, rather than the reverse. Causality aside, the fact remains that how the public sphere is structured matters. Even if social media is not the cause of affective polarization, it might be an instrument for remedying it, as one line of research into recommender systems aims to do.⁹⁶

The platform's amassing of power means that such consequential political decisions are in the hands of a few actors who are not subject to political accountability mechanisms.⁹⁷ Platforms are not the only corporations in concentrated sectors that make politically consequential decisions; media concentration is also a long-standing problem.⁹⁸ Acknowledging this continuity is not a reason to allow the same to repeat. Moreover, social media businesses might be more pliable to corporate control than legacy media corporations. Without overestimating the autonomy of news professionals, one may still recognize that journalistic standards and professional discipline serve as counterweights to corporate control within media organizations.⁹⁹ Social media executives, however, are unconstrained by such counterweights.¹⁰⁰

The platforms' awesome political power is "the central problem with the operation of the digital public sphere today."¹⁰¹ A good account of what is wrong with this concentration of power can be found in C. E. Baker's treatise on media concentration, which discusses ownership.¹⁰²

Two reasons are worth emphasizing: concentration poses obvious problems for political equality, and it leaves communication structures vulnerable to manipulation and co-optation. As one commentator noted after the Supreme Court's decision in a highly visible platform jawboning case,¹⁰³ "private entities offer tempting targets for governments to coopt — the larger and more influential, the more tempting."¹⁰⁴

96. See, e.g., Jonathan Stray, *Designing Recommender Systems to Depolarize*, FIRST MONDAY (May 2, 2022).

97. See BAKER, *supra* note 88, at 14 ("Economic power [over media control] is 'undue' because it should not exist within the public sphere.").

98. See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION 17 (1947).

99. See C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 899–900 (2002).

100. See Jack Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 79 (2021).

101. Genevieve Lakier, *The Limits of Antidiscrimination Law in the Digital Public Sphere*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 192 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

102. See BAKER, *supra* note 88, at 5–38.

103. *Murthy v. Missouri*, 603 U.S. 43 (2024).

104. Volokh, *supra* note 3, at 65; *but see* Lakier, *supra* note 3, at 8 (stating that the Biden administration's efforts were largely unsuccessful and conjecturing that platforms' size might be an explanation).

D. Controlling Power with Rights and Structure

Constitutions regulate political power. While upholding rights and constraining power is often portrayed as its overarching goal, the Constitution is just as much about limiting power as it is about enabling it. “[A]s Madison put it, ‘the constitution is a bill of powers.’”¹⁰⁵ Constitutional law protects *and* empowers the people. According to the classic account, the Constitution is made of two parts, rights and structure; constitutional rights stand for protection, and constitutional structure stands for empowerment.¹⁰⁶ The structural constitution organizes power through “systems . . . designed to select decision makers who are likely to put the power of the state to good uses.”¹⁰⁷ And that assignment of power follows the “central organizing principle . . . that power must be divided, diffused, or balanced.”¹⁰⁸

In reality, at the Founding, both rights and structure were taken to provide constitutional protections for the people.¹⁰⁹ For instance, Madison states in *The Federalist*, “that the Constitution is itself . . . A BILL OF RIGHTS” because it specifies “political privileges of the citizens in the structure and administration of the government” and hence should not be faulted for unspecified rights.¹¹⁰ In fact, Madison maintained that declarations of rights’ “parchment barriers against the encroaching spirit of power” were *inferior* to constitutional structure (organization of powers).¹¹¹

Scholars have questioned the basis of this faith,¹¹² highlighting that power grants are not self-executing but also require the political buy-in for the constitutional firmament, which the Constitution might promote but does not supply.¹¹³ The categorical contrast of rights and structure has also been softened in light of the recognition that they “can be functional substitutes for one another.”¹¹⁴ Finally, scholars have emphasized that “a number of different and

105. Yasmin Dawood, *Effective Government and the Two Faces of Constitutionalism*, in CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? 51 (Vicki C. Jackson & Yasmin Dawood eds., 2022) (quoting James Madison, Speech in the House of Representatives (June 8, 1789), in THE PAPERS OF JAMES MADISON (William T. Hutchinson et al. eds., 1962–1991), at 12:205).

106. See Mark Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 359 (2007) (noting that the conventional account contrasts the organization of powers found in the original Constitution with the protections provided by the Bill of Rights).

107. Daryl J. Levinson, *Incapacitating the State*, 56 WM. & MARY L. REV. 181, 193 (2014).

108. Levinson, *supra* note 14, at 33.

109. See Graber, *supra* note 106, at 360.

110. THE FEDERALIST NO. 84, at 515 (Alexander Hamilton).

111. THE FEDERALIST NO. 48, at 308 (James Madison).

112. See THE FEDERALIST NO. 51, *supra* note 13, at 322 (James Madison) (propounding that horizontal and vertical division of power allows “[a]mbition to counteract ambition”).

113. See Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 729–30 (2011).

114. Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1289 (2012).

disconnected areas of public law might be linked by a common concern with how political power is distributed, diffused, and balanced.”¹¹⁵

Platform regulation is thus an area of public law that must be concerned with the distribution of power. But if the diffusion of power is a central organizing principle across public law,¹¹⁶ does the structural constitution really have anything to offer? It does offer an orientation toward institutions and political communities.¹¹⁷ Although other areas of law also use this method, the organization of powers is chiefly concerned with constituting polities and the mechanisms through which they govern.¹¹⁸ Heather Gerken’s work on “decisional dissent” illuminates how federalism embodies this. San Francisco’s weeks-long issuance of marriage certificates, although a violation of California law, allowed a national and state minority to decide rather than plead, to speak truth *with* power, not to power, and to wield authority collectively. It catalyzed a public movement, and went beyond argument to show the reality of what this community deliberated about and enacted.¹¹⁹ In affirming the centrality of federal Indian law to public law, Maggie Blackhawk underscores the importance of bestowals of power that allow communities to define rights.¹²⁰

E. *The New Governors’ Missing Structural Constitution*

Looking for inspiration in constitutional law is certainly not foreign to legal scholarship examining the internet and social media. Indeed, Section 230, which leading commentators credit with the success of platform products,¹²¹ has often been described in constitutional terms.¹²² Prolific scholarship has been dedicated

115. Levinson, *supra* note 14, at 140.

116. *Id.* at 138.

117. Antonin Scalia, Foreword, *The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1417 (2008) (stating that the “distinctive function of a constitution . . . is to constitute the political organs, the governing structure, of a state”).

118. Cf. MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 54 (2003) (“A system of government is . . . founded on the capacity to fashion a collective order out of the unity of a people and to establish some apparatus of rule.”).

119. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1754 (2005).

120. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1848, 1869 (2019).

121. See, e.g., Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 650 (2014) (“[Section 230] proved central to the rise of the new breed of Silicon Valley enterprise”); Kosseff, *supra* note 4, at 276 (“[T]he Internet as we know it today could not exist without Section 230”).

122. See, e.g., Marvin Ammori, *The “New” New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2286 (2014) (“[Section] 230 is [t]oday’s [*New York Times* v.] *Sullivan*.”); Langvardt, *supra* note 26, at 1373 (“Section 230 is often praised as the Internet’s Magna Carta . . .”) (footnote omitted); Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 716 (2023) (quoting a scholar who admonished the author that “challenging Section 230 is like stabbing the First Amendment in the heart”).

to “digital constitutionalism,”¹²³ and the EU’s Digital Services Act¹²⁴ has been said to be an example of this approach.¹²⁵

Digital constitutionalism has been more successful abroad. In the United States, scholars have also mapped the platforms’ structures and operations onto the government’s.¹²⁶ This has led commentators and other scholars to recommend corresponding public-law mechanisms to enhance platforms’ accountability and legitimacy, but by importing administrative law frameworks.¹²⁷

Evelyn Douek’s leading account of content moderation as mass administration offers a pointed critique of digital constitutionalism’s emphasis on individual users’ due-process rights. “Content moderation,” Douek argues, “cannot be made accountable post by post.”¹²⁸ Another problem in digital constitutionalism literature is its incomplete conception of the Constitution. The focus on rights comes at the cost of overlooking the other half of the Constitution: structure.

Platform neutrality proponents likewise have impossible aspirations for rights. Their project for platform power hopes to invert the structures that have marked regulation, that of legal entitlements for companies and corresponding disentitlements for users.¹²⁹ Neutrality is more ambitious than just due process rights; it doesn’t stop in procedural protections. It gives users substantive rights

123. See, e.g., Nicolas Suzor, *The Role of the Rule of Law in Virtual Communities*, 25 BERKELEY TECH. L.J. 1817 (2010); Edoardo Celeste, *Digital Constitutionalism: A New Systematic Theorisation*, 33 INT’L REV. L., COMPUTS. & TECH. 76 (2019); Giovanni De Gregorio, *The Rise of Digital Constitutionalism in the European Union*, 19 INT’L J. CONST. L. 41 (2021).

124. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). 2022 O.J. (L 277) 1.

125. See, e.g., GIOVANNI DE GREGORIO, DIGITAL CONSTITUTIONALISM IN EUROPE: REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY 213 (2022), <https://doi.org/10.1017/9781009071215>.

126. See, e.g., Thomas E. Kadri & Kate Klonick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CALIF. L. REV. 37, 93 (2019); EVELYN DOUEK, HOOVER INST., VERIFIED ACCOUNTABILITY: SELF-REGULATION OF CONTENT MODERATION AS AN ANSWER TO THE SPECIAL PROBLEMS OF SPEECH REGULATION 2 (Aegis Series Paper, 2019), https://www.hoover.org/sites/default/files/research/docs/douek_verified_accountability_aeginstl1903_webready.pdf (describing models for self-regulation as a “kind of constitutionalism”).

127. Cf. Bloch-Wehba, *supra* note 26, at 71–78 (discussing how to “apply the principles and values of administrative law in the context of global platform governance”); Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829 (2021) (examining private adjudication by platforms and recommending procedures); Douek, *supra* note 80, at 532 (describing an approach that “draws . . . on principles and practices of administrative law”).

128. See Douek, *supra* note 80, at 565; see also Clara Iglesias Keller & Jane Reis G. Pereira, *Digital Constitutionalism as an Online Speech Governance Framework: A Critical Approach*, in DIGITAL CONSTITUTIONALISM 308–09 (Indra Spiecker Gen. Döhmman, Laura Schertel Mendes, & Ricardo R. Campos eds., 2025) (arguing against digital constitutionalism scholarship’s focus on legality through procedural requirements).

129. COHEN, *supra* note 20, at 90; see generally Julie E. Cohen, *Law for the Platform Economy*, 51 UC DAVIS L. REV. 133, 153–75 (2017). See *supra* note 28 and accompanying text.

against content moderation. The next Part shows why the rights created by neutrality do not vindicate users' free speech interests.¹³⁰ The present discussion illuminates what is wrong at the level of doctrine: constitutional rights without constitutional structure. Neutrality does not create any mechanisms for exercising power. In other words, it ignores the "indispensable necessity of govern[ance]."¹³¹

That objection certainly does not apply to platform responsibility. It is meritorious in enlisting another device in the public law toolbox—administrative law¹³²—to check platform power. But administrative law "takes up t[he] work where constitutional law leaves it."¹³³ While there is extensive debate about how administration is or can be democratic, the starting point is the Constitution, a source to which the legitimacy of administrative agencies must be traced back. A defining feature of constitutionalism as a democratizing program is that power is not taken as a given; conferrals of power must instead be justified against the demands of legitimacy. Under constitutionalism, an established regime cannot be grounded in the fact of government.¹³⁴

Yet platform responsibility takes the new governors' ruling prerogatives for granted. To proponents, platform prerogative is simply realism: there is no alternative; what is left is improving the new governors' decision-making.¹³⁵

130. See *infra* Part III A.

131. See THE FEDERALIST NO. 2, at 37 (John Jay) ("Nothing is more certain than the indispensable necessity of government . . .").

132. Cf. Douek, *supra* note 80, at 528 (discussing content moderation as a "project of mass speech administration").

133. Frank J. Goodnow, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 16 (1905) ("Administrative law takes up this work where constitutional law leaves it, and carries out in its minutest details the general plan of governmental organization laid down by constitutional law."). See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1264-66 (2006) (relying on Goodnow's treatise and arguing that the "early years of the Republic were in some sense a continuation of the Constitutional Convention" in building the administrative institutions that filled the hole about administration in the United States Constitution); see also Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1218 (2014) ("[A]dministrative law has evolved into an unwritten constitution that governs the administrative power not contemplated by the U.S. Constitution."); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2009) ("[C]onstitutional law and ordinary administrative law are inextricably linked . . ."); Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule & Michael Herz, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 2-3 (8th ed. 2017) (defining administrative law broadly as "the legal control of government" and observing its connection to constitutional law).

134. See, e.g., Dieter Grimm, *The Achievement of Constitutionalism and Its Prospects in a Changed World*, in THE TWILIGHT OF CONSTITUTIONALISM? 8-10 (Petra Dobner & Martin Loughlin eds., 2010).

135. Evelyn Douek, *The Siren Call of Content Moderation Formalism*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 155 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) ("The realist accepts that there will be an irreducible zone of discretion for platforms to decide their content moderation policies and enforcement. There is no legal or practical alternative other than accepting that many difficult choices will always be left in their hands.").

Anchoring in the *how* and taking the *who* of power as asked and answered,¹³⁶ platform responsibility accepts what media scholar Tarleton Gillespie calls “the fact of content moderation.”¹³⁷ He cautions that “when we adopt a problem-solving approach on terms borrowed from social media companies, we risk accepting as a precept that content moderation exists, and must exist in the way that it does—to accept that social media exists in the way it does.”¹³⁸ This is what follows from an administrative law project if it does not confront constitutional structure.¹³⁹

III.

MISREMEDYING PLATFORM POWER

Proponents of both platform neutrality and platform responsibility are concerned with the seemingly boundless discretionary authority that platforms wield. Each camp targets this concern in its own way. Platform neutrality proponents adopt a radical strategy: their project seeks to neutralize platform power. Florida and Texas pursued this goal by creating individual rights that effectively give users veto power over platform governance. Platform responsibility, by contrast, aims not to eliminate platform power but to domesticate it. The European Union’s Digital Services Act as well as proposed U.S. legislation that follow its framework instead introduce a complex scheme to domesticate platform power. Through this intricate apparatus, reformers aspire to align platform decision-making with the public interest.

Neither project ultimately responds to platform power, as this Part shows. Neutrality, to the extent it dispossesses platforms of power, sacrifices governance in the process and negates the user speech interests it sets out to protect. It ignores the “indispensable necessity of govern[ance].”¹⁴⁰ Responsibility understands that necessity and is sophisticated about platform governance. But it does not confront the core problem of the concentration of platform power over the public sphere.¹⁴¹ Even on its own assumptions, it fails:

136. Cf. Levinson, *supra* note 14, at 141 (“‘Who governs?’ That simple question cuts to the core of how American democracy works and how the legal frameworks that constitute and regulate it, starting with constitutional law, should be designed and assessed.”) (quoting Robert A. Dahl & David Held, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961)).

137. Tarleton Gillespie, *The Fact of Content Moderation; or, Let’s Not Solve the Platforms’ Problems for Them*, 11 MEDIA & COMM’N 406 (2023).

138. *Id.* at 407.

139. Rebecca Tushnet, *Content Moderation in an Age of Extremes*, 10 J. L., TECH. & INTERNET 1, 17 (2019) (“Even if we are highly confident that the decisionmaker is good . . . there remains the question of whether it is legitimate for decisions to be made in this way.”). Douek does envision an internal separation of functions mandate in her recommendations, but only as a method to secure “platforms’ public commitments to enforce their rules,” Douek, *supra* note 80, at 589.

140. See THE FEDERALIST NO. 2, *supra* note 131, at 37 (John Jay) (“Nothing is more certain than the indispensable necessity of government . . .”).

141. Cf. Lakier, *supra* note 101, at 192 (“[T]he central problem with the operation of the digital public sphere today . . . is the tremendous power that a few large and nontransparent companies possess over some of the most vital arenas of public discourse . . .”).

it cannot set the goals that its oversight model of delegated regulation requires. And, to the extent it could work, rather than displacing or counteracting platform power, it would crown platforms as *de jure* governors.

A. Platform Neutrality Ignores the Necessity of Governance

The neutrality project for social media reform seeks to address dissatisfaction with the decisions that some of the largest companies have made by virtually nullifying their ability to govern content. Legislation by Florida and Texas is representative of this approach.¹⁴² Texas did so by banning viewpoint-based content moderation;¹⁴³ Florida prohibited platforms from taking adverse actions against politicians.¹⁴⁴ Such laws seek grounding in common carrier doctrine, public accommodations, and anti-discrimination law.¹⁴⁵ Some commentators have raised objections to the classification of platforms as common carriers.¹⁴⁶ Others have also resisted the idea that treating platforms as such would allay First Amendment scrutiny of this approach.¹⁴⁷

The majority in *Moody* showed no interest in those arguments. Its narrow holding vacated and remanded the lower courts' decisions so that the facial challenge brought by the industry group could be assessed under the right standard.¹⁴⁸ Yet the Supreme Court also "set out the relevant constitutional

142. See Fla. S.B. 7072 § 1(6) (legislative finding that "[s]ocial media platforms hold a unique place in preserving first amendment protections for all Floridians and *should be treated similarly to common carriers*") (emphasis added); Tex. H.B. 20 § 1(3) (legislative finding that "social media platforms function as common carriers") (emphasis added).

143. See TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a)(1)–(2) (West 2025) (prohibiting action on the basis of viewpoint).

144. Florida's S.B. 7072 broadly requires platforms: to apply moderation standards consistently; to provide users with an explanation for their decisions; not to "post-prioritize" or "shadow ban" candidates for political office; not to "censor," "post-prioritize," or "shadow ban" "journalistic enterprises." See § 501.2041(2)(b) (consistent application), (d)(1) (user explanation), (h) (rules on candidates), and (j) (journalistic enterprises). See also § 501.2041(1)(b) (defining "censor[ing]" as "any action . . . to . . . restrict . . . material posted by a user"), (e) (defining "post-prioritization" as an "action . . . to place, feature, or prioritize certain content . . . in a more or less prominent position than others"), and (f) (defining "shadow ban" as an "action . . . to limit or eliminate the exposure of a user or content").

145. See *Biden v. Knight First Amend. Inst.* at Colum. Univ., 141 S.Ct. 1220, 1226 (2021) (Thomas, J., concurring) ("The similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms").

146. See Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127, 143 (2022) (arguing that social media platforms do not share characteristics that marked common carriers historically); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 504–05 (2021). See also Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 419, 566 (2023) (surveying history of deplatforming law and cautioning that duties to serve coexist with duties to deplatform).

147. See Blake E. Reid, *Uncommon Carriage*, 76 STAN. L. REV. 89, 93 (2024).

148. *Moody v. NetChoice, LLC*, 603 U.S. at 718 (quoting 599 U.S. 762, 770 (2023)) (articulating the standard for a facial challenge as whether a law "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep"). Cf. *id.* (first citing *United States v. Salerno*, 481 U.S. 739, 745

principles” for the lower courts on remand.¹⁴⁹ Though the concurrence in the judgment by Justice Alito protested this as unnecessary and unjustified,¹⁵⁰ the majority was convinced that the Fifth Circuit had rested on such a “serious misunderstanding” that guidance was warranted.¹⁵¹ The majority was categorical in dispelling arguments that would indiscriminately place social media outside of the coverage of the First Amendment.¹⁵² It did not specify what level of protection social media should be afforded because it concluded that, regardless, “a State may not interfere with private actors’ speech to advance its own vision of ideological balance.”¹⁵³ Given this, the Court did not reach other questions that doom neutrality as a project even when it does not exhibit what the majority seemed to deem tainted motivation.¹⁵⁴ In fact, the flaws of neutrality are inherent in the project. Neutrality is often portrayed as empowering users.¹⁵⁵ But neutrality takes aim at platforms and strikes users too. If user empowerment is the goal, then platform neutrality is self-defeating.

1. *An Ungoverned Social Media Does Not Maximize User Speech*

Allowing all speech—or all speech that is not illegal—would beget cacophony, eroding instead of safeguarding user speech. If neutrality were to fully incapacitate platform governance, it would also eliminate its worth to users. A summary of this fundamental point is that “moderation is the essence of platforms, it is the commodity they offer.”¹⁵⁶ But eliminating moderation does not just wipe out the platform business model; it also denies users the value they could get out of social media.¹⁵⁷ An ungoverned user feed does not maximize user speech. It inundates users with spam, with lawful but awful content that

(1987); then citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 450–51 (2008); and then citing *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 615 (2021)).

149. *Moody*, 603 U.S. at 718.

150. *Id.* at 766 (Alito, J., concurring); see also *id.* at 749 (Jackson, J., concurring in part and concurring in the judgment) (counseling “restraint” about pronouncements about “potential rulings on the merits”).

151. *Moody*, 603 U.S. at 727 (majority opinion); cf. Eric Goldman, *Speech Nirvanas on the Internet: An Analysis of the U.S. Supreme Court’s Moody v. NetChoice Decision*, 2023–2024 CATO SUP. CT. REV. 125, 141 (2024) (arguing that the opinion “is a major First Amendment precedent,” no matter what is said about dicta status).

152. See *Moody*, 603 U.S. at 727 (“The Fifth Circuit was wrong in concluding that Texas’s restrictions on the platforms’ selection, ordering, and labeling of third-party posts do not interfere with expression.”).

153. *Id.* at 741.

154. See Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 138 (2024) (“Because the Court found that these purposes were categorically impermissible, it did not feel the need, or apparently the desire, to decide other basic things about these laws . . .”) (footnote omitted).

155. Cf. *NetChoice, LLC v. Paxton*, 573 F. Supp. 1092, 1099 (W.D. Tex. 2021) (quoting proclamation by the Governor of Texas calling special session to consider “[l]egislation . . . protecting social-media and email users from being censored based on the user’s expressed viewpoints”), *vacated*, 49 F.4th 439 (5th Cir. 2022), *vacated sub nom.*, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

156. Gillespie, *supra* note 46, at 207.

157. See James Grimmelman, *Listeners’ Choices Online*, 98 S. CALIF. L. REV. 1231–32 (2025).

virtually no one wants to see,¹⁵⁸ and generally prevents users from engaging with content that is meaningful to them.

2. *Universalizing Viewpoint Neutrality Hampers the Formation of Public Opinion*

In response to these concerns, the neutrality project has taken a different direction. Rather than eliminating platforms' authority to govern content altogether, this approach would permit companies to make content decisions, so long as those decisions are not based on viewpoint. Yet that still limits users' ability to join in discussions they think are worth having. The oral argument in *NetChoice LLC v. Paxton*, which was argued alongside *Moody*, illustrates this point. Texas's Solicitor General was asked what action a platform could take against speech supporting a terrorist organization that stopped short of incitement under the First Amendment. His response was that there could be no speech about terrorist organizations whatsoever—not even to condemn them.¹⁵⁹

It is easy to understand why disabling social media governance may seem like a plausible response to platform power. It is, for the most part, how constitutional law responds to state power over speech. That logic might seem persuasive when social media is discussed as “the modern public square.”¹⁶⁰ The metaphor suggests that free speech values would be optimally served if speech on social media were as unencumbered as it is in the traditional public square.

The analogy is misleading, and not merely because the Court ruled in *Manhattan Community Access Corp. v. Halleck*, “[t]he Free Speech Clause does not prohibit *private* abridgment of speech.”¹⁶¹ This mainly restates an aspect of the state-action doctrine that precludes First Amendment claims against private parties, notwithstanding earlier decisions where the Court had previously been more sympathetic.¹⁶² *Halleck* would thus be consistent with extending free speech rights through legislation or state constitutional law, which the Court still countenances.¹⁶³

158. Cf. Keller, *supra* note 86 (illustrating the category of protected but “almost universally condemned” content, such as “horrific footage from the racist massacres in Christchurch and Buffalo,” “Nazis marching through a neighborhood of Holocaust survivors,” “protestors picketing a soldier’s funeral with signs saying ‘Thank God for IEDs’ and ‘You’re going to hell’”).

159. See Transcript of Oral Argument at 70, *NetChoice LLC v. Paxton*, 603 U.S. 707 (2024) (No. 22-555).

160. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2016).

161. 587 U.S. 802, 808 (2019).

162. Cf. *Marsh v. Alabama*, 326 U.S. 501, 507 (1946) (upholding First Amendment claim despite company town ownership). As Genevieve Lakier has shown, *Marsh*’s substantive protections for access to privately-owned traditional public forums were quickly subsumed under state-action analysis, Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2140 (2018), and extended to equivalent public functions, *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), before this last development was overruled, *Hudgens v. NLRB*, 424 U.S. 507 (1976).

163. Cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (distinguishing *Hudgens*, 424 U.S. 507).

Rather, the deeper problem is that First Amendment limitations on the government are supposed to protect the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁶⁴ Universalizing those limitations hampers public opinion.¹⁶⁵ The First Amendment prohibition on viewpoint discrimination prevents the government from controlling public opinion, but for public opinion to control the government as the First Amendment supposes,¹⁶⁶ it must arrive at viewpoints.

Proponents defend viewpoint neutrality requirements for platforms as “equally protecting all speakers’ viewpoints.”¹⁶⁷ But self-government does not follow from the unbridled utterances of anyone who wishes to speak. One of Alexander Meiklejohn’s most famous passages condenses that idea: “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹⁶⁸ As Robert Post has shown, true collective decision-making pertains not just to the judgment passed, but also to the rules, norms, and structure that underpin the court of public opinion.¹⁶⁹

A functioning public sphere requires more than “a legal norm that the state doesn’t censor.”¹⁷⁰ It relies on “institutions that curated content and made judgments about quality and civility.”¹⁷¹ Institutions like legacy media are fundamental not just in circulating information but also in discriminating among it. The Court has recognized this even in broadcasting,¹⁷² despite the “less rigorous standard of First Amendment scrutiny” to which it is subject,¹⁷³ including with respect to exercises of Congress’s spending power.¹⁷⁴

Viewpoint neutrality is not a First Amendment value unto itself. First Amendment doctrine muddies this point somewhat, but despite judicial

164. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

165. Cf. Frederick F. Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 450 (1977) (“[T]he ideals of free public debate and a marketplace of ideas presume that there will be partisanship and preference for some ideas over others.”). This is not a new problem. Commentators protested the extension of First Amendment constraints to other private actors, such as universities, on the same grounds; see Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1606 (1998).

166. Cf. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

167. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 451 (2021).

168. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1st ed. 1948).

169. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 274 (1995) (arguing that Meiklejohn does not capture the “radical conception of the reach of self-determination” embodied in First Amendment doctrine).

170. Balkin, *supra* note 100, at 78.

171. Balkin, *supra* note 39, at 240.

172. Cf. Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 130 (1973) (rejecting claim of “discrimination” against broadcaster policy not to accept editorial ads).

173. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 637 (1994).

174. Cf. FCC v. League of Women Voters, 468 U.S. 364 (1984) (holding unconstitutional a requirement not to engage in editorializing as part of eligibility for federal grant to noncommercial broadcasters).

pronouncements to the contrary, the point still holds. The source of confusion is the Court's insistence, particularly in public forum cases, that the government "may not discriminate against speech on the basis of its viewpoint."¹⁷⁵ Yet the Court can only countenance that statement if it takes viewpoint discrimination to be adaptive to context. For instance, the Court upheld a student group's challenge to the denial of funding, but it did so while reaffirming "the right of the University to make academic judgments as to how best to allocate scarce resources."¹⁷⁶ The viewpoint neutrality principle adopted in *Rosenberger v. Rector & Visitors of University of Virginia* is thus sensitive to "the purposes of that limited forum."¹⁷⁷

The Court attempted to reconcile this tension by characterizing discrimination in furtherance of a university's educational mission as content-based rather than viewpoint-based. Viewpoint discrimination, the majority insisted, is only admissible when the government is itself the *speaker* or when it "appropriates public funds to promote a particular policy of its own."¹⁷⁸ Yet, as Schauer notes, "[m]any subject matter restrictions . . . will mask or reflect viewpoint distinctions."¹⁷⁹ What counts as pertaining to the scholarly study of a particular discipline is a viewpoint based on academic standards and discourse.¹⁸⁰ Further, identifying *who* the speaker is, as *Rosenberger* calls for in acknowledging government speech, is often itself a fraught question.¹⁸¹ Leaving hard cases aside, viewpoint discrimination still arises in circumstances where it is implausible that the government is the speaker. Student exams are exemplary, as are research grant decisions.¹⁸² Even in California, which applies First Amendment standards to private universities, courts have recognized that viewpoint neutrality does not reach questions of "genuine academic judgment."¹⁸³ This supports Robert Post's suggestion that the viewpoint-content line drawn in *Rosenberger* in fact stands for a division between restrictions that

175. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

176. *Id.* at 833 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

177. *Rosenberger*, 515 U.S. at 830.

178. *Id.* at 833.

179. See Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 105 (1998).

180. Cf. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 166 (1996) ("Historians who deny the Holocaust are not likely to receive appointments to reputable departments . . .").

181. As Schauer, *supra* note 179, at 101 argues, using the government speech label for the conclusion that the state may speak as it wishes in such cases "does not provide us with any of the resources that will help in reaching that conclusion." Cf. Schauer, *id.* (contrasting enforcing the government's viewpoint upon a state-commissioned artist and upon a library or university professor).

182. Cf. Post, *supra* note 180, at 166 ("[S]tudents who deny the legitimacy of the taxing power of the federal government are not likely to receive high grades in law schools"); *id.* at 167 (discussing viewpoint discrimination against the proposed study of a superseded scientific theory in the course of a research grant application by a chemistry researcher).

183. See Taylor J. Barker, *Expressive Association Claims for Private Universities*, 76 STAN. L. REV. 1787, 1792 (2024).

are instrumental to legitimate purposes in what Post calls managerial domains and those that are not.¹⁸⁴

Eliminating viewpoint discrimination wholesale impoverishes rather than enriches user speech. It denies users the opportunity to structure social media so as to enhance the conversations they are interested in joining and the content they would like to consume. Community administrators of the ask-me-anything subreddit r/IamA make decisions about who is “notable or interesting enough” to merit its own post, to which an amicus brief in *Moody* credits the superior numbers of their community compared to less moderated ask-me-anything alternatives.¹⁸⁵

Platform neutrality proponents are certainly right to recognize that there is power in setting such structures and in presiding over the governance they establish. They are also right to be concerned about the concentration of such power in the hands of those who control the world’s most economically prosperous companies.¹⁸⁶ Their mistake is in assuming that to eliminate or minimize this power would serve users or the public.

B. Platform Responsibility Cannot Tame Platform Power

Where neutrality attempts to sort the problem by abolishing platform power, responsibility seeks to put such power to good use. A concise statement of the project would be “to create incentives for social media companies to be responsible and trustworthy institutions that will help foster a healthy and vibrant digital public sphere.”¹⁸⁷ Platform responsibility thus acknowledges that governance is inevitable. The new governors play a central role in public discourse, rivaling or displacing traditional media, and yet do not abide by the norms associated with such institutions.¹⁸⁸ This creates a challenge of constitutional significance, as democracy assumes serious public debate and a well-informed citizenry to enact self-government. Platform responsibility is needed “in light of [platforms’] effect on the news industry and democracy,”¹⁸⁹ and given that “the rules for what people can say online are too important.”¹⁹⁰ Taking freedom of speech as preventing regulation that would directly prescribe

184. Post, *supra* note 180, at 167.

185. Brief of Amici Curiae, The Moderators of r/Law and r/SCOTUS 9–10 (Dec. 7, 2023), *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

186. See Volokh, *supra* note 167, at 384–95.

187. Balkin, *supra* note 100, at 72.

188. See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 570 (2018).

189. MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 104 (2021).

190. Douek, *supra* note 80, at 530.

standards,¹⁹¹ the project instead explores indirect mechanisms,¹⁹² including broadcast-style regulatory structures,¹⁹³ curatorial due process and fiduciary duties,¹⁹⁴ and risk-management obligations associated with new governance regimes.

The argument here is not against attaching new responsibility to platforms. As the main instrument for social media reform, however, platform responsibility is flawed. It is not apt to address the concerns about outsized political power in the hands of social media companies. In fact, it may add to that problem. The inaptitude of platform responsibility to respond to the problem of power over social media is made evident through an examination of the framework that underlies the most sophisticated regulatory schemes enacted or proposed—new governance.

1. *Governing Like a Platform*

The mainstay of platform responsibility draws on “new governance” thinking.¹⁹⁵ From the mid-1990s, new governance¹⁹⁶ proponents argued that a more expansive view of regulation would be both a more realistic representation of the reality of policymaking and a key to effective results. Central to this argument is that the classic model of the relation between regulators and regulated entities supposes a rigid separation between who makes the rules and who must comply with them.¹⁹⁷ New governance posits a more flexible model.¹⁹⁸ It responds to the classic model of regulation as control by emphasizing

191. See Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2044 (2018) (arguing that an obligation to act in the public interest cannot be enforced by law unto media institutions and social media companies, and positing a “curatorial obligations of due process” for the latter); DOUEK, *supra* note 126, at 7 (arguing that regulation of content moderation should focus on processes, rather than substance).

192. See Douek, *supra* note 80, at 533–34 (advancing a regulatory model for content moderation that would “definitely [be] more reconcilable with the First Amendment, than less systemic, more direct forms of online speech regulation”); Balkin, *supra* note 100, at 89 (“[D]on’t rush to impose direct regulation on social media moderation practices”); MINOW, *supra* note 189, at 128.

193. See MINOW, *supra* note 189, at 125–28; Wu, *supra* note 188, at 577 (positing regulation equivalent to “a ‘fairness doctrine’ for social media,” which Wu “personally would not favor” out of pragmatic considerations).

194. See Balkin, *supra* note 191, at 2044, 2047.

195. Cf. Brenda Dvoskin, *The Illusion of Inclusion: The False Promise of the New Governance Project for Content Moderation*, 93 FORDHAM L. REV. 1315, 1324 (2025).

196. Cf. Lisa T. Alexander, Afterword, *Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737, 739 (2010) (“[N]ew governance has many monikers.”); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004) (collecting variously-labeled sources and articulating them under a common new governance program).

197. Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816–17 (2000).

198. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 28 (1997); Lobel, *supra* note 196, at 388.

collaboration.¹⁹⁹ Scholars insist that this perspective does not rest on the notion of a smaller government²⁰⁰ or “governmental retreat.”²⁰¹ Their point is that private collaboration is essential for the state to accomplish whatever goals it sets.

The payoff of new governance for legal scholars studying social media cannot be denied. At the heart of important investigations into companies’ practices and structures is the appreciation that legal analysis should not be oblivious to “what . . . platforms are actually doing and how they are doing it.”²⁰²

Beyond analyses and empirical studies of social media platforms, new governance principles have also been incorporated into proposed regulatory frameworks, introduced as bills, and enacted legislation outside the United States.

The foremost example of social media regulation in the mold of new governance is the European Union’s Digital Services Act (DSA).²⁰³ “The crown jewel” of the DSA is its intricate risk-management regime for the largest providers.²⁰⁴ The DSA defines “systemic risks”—which covered platforms must assess and mitigate—in broad terms, including “any actual or foreseeable negative effects for the exercise of fundamental rights” and effects “on civic discourse.”²⁰⁵ The EU envisions the DSA steering platforms towards more “responsible and diligent behavior” through a regulation under which platforms will have their homework graded by regulators, aided by independent auditor reports.²⁰⁶ The entire regulatory structure is underpinned by significant liability for an *ex post* noncompliance determination—up to 6% of annual worldwide turnover revenue in fines.²⁰⁷

199. Freeman, *supra* note 198, at 95; Orly Lobel, *New Governance as Regulatory Governance*, in OXFORD HANDBOOK OF GOVERNANCE 66–67 (2012).

200. Lobel, *supra* note 196, at 451.

201. Freeman, *supra* note 198, at 96.

202. Klonick, *supra* note 1, at 1630. Cf. MATTHIAS C. KETTEMANN & WOLFGANG SCHULZ, LEIBNIZ INST. FOR MEDIA RSCH., HANS BREDOW INST., 1, SETTING RULES FOR 2.7 BILLION: A (FIRST) LOOK INTO FACEBOOK’S NORM-MAKING SYSTEM (2020), <https://doi.org/10.21241/ssoar.71724> (reporting the results of an “ethnographically-informed participatory organizational observation,” complemented by interviews, on Meta’s policymaking processes). See also Langvardt, *supra* note 26; Bloch-Wehba, *supra* note 26; Kadri & Klonick, *supra* note 126; EVELYN DOUEK, KNIGHT FIRST AMEND. INST. AT COLUMBIA UNIV., THE RISE OF CONTENT CARTELS: THE TECH GIANTS, MONOPOLY POWER, AND PUBLIC DISCOURSE (2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels>; Loo, *supra* note 127.

203. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). 2022 O.J. (L 277) 1.

204. See HUSOVEC, *supra* note 82, at 316.

205. DSA, art. 34(1)(b), (c).

206. DSA, recital 3.

207. DSA, art. 52(3); see also art. 52(3), *in fine* (establishing a fine of “1% of the annual income or worldwide turnover” for inaccurate reporting); art. 52(4) (establishing a maximum “periodic penalty payment” of “5% of the average daily worldwide turnover or income” for noncompliance with decisions by Member State and EU agencies). See Wilman, Kalèda, & Loewenthal, *supra* note 82, at 365–67.

In the United States, this resonates with proposed legislation²⁰⁸ and influential scholarship²⁰⁹ that likewise rely on systemic duties, auditing, reporting, and compliance. The EU's DSA identifies risks that platforms are required to manage.²¹⁰ Proposals in the United States do not and instead seek to make platforms accountable to their own stated standards and policies.²¹¹

This Article adds to a discussion of the complications of the new governance for the regulation of information technology, which scholars have discussed as part of their critique of “regulatory managerialism.”²¹² One recent contribution calls into question the aspiration that a regulatory-negotiation²¹³ parallel to platform governance might enable social media to create consensus-based content policies through consultation and participation of interested parties.²¹⁴ The aim here is to tackle another question: Can platform responsibility deliver on the goal of reining in platform power through its reliance on the new -governance framework? This Article argues it cannot.

2. *Responsibility Cannot Set the Goals Its New-Governance Delegation Assumes*

Scholarship on new governance initially focused on questions quite apart from social media. Jody Freeman's influential writing at the turn of the century discussed the role of private actors in governance in contracted healthcare provisions, in privatized prisons, and in environmental impact management, for instance.²¹⁵ New-governance exponents did not address the media, even as the Federal Communications Commission continued its overhauling of broadcast

208. See Digital Services Oversight and Safety Act of 2022, H.R. 6796, 117th Cong. (2022) [hereinafter DOSA] (requiring a “large covered platform,” *inter alia*, to conduct risk assessments and submit risk assessment and risk mitigation reports to the Federal Trade Commission).

209. Cf. Douek, *supra* note 80, at 566 n. 216, 584–606 (referring to the DSA as “an example of regulation that incorporates provisions aimed at the broader systems and processes of content moderation” and describing a regulatory framework to increase accountability for platforms’ public commitments).

210. But see Wilman, Kalèda, & Loewenthal, *supra* note 82, at 258 (“What is precisely meant by this term, however, has not been spelled out.”); Husovec, *supra* note 82, at 319.

211. See Douek, *supra* note 80, at 593–94. The proposed DOSA borrows language from the DSA when it addresses risks, but under DOSA risks are limited to “content that is *in breach of the community standards* of the provider of the service.” See DOSA, § 4(a)(3)(C) (defining systemic risks) (emphasis added); see also DOSA, § 7(a)(2) (establishing risk assessment requirements for large covered platforms).

212. Cf. COHEN, *supra* note 20, at 185–95; Julie E. Cohen & Ari E. Waldman, *Introduction: Framing Regulatory Managerialism as an Object of Study and Strategic Displacement*, 86 L. & CONTEMP. PROBS. i (2023).

213. Cf. Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 653 (2000) (“[R]egulatory negotiation (reg-neg) . . . is a consensus-based approach to developing rules which grew out of the collective bargaining tradition in labor law and was introduced as a promising alternative to ‘ossified,’ adversarial notice-and-comment rulemaking.” (citation omitted)).

214. See Dvoskin, *supra* note 195, at 1330–31.

215. See Freeman, *supra* note 198 *passim*; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) *passim*.

regulation²¹⁶—adopting a vision that could very well be described as less agency-centric and more cognizant of the role of private actors in governance.

From that perspective, the fact that new governance did not take up media regulation as one of its main case studies should be surprising. It is not surprising, however, upon a closer look at how proponents refined new governance to provide an intellectual foundation for a then-emerging expanded *regulatory* role of regulated entities.

Consider Kenneth Bamberger’s account of private-actor regulation in terms of delegation.²¹⁷ Administrative law had come to appreciate that the transmission belt model of congressional oversight could not capture the reality of complex agencies and their statutory mandates, which required the exercise of agency expertise and judgment, Bamberger noted—the law should therefore also acknowledge that agencies, in turn, needed to rely on expertise and judgment on the part of regulated entities.²¹⁸

The reasons were similar: neither Congress nor agencies were in a position to prescribe commands in sufficient detail to eliminate discretion; neither possessed as much information, expertise, or resources as their delegates. Administrative law had dispensed with the fiction that agency action is constitutionally legitimate only when Congress determines outcomes by statute, instead embracing theories that recognize agency discretion and emphasize accountability mechanisms. Bamberger advanced that the same should be done with regard to the agency-firm leg of the regulatory process.

This is insightful. By relying on this frame and extending it to agencies and regulated entities, “regulation as delegation” not only conscripts thinking about oversight structures and processes. It also counters fundamental questions about the democratic pedigree of rulemaking by private parties. “Regulation as delegation” absorbs this rulemaking and makes it a part of a larger process; it lashes private regulation to agency regulation and ultimately to law-making by the people’s elected representatives.

Yet, with platform governance, there is a fundamental mismatch. New governance cannot anchor the chain of delegation when it comes to the most important questions in social media. Even the collaborative models of regulation

216. Cf. Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813, 841–47 (2008); Hannibal Travis, *The FCC’s New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 428–43 (2011).

217. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 381 (2006) (arguing that role of entities in complex regulatory systems “is analogous to Congress’s delegation to agencies, through statutory ambiguity”).

218. *Id.* at 400.

it endorses proceed from the idea that, while much might be left to “regulated firms as partners in regulation,”²¹⁹ this is done “in the service of public goals.”²²⁰

Goal setting is implicit in the notion of delegation. The *goals* may be so broadly stated that entities will need to define “aims in particular contexts.”²²¹ Still, as Bamberger himself writes with Deirdre Mulligan, “[p]ublic law does not usually outsource the core role of policy formation or rulemaking to private entities.”²²²

Yet this outsourcing is exactly what platform responsibility entails. And this puts it not just in an unusual, but in fact in an impossible situation. Goal setting in the domain of public discourse flies in the face of *West Virginia State Board of Education v. Barnette*’s “fixed star”—“that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”²²³

To recognize the fissure between the goal-setting presumed by platform responsibility’s new governance and the First Amendment, there is no need to adjudicate whether *Barnette*’s “paeans to neutrality” are true doctrine or exaggerated rhetoric.²²⁴ Impermissible goal-setting also does not depend on whether platforms are to be treated more like broadcasters or newspapers, though certainly the Court has been rather blunt in its defense of the editorial independence of newspapers, so as to obviate the need for discussion if the latter were the case. Indeed, even as it lauded “press responsibility” as “an undoubtedly desirable goal,” the Court was clear that “like many other virtues it cannot be legislated.”²²⁵ Neither grand controversies about toleration and neutrality as the ideals underpinning the development of the First Amendment²²⁶ nor the ontology of pesky, shapeshifting platforms²²⁷ need not be deciphered here. The reason is that, even in the domain of broadcasting, nothing comes close to setting a

219. Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669, 684 (2010).

220. Bamberger, *supra* note 217, at 400.

221. *Id.* at 390 (emphasis added).

222. Mulligan & Bamberger, *supra* note 33, at 1125.

223. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

224. Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 916–17 (2021) (arguing *Barnette* stands for toleration, despite “includ[ing] a host of enduring phrases that are often construed as paeans to neutrality”); see also Steven Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 668 (2003) (arguing that *Barnette* should be read not as preventing the state from “prescrib[ing] orthodoxy . . . in matters of opinion or forc[ing] citizens to confess by word or act their faith therein,” 319 U.S. at 642, but from prescribing and forcing citizens to profess orthodoxy). But see Genevieve Lakier, *A Counter-History of First Amendment Neutrality*, 131 YALE L.J. F. 873, 905 (2022) (situating *Barnette* along a line of cases establishing neutrality, concluding against Campbell that neutrality “played an important role in free-speech law from its beginning,” and arguing that democracy requires that it be a part of free-speech law).

225. *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

226. See generally Campbell, *supra* note 224; Lakier, *supra* note 224.

227. See generally Jane R. Bambauer, James Rollins & Vincent Yesue, *Platforms: The First Amendment Misfits*, 97 IND. L.J. 1047 (2021).

meaningful goal to allow the delegate accountability assumed by platform responsibility's new governance.

Understanding how the courts and the FCC sought to resolve this tension would require an in-depth exploration of broadcast regulation generally and programming regulation specifically. The latter, of course, has been transformed as the Commission, since the 1980s, has seen its mandate as promoting competition.²²⁸ So thorough is this transformation that, to a leading media scholar, “the notion of ‘public interest’ has become so tied to the idea of market economics that it has lost almost all independent meaning.”²²⁹ But a full expedition into the old country of broadcast law is not needed. A brief excursion will suffice to show that the delegation assumed by platform responsibility was not present even in the heyday of broadcast content regulation.

Before the FCC renounced the fairness doctrine,²³⁰ the Court blessed it, famously insisting that “[i]t is the right of the viewers and listeners, not the rights of the broadcasters, which is paramount.”²³¹ The Communications Act of 1934 explicitly “maintain[s] the control of the United States” over broadcasting.²³² *Red Lion Broadcasting Co. v. FCC* ratified FCC content regulation of broadcasting “to assure that broadcasters operate *in the public interest*.”²³³

All of this, in theory, could well have anchored the delegation that platform responsibility assumes. In practice, however, although this model might have worked without much complication for the regulation of a toaster, TV broadcasting proved much trickier.²³⁴ In statutory terms, this complication is cryptically expressed in the puzzle that, while the FCC is authorized to issue regulations “as public convenience, interest, or necessity requires,”²³⁵ it is not

228. See Levi, *supra* note 216, at 841–43. Cf. Patricia Moloney Figliola, CONG. RSCH. SERV., R45699, THE FEDERAL COMMUNICATIONS COMMISSION: STRUCTURE, OPERATIONS, AND BUDGET 4–5 (2025) (summarizing the Commission’s Strategic Plan for 2022–2026).

229. MONROE E. PRICE, TELEVISION: THE PUBLIC SPHERE AND NATIONAL IDENTITY 168 (1996).

230. See *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) (questioning constitutionality of the doctrine); Syracuse Peace Council, MO&O 2 FCC Rcd. 5043 (1987) (concluding fairness doctrine to be unconstitutional); Amendment of Parts 1, 73 and 76 of the Commission’s Rules, 26 FCC Rcd. 11422, ¶¶ 3–4 (2011) (formally repealing doctrine). See Jerry Kang, Alan Butler & Blake E. Reid, COMMUNICATIONS LAW AND POLICY: CASES AND MATERIALS 238–39 (8th ed. 2024) (summarizing developments leading to demise of fairness doctrine).

231. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 395 (1969).

232. 47 U.S.C. § 301.

233. *Red Lion*, 395 U.S. at 380 (emphasis added). See *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 215–16 (1943) (validating FCC regulation predicated on public interest). See also 47 U.S.C. § 309(a) (requiring a finding that “public interest, convenience, and necessity” would be served for a license to be granted).

234. See Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 965–66 (1995). “[A] toaster with pictures” is how FCC Chairman Mark Fowler described television as he presided over the deregulation that would characterize his tenure at the FCC. See Milton Mueller, *Interview with Mark S. Fowler*, REASON, Nov. 1981, <https://reason.com/1981/11/01/interview-with-mark-fowler/>.

235. 47 U.S.C. § 303.

“give[n] . . . the power of censorship” and must not “interfere with the right of free speech by means of radio communication.”²³⁶ *Red Lion* would have allowed the Court, then, to simply treat broadcasters as “public functionaries,” as Robert Post has put it.²³⁷ This would have fitted new governance’s delegation model perfectly. Yet that is not the path the Court took.

Not long after *Red Lion*, the Court confronted access claims that sought to take viewers’ “paramount interest” to its ultimate conclusion by seeking judicial review of broadcasters’ decision-making. The Court refused to go that far. In *CBS v. DNC*, the Court rejected a challenge to broadcasters’ refusal to sell advertising time for one-minute editorial announcements to a business executives’ advocacy group opposed to the Vietnam War and to the Democratic National Committee.²³⁸ The plaintiffs argued that broadcasters violated the First Amendment by refusing to let them buy ads to address matters of public concern *because* they were addressing such matters, as opposed to satisfying the permitted private interests typically pursued by advertisers. That refusal seemed hard to square with the Court’s description of broadcasting as conducted “in the public interest” in *Red Lion*. How would the public interest exclude matters of public concern?

The Court’s way out was to give deference to the FCC’s regulation granting broadcasters “the right to exercise editorial judgment.”²³⁹ So, having concluded in *Red Lion* that broadcasters could not claim a right against content regulation in the service of the public interest, the Court now confirmed the FCC’s position that the public interest was in fact *best served* by editorial independence. *CBS v. DNC*’s editorial independence rested on arguments grounded in deference and statutory interpretation. But it also necessarily rested on a reconfiguration of viewers’ “paramount interest.” Second-order satisfaction of those interests sufficed, and that was what Congress enacted into law,²⁴⁰ so the Commission’s determination would stand.

The Court again sided with the regulators in *CBS, Inc. v. FCC* when it narrowed the editorial independence it had previously announced.²⁴¹ The FCC had found that the broadcasters had violated their obligation, under the Federal Election Campaign Act of 1971,²⁴² to sell reasonable time to the Carter-Mondale campaign. The Court rejected the argument that the FCC had violated the plaintiffs’ editorial independence. Yet it did so by reaffirming broadcasters’ independence, making note of the fact that the Commission had committed to

236. 47 U.S.C. § 326.

237. Post, *supra* note 180, at 162.

238. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973).

239. *Id.* at 111.

240. *Cf. id.* (noting a “clearly manifest[ed] . . . intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.”).

241. *CBS, Inc. v. FCC*, 453 U.S. 367, 367 (1981).

242. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3., codified in relevant part at 47 U.S.C. § 312(a)(7) (1976 & Supp. IV 1980).

giving discretion to the broadcasters in their determination of what counted as a reasonable request under the Act.²⁴³ As Robert Post put it, between *Red Lion*, *CBS v. DNC*, and *CBS v. FCC*, the Court navigated around an intermediary position for broadcasters, who it would treat as part private actor (like a newspaper) and part subordinate government actor.²⁴⁴ Another way to reason through the trio of cases is that the Court interpreted the First Amendment as requiring editorial independence as a matter of public interest, even where a private actor would have no property or own-right claim against government regulation. Editorial independence subject to limitations “consistent with its public [duties]”²⁴⁵ was admittedly less than what the *Miami Herald* was entitled to.²⁴⁶ But that was still significant considering the *Red Lion* baseline approach, which permitted broad public-interest regulation to superintend broadcasters.

The model that results from this is not one in which broadcasters are agents acting on delegation from their principals. In fact, both noted advocates of the fairness doctrine and its fiercest enemies agreed on one thing: “the broadcaster ha[d] considerable discretion in operating the doctrine.”²⁴⁷ The resulting model is rather one in which the trustees are protected from *interference* by the public. In *CBS v. DNC* and *CBS v. FCC*, this protection may be read as arising not from the Constitution itself but from a prudential legislative decision. But the Court went further. In *FCC v. League of Women Voters*,²⁴⁸ it recognized broadcaster discretion and protection from interference by Congress as a First Amendment matter. The Public Broadcasting Act of 1967 provided funding for noncommercial TV and radio stations, but denied it to broadcasters that “engaged in editorializing,” ostensibly so that such stations would be safe from undue federal influence and not vulnerable to misappropriation by private interest groups.²⁴⁹ Yet the Court did not see this as a legitimate goal-setting directive. Neither a *Red Lion* theory nor a spending power theory persuaded it.²⁵⁰ In fact, rather than a lawful directive issued by a principal to its agents, the majority discerned an invidious form of content discrimination.²⁵¹

243. *CBS, Inc. v. FCC*, 453 U.S. at 395–97.

244. *Cf.* Post, *supra* note 180, at 158–60.

245. *CBS, Inc. v. FCC*, 453 U.S. at 367 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110 (1973)).

246. *Cf. Mia. Herald Publ’g Co. v. Tomillo*, 418 U.S. 241 (1974) (invalidating Florida’s right of reply to political candidates subjected to criticism by newspapers).

247. Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 772 (1972); *see also* THOMAS G. KRATTENMAKER & LUCA A. POWE JR., REGULATING BROADCAST PROGRAMMING 243 (1994).

248. *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

249. *See id.* at 384–85.

250. *Id.* at 399–401.

251. *Cf. Women Voters, id.* at 384 (“Since ‘[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic,’ we must be particularly wary in assessing § 399 to determine whether it reflects an impermissible attempt ‘to allow a government [to] control . . . the search for political truth.’”) (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980)).

This upsets the dynamic assumed by regulation as delegation. It may well be the reason why new-governance scholars have not taken up broadcasting as they have other areas of regulation, though FCC deregulation would have seemed to make it ripe for the taking. And, of course, the Court has repeatedly declined to extend to other areas the standards it has developed for broadcasting.²⁵²

While the discussion above is localized, this is not a problem that vexes only the United States because of its exceptional First Amendment.²⁵³ Indeed, the European Commission’s guidance on electoral processes under the DSA is an example of how the regulatory delegation assumed by new governance fails because it cannot set goals. Political mis- and disinformation concerning elections were main factors motivating the enactment of the DSA.²⁵⁴ Part of the problem was exactly that platforms allowed and rewarded false information that legacy media would have been expected not to disseminate.²⁵⁵ Platforms, however, did not abide by the same norms, and hence the DSA’s new governance approach turned to risk management obligations. But when the Commission issued guidelines and initiated proceedings that seemed to conflate illegal and *legal* disinformation, EU scholars and civil society actors were critical.²⁵⁶ A main charge was that the conflation allowed the Commission to disregard freedom of expression limitations and make new law without legislative support.²⁵⁷ How far the Commission will go and whether European Union courts will sustain a challenge are still open questions, and some scholars believe the DSA could reach legal disinformation, albeit in a more constrained way.²⁵⁸

Compare that to the cases discussed by new governance proponents. A workplace safety compliance program allowed self-regulation “as long as the

252. Cf. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 638–39 (1994); *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997).

253. Cf. Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 41–42 (Michael Ignatieff ed., 2005).

254. Cf. DSA, Rec. 2 (mentioning “online disinformation” as prompting the regulation); Amélie P. Heldt, *EU Digital Services Act: The White Hope of Intermediary Regulation*, in *DIGITAL PLATFORM REGULATION* 71 (Terry Flew & Fiona R. Martin eds., 2022) (quoting statements by European Commission President highlighting disinformation).

255. Cf. Martin Husovec, *The Digital Services Act’s Red Line: What the Commission Can and Cannot Do about Disinformation*, 16 J. MEDIA L. 47, 49 (2024).

256. Ronan Ó Fathaigh, Doris Buijs & Joris Van Hoboken, *The Regulation of Disinformation Under the Digital Services Act*, 13 MEDIA & COMM’N, 14–15 (2025) (describing civil society reaction and hypothesizing a jawboning challenge under the European Charter of Human Rights).

257. Cf. Mattias Wendel, *Taking or Escaping Legislative Responsibility? EU Fundamental Rights and Content Regulation Under the DSA*, in *CONTENT REGULATION IN THE EUROPEAN UNION: THE DIGITAL SERVICES ACT* 81–82 (Antje von Ungern-Sternberg ed., 2023); Husovec, *supra* note 255, at 52–53; Ó Fathaigh, Buijs, & Van Hoboken, *supra* note 256, at 14–15.

258. Cf. WILMAN, KALÉDA, & LOEWENTHAL, *supra* note 82, at 272 (highlighting mitigation measures might be required “particularly in respect of large-scale, intentionally deceptive disinformation campaigns”); HUSOVEC, *supra* note 82, at 341 (arguing in favor of “content-neutral restrictions”).

program effectively reduced accident rates.”²⁵⁹ A permit process that offered exemption from environmental standards on an applicant’s showing of “superior environmental performance.”²⁶⁰ Regulation under Title V of the Gramm-Leach-Bliley Act²⁶¹ and HIPAA’s Administrative Simplification provisions²⁶² that required “risk-assessment and data-security systems to protect its privacy and security.”²⁶³ In all these cases, regulators’ goals were well within their constitutional reach.²⁶⁴

This highlights that there is a role for platform responsibility—just not as an instrument for countervailing power. Some very real harms on social media are illegal content, like child sexual abuse material (CSAM) or fraud; outside of the United States, the same goes for illegal hate speech. For those categories, the framework of regulation by delegation works. Regulators might well set goals for removing and preventing such content and supervise company processes in the pursuit of that goal. Supervising platforms’ systems through prevalence metrics, or accuracy and precision targets, is then a sensible strategy to achieve compliance with legal standards.²⁶⁵

But beyond that, platform responsibility stumbles at precisely the point where platform power is most acute: the governance of lawful content. The appeal of delegation as a regulatory strategy rests on the ability of public actors to define the goals that private actors must pursue. Responding to the immense power platforms enjoy must mean confronting their prerogative to define what is worth users’ attention and what is not. This is not something that the new-governance framework underlying platform responsibility is designed to tackle.

That is not to say that platform responsibility cannot change this part of platform decision-making. Given how comprehensive and flexible the regulatory structures it creates are, for example, under the EU’s DSA, it is indeed plausible that it will. But such an outcome would emerge not from the procedural virtues of the regulatory architecture it invokes. It would instead result from opaque, pliable regulatory dynamics that limit avenues for public contestation. Yet this process could be seen as a surrogate legislature for the domain of platform governance. This is a different program for platform responsibility, one that cannot claim the democratic justification that new governance literature has asserted for private regulation. Scholars have offered rich critiques of such

259. Freeman, *supra* note 197, at 834 (discussing the California Cooperative Compliance Program).

260. Freeman, *supra* note 198, at 55.

261. 15 U.S.C. §§ 6801–6809.

262. Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d–1320d-9.

263. Bamberger, *supra* note 219, at 680.

264. This must be distinguished from the claim that new governance allows regulators to “extend their influence to matters and actors that they could not otherwise lawfully reach,” Freeman, *supra* note 213, at 671, n.528 (citing Lee Breckenridge, *Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management*, 25 *ECOLOGY L. Q.* 692, 698 (1999)).

265. Cf. Douek, *supra* note 80, at 575, 601.

regulatory systems and the politics they embody.²⁶⁶ This Article aims to contribute to this discussion contrastively, by offering an alternative to the project.

3. *Policing Platforms' Own Pledges Is Not a Meaningful Limitation on Power*

Proponents of platform responsibility in the United States have put forward a solution that might seem to evade this problem of goal-setting for free speech: have regulators check that platforms honor their own policies and values.²⁶⁷ Jack Balkin explores this in his proposal for information fiduciaries; platforms could be required “to be consistent between the value commitments they make to the public and the values they actually enforce through their algorithms.”²⁶⁸ He argues that, because such a requirement would not specify particular content moderation policies and “only have indirect effects on social media companies’ editorial decisions,” it should withstand a First Amendment challenge.²⁶⁹ Evelyn Douek likewise contends that, “[t]hrough a mechanism like the FTC’s authority to police unfair and deceptive practices, a regulator could over time ‘add[] some teeth’ to platforms’ content moderation commitments.”²⁷⁰ Proposed legislation like the DOSA and the PACT Act, both introduced in the 117th Congress, seek to bind platforms to their pledges.²⁷¹

The most important shortcoming of what this alternative could achieve is also the most obvious. Platforms would be free—and incentivized—to rewrite their policies and statements to retreat from any language that would cause them trouble.²⁷² There is reason to think that is exactly what platforms would do. Privacy policies, cited as examples of enforcement by platform responsibility

266. Cf. William Boyd, *De-Risking Environmental Law*, 48 HARV. ENV’T L. REV. 153 (2024); Rachel Griffin, *Governing Platforms Through Corporate Risk Management: The Politics of Systemic Risk in the Digital Services Act*, 2025 EUR. L. OPEN 1.

267. See Douek, *supra* note 80, at 593–94.

268. Balkin, *supra* note 39, at 252.

269. *Id.* at 250.

270. Douek, *supra* note 80, at 605.

271. See DOSA (requiring a “large covered platform,” *inter alia*, to conduct risk assessments and submit risk assessment and risk mitigation reports to the Federal Trade Commission, with regard to “systemic risks” pertaining to illegal content and “content that is in breach of the community standards of the provider of the service”). See also Platform Accountability and Consumer Transparency Act (PACT Act), S. 797, 117th Cong. § 4(5) (2021) [hereinafter PACT Act] (mandating a user complaint procedure for removal of illegal and policy-violating content and empowering the Federal Trade Commission to treat infringements “as a violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the Federal Trade Commission Act”).

272. Anticipating an objection, Douek observes that platforms cannot avoid content moderation. Douek, *supra* note 80, at 605. But, judging from the experience with privacy policies, the preferred strategy would be symbolic compliance: write vague, noncommittal terms.

proponents,²⁷³ are notorious for their vagueness and obscurity²⁷⁴—part of the reason why scholars have questioned the dominance of the notice-and-consent model in U.S. privacy law.²⁷⁵ Scholars who, despite reservations, still see a role for privacy policies, do so while pressing for complementary regulations such as industry-wide standard practices to mitigate information overload and other burdens of privacy self-management as well as substantive regulations outlawing unacceptable practices.²⁷⁶ However, the latter is what the program of policing platforms’ own pledges sets out to avoid. Meanwhile, the former would actually be contrary to what proponents hope for speech—more diversity, less profit-dominated public debate.²⁷⁷ As such, it would certainly not rein in platform power.

Even if regulators were to enforce platforms’ own publicly espoused commitments against them, adjudicating important issues and cases for social media governance often requires adjudicating between different interpretations of platforms’ content policies. Making a determination about which interpretation should prevail will require judgment about “different values and priorities”—even if those are drawn only from what can be inferred from the content policies themselves—but the *Moody* guidance declares such judgments out of bounds for regulators.²⁷⁸ To the extent that regulators could dodge engaging in such judgment by limiting their determinations to impermissible interpretations of content policies—for instance, hewing close to unfair and deceptive acts or practices standards²⁷⁹—they would, by the same measure, renounce aspirations of checking platform power. Companies would be left

273. See *id.*

274. See Joel R. Reidenberg, Jaspreet Bhatia, Travis D. Breaux & Thomas B. Norton, *Ambiguity in Privacy Policies and the Impact of Regulation*, 45 J. LEGAL STUD. S163, passim (2016); Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1899 (2013); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1471 (2019).

275. See Solon Barocas & Helen Nissenbaum, *Big Data’s End Run Around Anonymity and Consent*, in PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT 58–59 (Julia Lane, Victoria Stodden, Stefan Bender, & Helen Nissenbaum eds., 2014) (arguing that consent would be inadequate even if policies were written in clear and accessible language); Cf. Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 598–99 (2021) (summarizing criticism of notice-and-consent); Ari Ezra Waldman, *Privacy, Practice, and Performance*, 110 CALIF. L. REV. 1221, 1226 (2022) (referring to privacy policies as “performative”).

276. See, e.g., Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 672–74 (2014); Daniel J. Solove, *The Limitations of Privacy Rights*, 98 NOTRE DAME L. REV. 975, 994–1001 (2023).

277. Cf. Balkin, *supra* note 39, at 234.

278. Cf. *Moody v. NetChoice, LLC*, 603 U.S. 707, 743 (2024) (“Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose.” (emphasis added)).

279. As Douek, *supra* note 80, at 605, suggests.

calling the shots both in what the content policies should be and how they are to be applied in controversial cases or questions.²⁸⁰

This alternative program for platform responsibility is no small concession. Its acceptance of the prerogatives of the new governors is a capitulation of the goal of reining in platform power. It instead seeks something much less ambitious: making the exercise of authority non-arbitrary. This might be a justified move were it the only avenue open for regulation. But, as this Article shows, it is not.

This is not to say that platform responsibility has nothing to offer. On the contrary, Douek, the most sophisticated proponent of responsibility, makes institutional design recommendations that are beautifully ingenious.²⁸¹ If attached to a framework that challenges platform power, these recommendations could be an effective toolbox for implementation and enforcement.

IV.

COUNTERVAILING PLATFORM POWER

Taken together as the principal reform alternatives, the two projects present social media governance as a dilemma: either resign ourselves to platform rule of the public sphere with platform responsibility or live with ungovernable digital spaces with platform neutrality. This Article argues that this is a false choice. A structural constitutional response points to a third path: disciplining power by dividing and counterbalancing it.²⁸² Platform responsibility correctly concludes that governance will not arise out of individual user rights. It doesn't follow, however, that it cannot emerge out of user entitlements *at all*—the rejection of individual rights says nothing about *collective* power over governance ordering.²⁸³

280. While courts often do not reach state statutory unfair or deceptive acts or practices claims because of CDA preemption, when they do, they have deemed platforms' commitments unlikely to deceive members of the public. *See, e.g.*, *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020) (failure to state a false advertising claim under Lanham Act); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 274 Cal. Rptr. 3d 360, 382 (2021) (failure to state a claim under California's Unfair Competition Law); *Trump v. Twitter Inc.*, 602 F. Supp. 3d 1213, 1227 (N.D. Cal. 2022), *appeal filed*, No. 22-15961 (9th Cir. June 28, 2022) (failure to state a claim under California's Unfair Competition Law or Florida Deceptive and Unfair Trade Practices).

281. *See* Douek, *supra* note 80, at 584–606. Note also that the proposed requirements for disclosure of contacts with decision-makers and retention and provision of data are not just about verified accountability of platform pledges and not subject to the objections raised here.

282. *Cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450 (1987) (“As with separation of powers, federalism enabled the American People to conquer government power by dividing it.”). *See* Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991); THE FEDERALIST NO. 51, *supra* note 13, at 322–23 (James Madison) (arguing “auxiliary precautions” are needed in human government and advancing divisions and subdivisions of power through federalism and separation of powers).

283. *Cf.* Viljoen, *supra* note 275, at 638 (“Reconceptualizing the project of data governance from that of securing individual rights to institutionalizing collective ordering . . .”).

This Part makes the argument for user countervailing power. It considers the good, the bad, and the ugly of communities and argues that collective user empowerment, without idealization, can offer a shield against the worst of governance while counteracting the political power that platforms have amassed. This Part also briefly considers public options as another strategy within the broader family of countervailing power. Lastly, the Part returns to constitutional structure. It reviews competition-promoting reforms and claims that organizing user power creates the conditions necessary for reforms such as platform unbundling to meaningfully disperse concentration of power over social media.

A. *In Defense of User Countervailing Power*

Dividing and balancing power has been referred to as “the central organizing principle of the structural constitution.”²⁸⁴ Scholars have long documented the limits of this classic strategy of power diffusion among government institutions.²⁸⁵ Such diffusion does little to prevent the danger and corruption of concentrated economic power, especially if it incapacitates the state.²⁸⁶ Levinson has called for extending the idea of power diffusion beyond government institutions.²⁸⁷ One avenue down this path seeks to “rebalanc[e] power in the direction of political equality” by enabling collective organization to serve as countervailing power.²⁸⁸ For instance, theorists envision the reinvigoration of labor unions and the creation of other like mass-membership collectives, such as tenants’ and debtors’ associations.²⁸⁹

This Article’s approach is to counteract platform power by organizing collective user power.²⁹⁰ This path offers a source of private decision-making that is consistent with the independence of public opinion that the First Amendment assumes and seeks to protect.²⁹¹ Users are in a position to discuss,

284. Levinson, *supra* note 14, at 33.

285. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329–30 (2005).

286. Cf. Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 422 (2015).

287. Cf. Levinson, *supra* note 14, at 139–40.

288. Andrias & Sachs, *supra* note 15, at 575.

289. Cf. *id.* at 604.

290. Andrias and Sachs develop “legal interventions . . . with the . . . goal of rebalancing political power in the direction of political equality,” Andrias & Sachs, *id.* at 575. That is the goal of the project advanced in this Article; the proposal hopes to establish mass-membership-like organization through collective user governance. But the project does not directly aim to address wealth inequalities, which Andrias and Sachs emphasize, *id.* at 555. It is still a counter-hegemonic framework that aims to counteract concentrated political power, *see supra* Part II.C, by providing organizational capacity for the many, who are disempowered, against the few. *See* Samuel Ely Bagg, *THE DISPERSION OF POWER: A CRITICAL REALIST THEORY OF DEMOCRACY* 133 (2024), <https://doi.org/10.1093/oso/9780192848826.001.0001> (defining countervailing power as counter-hegemonic).

291. Cf. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 626–46 (1990). *See supra* Part III.A.2, notes 165–170 and accompanying text.

develop, contest, and uphold social norms to structure their discourse and spaces. Countervailing power allows public discourse to be structured, which neutrality would deprive users of.²⁹² It does so without dependence on responsibility's false promises of legalistic control. Responsibility seeks to induce platforms to align with user interests in their exercise of power and "accepts that there will be an irreducible zone of discretion for platforms to decide."²⁹³ In contrast, countervailing power has a different ambition: it offers to change *who* makes the decisions, not just how.²⁹⁴ It allows for what, in public law terms, may be described as the rightful exercise of discretion: decisions about the lawful speech of others that *are political* in a good sense, because they are made by those who will be subject to them.²⁹⁵

Users are well-positioned for the devolution of platform power, as they are subject to platform governance and therefore have lived experience of the digital environment and its social contexts. Users don't just create content; they have created many of the features we associate with social media, which platforms later made official with native integrations. For instance, it was Twitter users, not staff, who introduced at-mentions, hashtags, and retweeting.²⁹⁶ Furthermore, user-originated design is not limited to content creation. It has extended to content moderation. AutoMod, Reddit's community moderation tool, was developed by a user as a third-party service before the same user—now hired by Reddit—integrated the tool natively into the platform.²⁹⁷

More than just being adept at extending and tweaking platforms, users also have a superior claim as policymakers for the spaces they establish. If Robert Post's account of managerial regulation of speech is correct, users are best equipped to interpret the purposes guiding their communities, discern the social norms, and elect the speech rules that will facilitate both.²⁹⁸ This contextual understanding of the value of speech helps see why content policies might be legitimate even when such policies are much more restrictive than public standards.

292. Cf. Blackhawk, *supra* note 120, at 1869 ("Decentralized power allows communities to define rights for themselves.").

293. Douek, *supra* note 135, at 155.

294. Cf. Levinson, *supra* note 14, at 141 (calling for renewed attention to "who governs").

295. Levinson, *supra* note 107, at 193 (contrasting political and legal strategies for controlling power). This distinguishes what this Article puts forward from prolific scholarship (chiefly outside of the U.S.) dedicated to "digital constitutionalism." See *supra* notes 124–129 and accompanying text.

296. See Jean Burgess & Nancy K. Baym, *TWITTER: A BIOGRAPHY* 39–40, 61–62, 83–84 (2020).

297. Lucas Wright, *Automated Platform Governance Through Visibility and Scale: On the Transformational Power of Automoderator*, SOC. MEDIA + SOC'Y, Feb. 15, 2022.

298. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 CONST. DOMAINS 1713, 1784–85 (1987) (contrasting First Amendment applicable to the governance of public discourse and managerial domains); Robert C. Post, *The Unfortunate Consequences of a Misguided Free Speech Principle*, 153 DAEDALUS 135, 140–41 (2024) (applying framework to social regulation of speech and arguing that principles that govern public discourse must not be assumed to govern other social contexts).

Yet, to endorse a collective-user approach to countervailing platform power, it is important to recognize also that user governance has its problems. Community administrators and moderators may be arbitrary or even corrupt.²⁹⁹ The basic form of user governance is also typically not one premised on equal political power.³⁰⁰ These weaknesses of user governance notwithstanding, there is good reason to believe the diffusion of the amassed platform power should take priority.³⁰¹ Their tremendous power is “the central problem with the operation of the digital public sphere today.”³⁰²

Crucially, devolving power to users does not require “relying on the self-interested motivations of online communities to stem . . . dangerous content flows *that appeal to those same communities*”³⁰³ Some communities might be founded upon frankly antisocial, harmful, or even criminal goals.³⁰⁴ The prototype of platform federalism outlined below provides governance structures that deliberately account for this problem.³⁰⁵

B. The Complementary Path of Public Options

Public provisioning of social media services, sometimes offered under the public utility heading,³⁰⁶ is another path to countervailing platform power.³⁰⁷ K. Sabeel Rahman contemplates “a basic, ‘plain vanilla’ public option”;³⁰⁸ Ethan Zuckerman is ambitious about the civic innovation this could induce.³⁰⁹ Public options counter private platform power just as public parks create opportunities for speech that are not dependent on holding private real estate.³¹⁰ Yet, as with public parks and private real estate, property holders might control the spaces

299. James Grimmelman, *The Virtues of Moderation*, 17 YALE J. L. & TECH. 42, 96 (2015).

300. See Nathan Schneider, *Admins, Mods, and Benevolent Dictators for Life: The Implicit Feudalism of Online Communities*, 24 NEW MEDIA & SOC’Y 1965, 1977, 1981 (2022) (asserting implicit feudalism and calling platform designers to be “more intentional if they want democracy to arise in the communities they support.”). Schneider’s finding of implicit feudalism may also be read as a function not just of the lack of investment in structuring community governance, but a deliberate decision by platform designers to woo community administrators with the material and symbolic dividends that despotic power might offer. Cf. Grimmelman, *supra* note 299, at 96 (noting practice of moderators taking bribes to promote content).

301. See *supra* Part II.C.

302. Lakier, *supra* note 101, at 192.

303. Cohen, *supra* note 24, at 38.

304. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 75 (2009) (describing a group devoted to “terrorizing and silencing hundreds of women” that gathered on 4chan).

305. See *infra* Part V.B.4.

306. K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234, 249 (2018).

307. Cf. Ethan Zuckerman, KNIGHT FIRST AMEND. INST., COLUMBIA UNIV., THE CASE FOR DIGITAL PUBLIC INFRASTRUCTURE (2020), <https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure>.

308. Rahman, *supra* note 306, at 249.

309. Cf. Zuckerman, *supra* note 307, at 33–35.

310. Cf. J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 402.

where people actually congregate,³¹¹ thus warranting other approaches. This is what countervailing platform power through collectively empowering users offers. But these avenues are not in contradiction.

C. Passing Power Without Structures? Platform Interoperability and Unbundling

Other scholars and would-be reformers have emphasized the role of antitrust and other competition-based remedies.³¹² Some proposals focus on stronger antitrust enforcement and doctrinal revision to break up platforms or subject acquisition to heightened merger review.³¹³ Meanwhile, other proposals emphasize bringing competition into platforms' walled gardens instead. This competition could be introduced through horizontal or vertical interoperability.³¹⁴ Such avenues are also presented in terms of countervailing power.

Horizontal interoperability (often simply "interoperability") applies to different platforms. For instance, Instagram is interoperable with Facebook and Threads, but not with TikTok. Vertical interoperability, meanwhile, is within the platform. Other terms include middleware and unbundling.

Platform unbundling would allow users to benefit from their extensive social networks present on dominant platforms such as Facebook without permitting concentrated power over the public sphere. Reformers would thus disaggregate platform functions: crucially, content hosting would be unbundled from curation and moderation—the "editorial layer"—and would instead be done by middleware.³¹⁵ Where today users have only the options created by the platform itself, middleware would allow third-party providers to offer options to users. This proposed reform also seeks to empower users,³¹⁶ but it pursues that

311. Cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (upholding state constitutional law access mandate applied against a shopping mall).

312. See Balkin, *supra* note 39, at 246 (adopting a broader notion of competition law, "includ[ing] new laws and administrative regulations that seek to regulate industry structure").

313. See Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 119–26 (2018); Amy Klobuchar, *Profit over People: How to Make Big Tech Work for Americans*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 309–11 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

314. See Przemysław Palka, *The World of Fifty (Interoperable) Facebooks*, 51 SETON HALL L. REV. 1193, 1229 (2020) (defining horizontal and vertical interoperability); Hovenkamp, *supra* note 22, at 2020–38.

315. FRANCIS FUKUYAMA, BARAK RICHMAN, ASHISH GOEL, ROBERTA R. KATZ, DOUGLAS MELAMED & MARIETJE SCHAAKE, CYBER POL'Y CTR. & CTR. ON PHILANTHROPY & CIV. SOC'Y, STANFORD UNIV., REPORT OF THE WORKING GROUP ON PLATFORM SCALE 30 (2020), https://pacscenter.stanford.edu/wp-content/uploads/2020/11/platform_scale_whitepaper_-cpc-pacs.pdf.

316. See LUKE HOGG & RENÉE DiRESTA, FOUND. FOR AM. INNOVATION & TECH & PUB. POL'Y AT MCCOURT SCH. OF PUB. POL'Y, GEORGETOWN UNIV., SHAPING THE FUTURE OF SOCIAL MEDIA WITH MIDDLEWARE 11 (2024), <https://www.thefai.org/posts/shaping-the-future-of-social-media-with-middleware>.

by creating a marketplace, “stimulating the creation of a competitive layer of companies offering middleware products.”³¹⁷

In other words, “[m]iddleware pushes control from a platform towards its users, specifically towards users as listeners.”³¹⁸ As imagined by Francis Fukuyama and other proponents, however, the control that users exert with middleware is consumer choice. One immediate concern with this strategy is the risk of reconsolidation.³¹⁹ Indeed, a world where platforms are circumscribed to hosting “would look much more like web search already does,” with Google commanding a dominant share.³²⁰ According to some scholars, structural separation as an antitrust remedy could prevent reconsolidation on a platform-provided service.³²¹

A more dispersed market might indeed lower the stakes of the decisions taken by each middleware provider, and more options favor pluralism in the digital public sphere.³²² But the product differentiation it could offer might still supply options shaped by the same broad economic forces that exist today. This is particularly likely to be the case if middleware providers are ad-supported or share advertising revenue with hosting platforms.³²³ This is a familiar argument in media law scholarship. C.E. Baker argued that “[t]he market cannot be expected to provide the audience what it wants” and thus advocated for public subsidies as well as “rules relating to the distribution of decision-making power” within media firms.³²⁴ The collective user empowerment this Article seeks comes under the latter heading; public options in social media, discussed above, are an example of the former.

Even if a more dispersed market lowered the stakes and diversified options, middleware still aggregates individual users’ choices. Users might not be inclined or informed to make the decisions that effectuate the dispersal of power

317. FUKUYAMA, RICHMAN, GOEL, KATZ, MELAMED, & SCHAAKE, *supra* note 315, at 30; see Ethan Zuckerman & Isaac Brickman, *Improving Social Media with Middleware*, 715 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 101 (2024) (“[M]iddleware is a market-based solution . . .”); but see Caleb Malchik & Joan Feigenbaum, *Toward User Control over Information Access: A Sociotechnical Approach*, 2022 PROC. NEW SEC. PARADIGMS WORKSHOP 117, 127 (proposing member-funded data co-ops for a client-side discovery tool).

318. Grimmelmann, *supra* note 157, at 1281 (emphasis omitted).

319. See Madhavi Singh, *Reimagining Social Media Through Middleware: A Structural Path to Competition and User Agency*, 26 N.C. J. L. & TECH. 459, 493 (2025).

320. Grimmelmann, *supra* note 157, at 1280.

321. See Singh, *supra* note 319, at 493–94; see also Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1084 (2019) (discussing structural separation for the digital economy more generally).

322. Cf. Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. 119, 157 (2023) (arguing that pluralistic markets reduce the stakes of any one moderation decision, because actors that retain only minimal influence over the digital public sphere become less systemically relevant); Dvoskin, *supra* note 195, at 1374 (arguing for “structural separation between platforms and recommendation systems [as] a means to encourage pluralism and contestation”).

323. Cf. HOGG & DIRESTA, *supra* note 316, at 23, <https://www.thefai.org/posts/shaping-the-future-of-social-media-with-middleware>.

324. Baker, *supra* note 84, at 411.

that platform unbundling is designed to do. Much of what plagues privacy self-management may also plague middleware.³²⁵ Likewise, just as individual decision-making in privacy cannot account for the horizontal relations, individual decision-making for middleware also cannot provide collective ordering.³²⁶ This suggests there should exist a mode of governance that is befitting of the social interests involved.³²⁷

Levinson's notion of pass-through power brings the hydraulics into view. Diffusion of government power to institutions does not end there, he observes, but often passes through them to the organized interests that effectively govern, such as political parties. If policy preferences are established outside state structures, institutions are doers, but not deciders.³²⁸ If applied to platform governance, the question becomes: do users decide?

If platform-set defaults prevail, then power passes through users back to the new governors in setting policy.³²⁹ If that were not the case, because of a structural separation mandate,³³⁰ for instance, or even because a middleware provider successfully conquers the market, then the risk is that power will pass through users to some other new governors, re-entrenching platform power.³³¹

Pass-through power shows that increased competition might not produce the pluralism that scholars predict.³³² If platforms compete for a pulverized market share but share a single set of policies, the concentration of political power over the public sphere will be reintroduced at the hands of the policies' author. A lighter version of this has worried commentators, who were concerned with the prospect of Meta's Oversight Board expanding to other platforms long before the entity established its European offshoot as a DSA out-of-court settlement body.³³³

None of this means that more competition, interoperability, or unbundling is undesirable. And it does not suggest that antitrust enforcement or industry-

325. See Solove, *supra* note 274, at 1888 (summarizing cognitive problems).

326. See Viljoen, *supra* note 275, at 578 (arguing that individualized mechanisms cannot respond to population-level implications of data processing).

327. See Viljoen, *id.* at 639 ("That data is relational (and gives rise to irreducibly social interests) implies that data should thus be governed democratically").

328. Levinson, *supra* note 14, at 84–85.

329. See *supra* notes 56–59 and accompanying text.

330. See Dvoskin, *supra* note 195, at 1373 (calling for a structural separation between platforms and recommender systems).

331. See Olivier Sylvain, *Middleware and the Illusory Promise of End-User Control*, 715 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 92 (2024) (presaging re-entrenchment).

332. See Guggenberger, *supra* note 322, at 157; Jack M. Balkin, *Moody v. NetChoice: The Supreme Court Meets the Free Speech Triangle*, 2024 SUP. CT. REV. 127, 150 (2025).

333. See Thomas E. Kadri, *Juridical Discourse for Platforms*, 136 HARV. L. REV. F. 163, 197 (2022); Tim Bernard, *Oversight Board Trust Launches EU Out-of-Court Dispute Settlement Service*, (Oct. 10, 2024), <https://techpolicy.press/oversight-board-launches-eu-outofcourt-dispute-settlement-service> (last visited Apr. 17, 2026).

specific remedies stand in opposition to countervailing power.³³⁴ Rather, the discussion should make clear that empowering users requires attention to the decision-making structures through which users exercise power. Section 230 itself offers an example of what happens when attempts to put users in charge ultimately neglect structures. Although legislators had high hopes for user control—having written those aspirations into law—they were frustrated, and the envisioned user control instead of gave way to the amassment of power by the new governors.³³⁵

The next Part offers a prototype that organizes and structures user countervailing power. The collective perspective it inaugurates alleviates many of the problems posed by self-management and provides the form of governance that commentators have called for in the parallel domain of data privacy.³³⁶

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The main projects for responding to platform power overlook a fundamental strategy in the public law repertoire: fight power with power. This Article offers collective user organizing as a means of countervailing platform power. This Part has laid the foundation and situated this move; the next Part explains how this reorganization of power finds support in First Amendment doctrine. Finally, the final Part will offer the Article's prototype: platform federalism.

V.

ORGANIZING FOR PLATFORM POWER

This Part offers a prototype for countervailing platform power through organizing user power. It provides a mechanism that diffuses platform authority so that users can collectively solve the predicament while protecting the independence of the public sphere. This prototype assumes platforms that are at least in part organized through user communities. This model might be modified for algorithmically based platforms such as TikTok and creator-based platforms like YouTube.³³⁷ Starting with platforms that include a community component helps visualize the countervailing power approach. Such platforms present the clearest case for borrowing a page from the structural constitution playbook: federalism.³³⁸

334. Cf. Palka, *supra* note 314, at 1231–35 (explicating that regulation and competition can be complements).

335. See *supra* notes 30–33 and accompanying text.

336. See *supra* notes 326–328 and accompanying text.

337. See *infra* Part V.E.

338. Two excellent pieces engage federalism in platform governance. Abiri and Guidi use the frame for a different purpose: to reaffirm national content standards. Cf. Gilad Abiri & Sebastián Guidi, *The Platform Federation*, 26 YALE J. L. & TECH. 240 (2024). Kadri's critique of juridical discourse around Meta's Oversight Board ends with a call for platform federalism that mainly coordinates across platforms (inter-platform), but his account is consistent with intra-platform federalism and thus with the proposal here, which is informed by it. Cf. Kadri, *supra* note 333, at 197–203.

This discussion begins with an outline of the prototype. Though the framework draws on constitutional law principles, it makes no claim to popular sovereignty; users are not the people. Platform federalism does not seek to displace the people's authority to regulate. Instead, it serves as a promising avenue for the more egalitarian governance of the online public sphere, a way out of the predicament presented by neutrality and responsibility. This Part first introduces platform federalism in action. It then addresses how to institute it in community-based social media, before briefly considering how the prototype might be adapted to other types of platforms. In the last Section, it discusses how regulation might propel platforms to enter into a bargain with users.

A. A Prototype: Platform Federalism

Platform federalism would divide governance into two levels roughly along the lines of federal and state levels of government in constitutional systems: platform and community. This allows for as many platform compacts—the platform equivalent of constitutions—as there are platforms. Different platforms and their communities could plausibly come to different arrangements.³³⁹

As in federal systems, platforms themselves would wield some authority. This distinguishes this prototype for countervailing platform power from decentralized social media initiatives such as those collectively known as the Fediverse.³⁴⁰ The Fediverse refers to a network of federated servers that can communicate with each other using open protocols like ActivityPub. Users on different servers can interact with each other as if they were on the same platform. Popular Fediverse services include Mastodon, Pleroma, and PeerTube. Under the framework adopted here, despite its name, the Fediverse is better understood as a confederation rather than a federation. It lacks a central authority with demarcated powers, capable of supporting the whole system and enforcing a platform compact against renegade communities—capabilities that platform federalism explicitly provides. Ostrom argues that confederations historically proved unstable precisely because they lacked sufficient central authority to maintain system-wide coherence.³⁴¹ For decentralized social media, this means that ActivityPub instances are disempowered to act collectively to address a renegade community, even when it violates the covenant that binds them.³⁴² Moreover, where decentralized social media faces operational challenges in

339. Cf. Kadri, *supra* note 333, at 199 (“[W]e might conceive of many possible regulations and regulators”).

340. See Alan Z. Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. FREE SPEECH L. 217, 222–26 (2023).

341. See VINCENT OSTROM, *THE MEANING OF AMERICAN FEDERALISM* 7 (1991).

342. See Robert W. Gehl & Diana Zulli, *The Digital Covenant: Non-Centralized Platform Governance on the Mastodon Social Network*, 26 INFO., COMM’N & SOC’Y 3275, 3288 (2022).

content moderation, federalism also allows for the pooling of resources and economies of scale in governance.³⁴³

Platform federalism, however, aspires to have platform authority well demarcated and, to the largest extent possible, remove from platforms the discretionary judgment about what is or is not valuable content. Because platform federalism appreciates that there is political power in both electing values and specifying how those values apply to fact patterns,³⁴⁴ the goal is instead for platforms to make more limited determinations on specified categories of content, rather than deciding for themselves—even if they reference broad statements of principles and values as some platforms currently do.

1. *Constitutionalism Without the People?*

Two important caveats should be noted about the aims and agenda of platform federalism. First, the goal is not to offer a perfect solution to all problems in platform governance. Second, while it draws on federalism and constitutional law principles, the proposal does not claim popular sovereignty.

The first caveat is that this proposal will not “solve all content moderation problems for all time.”³⁴⁵ Platform federalism is not an imagined utopia where each community lives by its own rules and conflict disappears. In fact, an important premise underlying this model is that platform governance *cannot* be solved anymore than politics can be solved. There will be disagreement about not only the “substantive norms that govern online speech,”³⁴⁶ but also the institutional delineations of how to settle them. Rather, the ambition is that such disputes will occur on firmer institutional ground and a more politically meaningful, democratic basis.

The second caveat is that transplanting the public law of a particular jurisdiction or theoretical frameworks proposed by scholars would clearly not work. Platforms are clearly not governments and so important assumptions underlying such systems would not apply. Perhaps most crucially, while state and federal power might be structured differently, both are supposed to embody and enact self-government and popular sovereignty.³⁴⁷ Thus, “the Government of the Union is . . . a Government of the people.”³⁴⁸ To the extent that user communities can be said to be self-governing as a reflection of communities’

343. See Yoel Roth & Samantha Lai, *Securing Federated Platforms: Collective Risks and Responses*, 2 J. ONLINE TRUST & SAFETY art. no. 171, 12 (Feb. 2024) (noting resource and other constraints).

344. See *supra* notes 87–91, 279–281 and accompanying text.

345. Douek, *supra* note 80, at 533.

346. *Id.*

347. See FEDERALIST NO. 46, *supra* note 13, at 294 (James Madison) (“The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers.”).

348. *McCulloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

practices and organization, the same will not be true of platforms, which are incorporated businesses—typically Delaware corporations whose loyalties lie with shareholder welfare.³⁴⁹

In this way, the proposal diverges from the constitutionalist model for federalism, which will require adjustments and suggest limitations. But that feature of platform federalism does not make it untenable as a federal model, as one objection might hold. Indeed, while embraced by constitutionalism, federalism has a tradition that predates it and under which different levels of government drew from separate, often conflicting sources of power.³⁵⁰

A related objection would insist that structural constitutional law is entirely inapposite to the regulation and governance of a corporation. This, however, overlooks that corporate charters are part of the history of modern constitutions.³⁵¹ Indeed, this corporate origin helps understand the phenomenon of written constitutionalism as one of continuity.³⁵²

A more serious objection concerns the blistering criticism leveled against digital constitutionalism.³⁵³ The charge is that digital constitutionalism changes nothing of worth and coats platform rule with a discursive patina of legitimacy.³⁵⁴ This is a concern that must be addressed. The goal of this Article, however, is to transform the structures of platform power, precisely what the critics have faulted in digital constitutionalism. Still, critics are right to take exception with the democratic legitimacy that “constitutionalism” implies.³⁵⁵

2. Regulation Coexists with Devolving Platform Power to Users

Platform federalism therefore must disclaim popular sovereignty. Another phrase for the two parts of the constitution is “rights and votes,”³⁵⁶ which evokes

349. See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 503 (2019); Abby Lemert, *Facebook’s Corporate Law Paradox*, 17 VA. L. & BUSINESS REV. 43, 78–79 (2022).

350. In fact, the contribution of U.S. federalism is precisely in “integrat[ing] both federal and representational principles into a single model of republican governance.” Heinz Eulau, *Polarity in Representational Federalism: A Neglected Theme of Political Theory*, 3 PUBLIUS 153, 163 (1973). See DANIEL J. ELAZAR, EXPLORING FEDERALISM 124–25 (1987) (discussing pre-modern federal experiences); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 854–57 (2020) (surveying the international law origins of federalism as part of states’ right, under the law of nations, to enter treaties as a reflection of their equal sovereignties).

351. See Amar, *supra* note 282, at 1432–37 (describing how corporate charters of corporations were part of the colonial experience that paved the way to the Revolution).

352. Nikolas Bowie, *Why the Constitution Was Written down*, 71 STAN. L. REV. 1397, 1507 (2019) (“[T]he charter constitutionalism of the Massachusetts Bay Company anticipated the written constitutionalism of the United States”).

353. See *supra* notes 124–129 and accompanying text (discussing digital constitutionalism).

354. See Rachel Griffin, *Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability*, 14 TRANSNAT’L LEGAL THEORY 46, 75–76 (2023); Keller & Pereira, *supra* note 128, at 296.

355. See Keller & Pereira, *supra* note 128, at 299–300.

356. Levinson, *supra* note 114, at 1288.

the strong sense of legitimation that political participation and universal franchise can create.³⁵⁷ This is the reason why this Article does not call the governing document of platform federalism a constitution, but rather a compact. The question is not one of terminology, however. The substantive corollary of the limitation just described is that devolving platform power to users does not displace the *people's* power to regulate.

Users—described above as a platform Third Estate³⁵⁸—nonetheless do not represent the whole of any country's society, much less of all the communities affected by platforms. Users and their platform federations may cause harm to other federations, to other users, and to people who are not social media users at all. Addressing this risk remains the province of legislation. This might well include targeted neutrality and responsibility frameworks.

For instance, as mentioned before, platform responsibility might work well for regulatory goals that are within reach under the First Amendment. An example is regulation creating a prevalence-metrics compliance mechanism for child sexual abuse material (CSAM).³⁵⁹ Where the responsibility project fails is in its aspiration to tame platform power through indirect mechanisms that claim to avoid constitutional limitations on speech regulation.

B. Platform Federalism in Practice

An approximation of platform federalism in practical terms is Reddit. Its multi-level governance has been compared to federal systems.³⁶⁰ Yet Reddit is decidedly not a federation. Unlike protocol-based social media services, Reddit's architecture does not prevent the company from overriding community decision-making or taking control over subreddits.³⁶¹ But Reddit is more akin to a decentralized unitary state because it can *unilaterally* grant and seize authority,³⁶² through code or any other means. That is exactly what it did after community administrators decided to limit access to the subreddits they manage in protest of Reddit's decision to charge for application programming interface

357. Cf. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 681–82 (2018) (reviewing RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY*) (describing popular sovereignty in terms of popular authorship and present consent).

358. See *supra* note 34 and accompanying text.

359. See *supra* note 265 and accompanying text.

360. See generally Vincent Marrazzo, *The Federalists of the Internet? What Online Platforms Can Learn from Reddit's Decentralized Content Moderation Scheme*, 2023 NEB. L. REV. BULL.; Artur Pericles L. Monteiro, *Anonymity, Identity, and Lies*, 4 J. FREE SPEECH L. 551, 567 (2023).

361. Cf. Rozenstein, *supra* note 340, at 225 (contrasting Reddit with the Fediverse, “where decentralization is a matter of *architecture*, not just policy”).

362. See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (1964) (providing classic definition of federalism in terms of constitutional entrenchment of different levels of government); cf. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (holding that a municipality does not enjoy constitutional protection from its parent state).

(API) access, disrupting third-party apps that many users favored.³⁶³ Reddit took over.³⁶⁴ Under platform federalism, that interference would be a redressable violation of the compact. Discord and Facebook Groups are other readily amenable cases.³⁶⁵

1. *Communities Are the Primary Decision-Makers*

User communities would be in charge of articulating and specifying principles and values. Communities are better positioned for those tasks. While platforms attempt to remain agnostic about goals, values, and norms³⁶⁶—and consequently rely on statements often devoid of substance³⁶⁷—communities can ground their decisions in the social purposes for which they were created.

Hence, a community of professionals is likely to adopt strict standards reflecting the decorum that its members are supposed to show. Communities around interests will often have rules about what kind of content belongs there, and what content is “off-topic.” Another community might adopt policies that are not only about upholding its own civility norms, but also about which kind of content is deemed valuable, in that environment.

Communities should have authority not only over content moderation but also over ranking and affordances. Reverse chronological ranking might be preferable for some communities, while others might choose other types of distribution.³⁶⁸ For instance, *r/ChangeMyView*, a subreddit where users post opinions specifically to invite disagreement, rewards those who engage with opposing views.³⁶⁹ Commenters are assigned “deltas” as points by the user who invited disagreement when they report a change in their opinion.³⁷⁰ That community might opt for ranking posts on the basis of deltas, prioritizing content by users who have been recognized for offering constructive criticism. Design

363. Michael Levenson, *Thousands of Reddit Communities Stay Dark as Policy Protest Continues*, N.Y. TIMES, June 23, 2023, at B3, <https://www.nytimes.com/2023/06/20/business/media/reddit-moderators-api-protest.html>.

364. Jay Peters, *Reddit Takes Over One of the Biggest Protesting Subreddits*, VERGE, July 20, 2023, <https://www.theverge.com/2023/7/20/23802370/reddit-over-reopens-subreddit-protest-male-fashion-advice>.

365. Cf. Jina Yoon, Amy X. Zhang & Joseph Seering, “It’s Great Because It’s Ran by Us”: Empowering Teen Volunteer Discord Moderators to Design Healthy and Engaging Youth-Led Online Communities, 9 PROC. ACM ON HUM.-COMPUT. INTERACTION 1 (2025); Tina Kuo, Alicia Hemani & Jens Grossklags, *The Unsung Heroes of Facebook Groups Moderation: A Case Study of Moderation Practices and Tools*, 7 PROC. ACM ON HUM.-COMPUT. INTERACTION (2023).

366. See Klonick, *supra* note 1, at n.306 (noting that Facebook standards applied globally “without differentiation along cultural or national boundaries”).

367. Evelyn Douek, *The Meta Oversight Board and the Empty Promise of Legitimacy*, HARV. J. L. & TECH., 373, 414-33 (2024) (discussing Meta’s Oversight Board’s formalistic approach).

368. NARAYANAN, *supra* note 47, at 9–12 (providing stylized description of the subscription, network, and algorithmic models of content distribution).

369. See SHAGUN JHAVER, PRANIL VORA & AMY BRUCKMAN, GEOR. INST. OF TECH., DESIGNING FOR CIVIL CONVERSATIONS: LESSONS LEARNED FROM CHANGEMYVIEW (2017).

370. See *Rules*, *r/ChangeMyView*, REDDIT (Feb. 2023), <https://www.reddit.com/r/changemyview/wiki/rules/> (last visited Feb. 27, 2023).

tweaks may also prove valuable for communities. r/AskHistorians relies on flairs, “a coloured line of text adjacent to the username,” to allow users to quickly identify those who have been privately verified as professional historians.³⁷¹

2. Which Communities?

As noted, platform federalism assumes a network at least in part constituted through user communities. On Facebook, user communities are the Facebook Groups.³⁷² On Reddit, subreddits are the user communities.³⁷³ X also has Communities,³⁷⁴ though these seem to play less of a role. “Community” here is neither a reference to the entire user base nor to a social community.

Though the model can be partially adapted to that effect,³⁷⁵ the platform federalism prototype is not designed to account for communities not constituted as user communities. This allows the prototype to maintain borders more easily, as the constituents of a community are its member users. The alternative would raise complications about who should count as a member and how communities could be represented at the federal level.

3. Enumerated Platform Powers

A platform compact would establish what action could be taken at the level of the platform, assigning it enumerated powers. Only communities can answer which powers a platform should have. Communities on different platforms are likely to develop their own versions of the enumerated “federal” powers. A basic outline can nevertheless be drawn.

Given the goal of reining in platform power, one intuitive approach would be to limit platform-level governance to moderating unlawful content. Since unlawful content is, by definition, content that no user may post and no community may host, one might think that restricting platforms to this task would neutralize their power. That would be both too much and too little, however. It would be too much because some illegal content will be better determined at the community level. For instance, defamation claims between users of the same community would be better adjudicated by members of that community. It would be too little because some policy violations that might not

371. Sarah A. Gilbert, “I Run the World’s Largest Historical Outreach Project and It’s on a Cesspool of a Website.” *Moderating a Public Scholarship Site on Reddit: A Case Study of r/AskHistorians*, 4 PROC. ACM ON HUM.-COMPUT. INTERACTION 19:1, 19:6 (2020).

372. Groups, FACEBOOK: HELP CTR., <https://www.facebook.com/help/web/1629740080681586/> (last visited Aug. 25, 2025).

373. What Are Communities or “Subreddits”?, REDDIT: HELP (Nov. 6, 2024), <https://support.reddithelp.com/hc/en-us/articles/204533569-What-are-communities-or-subreddits>.

374. Communities on X, X: HELP CTR. (Feb. 3, 2025), <https://help.x.com/en/using-x/communities>.

375. See *infra* Part V.E.

rise to the level of illegality might be better or only identified³⁷⁶ and addressed through signals that would not be available to communities. An example is policing coordinated inauthentic behavior or information operations.³⁷⁷ Tellingly, a recent study of content moderation practices and challenges in decentralized social media recommended centralizing “some critical moderation functions,” including coordinated manipulation, while noting it was a controversial suggestion among proponents of federation.³⁷⁸

Platforms can make a determination about child sexual abuse material (CSAM) without the need for additional context. But there is a separate, peremptory reason to have CSAM be adjudicated at the platform level: a platform has a statutory duty to report such content in which knowing distribution is unlawful.³⁷⁹ Platforms also have to comply with Section 512 requirements to benefit from its safe harbor from copyright claims.³⁸⁰ Liability might fall on platforms regardless of whether communities would be better situated to assess some complaints.

Platform powers over unlawful content also need not be all or nothing. For instance, to use Bamberger and Mulligan’s content moderation subfunctions,³⁸¹ platforms could be responsible for the identification of defamatory content but not for its application and resolution. Platforms could handle external notifications against defamatory content but forward them to communities for determination and appropriate action. They could also deploy classifiers to flag content and put it in a queue for verification and action by community moderators, as Reddit, Facebook, and Discord have done.³⁸²

The platform compact should also address what kind of legal content is unacceptable under platform-wide policies. Hate speech would be an example. Granted, hate speech is unprotected speech in most countries, while that is

376. Cf. Kadri, *supra* note 333, at 200–01 (discussing adapting the state federalism principle of subsidiarity in the context of social media).

377. See generally Camille François & Evelyn Douek, *The Accidental Origins, Underappreciated Limits, and Enduring Promises of Platform Transparency Reporting about Information Operations*, 1 J. ONLINE TRUST & SAFETY (2021).

378. Roth & Lai, *supra* note 343, at 21.

379. See 18 U.S.C. § 2258A (establishing reporting duties), § 2252A(a) (creating criminal offense); cf. Shelby Grossman, Riana Pfefferkorn, David Thiel, Sara Shah, Alex Stamos, Renée DiResta, John Perrino, Elena Cryst & Jeffrey Hancock, STANFORD INTERNET OBSERVATORY, THE STRENGTHS AND WEAKNESSES OF THE ONLINE CHILD SAFETY ECOSYSTEM 12–13 (2024) (describing provider duties).

380. See 17 U.S.C. § 512 (establishing hosting service providers eligibility for safe harbor); cf. U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17 23–27 (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (describing procedures).

381. See Mulligan & Bamberger, *supra* note 33, at 1122–25.

382. See *Content Moderation, Enforcement, and Appeals*, REDDIT: HELP (June 24, 2025), <https://support.reddithelp.com/hc/en-us/articles/23511059871252-Content-Moderation-Enforcement-and-Appeals>; *Review Content in Flagged by Facebook for a Group You Admin*, FACEBOOK: HELP CTR., https://www.facebook.com/help/901139650778514?locale=en_US (last visited Aug. 26, 2025); *AutoMod FAQ*, DISCORD: SUPPORT (July 3, 2025), <https://support.discord.com/hc/en-us/articles/4421269296535-AutoMod-FAQ>.

notoriously not the case in the United States. But platforms generally abide by hate speech policies that are stricter than what the law provides.³⁸³ The platform compact might provide for stricter policies in this and other domains, reflecting the communities' judgment about appropriate content.

4. *Platform Enforcement Against Community Misgovernance*

Platforms would also take action against renegade communities—that is, communities that fail to take action on content proscribed by the platform compact. The compact could establish increasing levels of intervention, such as direct platform-level content intervention, warnings for compact infringements, and temporary platform supervision after repeated infringement, suspensions, and bans. This could both curb the extent of the discretion platforms enjoy and encourage communities to police themselves to avoid federal intervention.

Platforms already adopt this strategy toward community content. Discord has discovery guidelines that establish criteria for servers to be featured when users are searching for communities.³⁸⁴ Facebook uses a Group Quality indicator to make decisions about ranking group content, requiring posts to be approved by group moderators or disabling groups.³⁸⁵ Reddit's enforcement actions against subreddits, the most well studied, are chapters in internet history; its "quarantines are . . . an opportunity for subreddit moderators to clean up their communities, to prevent their community's content from seeping into the larger platform."³⁸⁶

Comparative federalism offers other options and perspectives. For instance, community misgovernment may be addressed not just through bans, as the platforms have done, but also with alternatives that target the administrators but seek to preserve the community otherwise intact, saving its accumulated content and sparing faultless members. Federal systems like Brazil's, which generally

383. See JACOB MCHANGAMA, ABBY FANLO & NATALIE ALKIVIADOU, *THE FUTURE OF FREE SPEECH, SCOPE CREEP: AN ASSESSMENT OF 8 SOCIAL MEDIA PLATFORMS' HATE SPEECH POLICIES* (2023), https://futurefreespeech.org/wp-content/uploads/2023/07/Community-Guidelines-Report_Latest-Version_Formated-002.pdf; Tao Huang, *Mapping the Jurisprudence of the Facebook Court*, 72 BUFF. L. REV. 109, 160–62 (2024) (describing how Meta's Oversight Board has confirmed policies that do not meet international human rights law standards for punishable hate speech).

384. *Discovery Guidelines*, DISCORD: SUPPORT (July 28, 2023), <https://support.discord.com/hc/en-us/articles/4409308485271-Discovery-Guidelines>.

385. *Appeal Facebook's Decision to Disable Your Group or Remove Content, and More about Group Quality*, FACEBOOK: HELP CTR.; see also Tom Alison, *Changes to Keep Facebook Groups Safe*, META: NEWSROOM (Oct. 20, 2021), <https://about.fb.com/news/2021/03/changes-to-keep-facebook-groups-safe>.

386. Julia R. DeCook, *R/WatchRedditDie and the Politics of Reddit's Bans and Quarantines*, 6 INTERNET HISTORIES 206, 212 (2022); see Adrienne Massanari, *#Gamergate and The Fapping: How Reddit's Algorithm, Governance, and Culture Support Toxic Technocultures*, 19 NEW MEDIA & SOC'Y 329, 342–43 (2017) (describing introduction of quarantines).

proscribe union intervention on state government, still provide for federal takeover mechanisms premised on state dereliction of constitutional duties.³⁸⁷

Such actions can be fraught with error.³⁸⁸ Moreover, platforms may abuse this power to encroach on community autonomy, as Reddit did when it suspended protesting subreddits.³⁸⁹ Under platform federalism, the compact would establish the circumstances for such action and provide communities with relief mechanisms.

5. *Adjudicating Federal Disputes*

Federal systems require an adjudication mechanism for disputes about the appropriateness of the action of either level of government. Platform federalism can rely on dispute-resolution mechanisms established by the platform compact, as well as on judicial adjudication.

The compact can create a mechanism that includes platform and community representatives, or designate an existing mechanism external to the platform. For instance, Meta's Oversight Board could be tasked with adjudicating Facebook Groups disputes. The design of any dispute-resolution mechanism would require careful attention, as adjudication could help sustain and refine the compact, but it could also erode it. As with other design questions, an appropriate institutional arrangement will need to be responsive to the demands and concerns present during the bargaining process to set up the platform compact, to which the next Section turns.

At any rate, a collective perspective is helpful here as well. Commentators often note that adjudication is not a viable mechanism in platform governance, given the volume of content that could be subject to review.³⁹⁰ Platform federalism enables adjudication to play a part in platform governance by aggregating disputes around communities, which are typically a fraction of the number of active users. For instance, in 2020, Meta cited Facebook Groups figures in the order of "tens of millions," compared to 1.8 billion users active on those communities worldwide; it also stated that "more than 70 million" were involved in running groups.³⁹¹

387. See Virgílio Afonso da Silva, *THE CONSTITUTION OF BRAZIL: A CONTEXTUAL ANALYSIS* 214–15 (2019). Germany and Spain also have similar mechanisms. The German mechanism has never been used. Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 754–55 (2004). The aftermath of the 2017 Spanish federal intervention in Catalonia is still playing out. See generally Lucía Payero-López, *Assessing the Spanish State's Response to Catalan Independence: The Application of Federal Coercion*, in *FEDERALISM AND NATIONAL DIVERSITY IN THE 21ST CENTURY* (Alain-G. Gagnon & Arjun Tremblay eds., 2020).

388. See, e.g., Sarah Perez, *Facebook Group Admins Complain of Mass Bans — Meta Says It's Fixing the Problem*, TECHCRUNCH (June 24, 2025), <https://techcrunch.com/2025/06/24/facebook-group-admins-complain-of-mass-bans-meta-says-its-fixing-the-problem/>.

389. See Peters, *supra* note 364.

390. Cf. Kyle Langvardt, *Can the First Amendment Scale?*, 1 J. FREE SPEECH L. 273, 293 (2021).

391. See Fidji Simo, *Supporting Online Communities When They're Needed Most*, META: NEWSROOM (Oct. 1, 2020), <https://about.fb.com/news/2020/10/supporting-online-communities/>.

C. Creating and Amending the Compact

The discussion so far has assumed a platform compact already in operation and illustrates what multilevel governance that enables countervailing power could look like. But the making and amending of the compact are serious and complex constitutional questions for platform governance. Although federalism may provide a scaffold, this process will benefit from other strategies scholars have proposed for platform governance, such as citizens' assemblies³⁹² and platform unions.³⁹³ While a fully specified design framework is beyond the scope of this discussion, an outline will still be helpful for understanding the prototype put forward in this Article.

1. Voice: Cross-Community Deliberation

Federal systems often involve state representation in constitutional conventions³⁹⁴ and subjecting amendments to some sort of state approval (for example, ratification).³⁹⁵ But platforms typically allow users to be members of more than one community, complicating community representation. Assigning each community one or more representatives would also create incentives for manipulating results by artificially changing the number of communities or users. Platform federalism may instead rely on citizens' assemblies to create and amend the compact.³⁹⁶

Assemblies could, in theory, be structured to reflect community representation—for example, by apportioning participation according to the number of active users in each community. But it may be more appropriate to organize them in a way that reflects platform-wide user demographics instead. Although this is a departure from how state federalism operates, it does not detract from the overall project—which is based not on the idea of community consent. Rather, it advances a framework to diffuse platform power and empower users.

392. AVIV OVADYA, BELFER CTR. FOR SCI. & INT'L AFFAIRS, HARVARD KENNEDY SCH., *TOWARDS PLATFORM DEMOCRACY: POLICYMAKING BEYOND CORPORATE CEOs AND PARTISAN PRESSURE* (2021), <https://www.belfercenter.org/publication/towards-platform-democracy-policy-making-beyond-corporate-ceos-and-partisan-pressure>.

393. See generally Charlotte Garden, *Platform Unions*, 108 MINN. L. REV. 2013 (2024).

394. Cf. RIKER, *supra* note 362, at 12 (positing that a federal bargain between parties is the essence of federalism).

395. Cf. RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 161–62 (3d ed. 2008).

396. See Ovadya, *supra* note 392. Meta has announced it has run three such assemblies, which it calls Community Forums, in partnership with Stanford's Deliberative Democracy Lab. See Jennifer Broxmeyer, *Leading the Way in Governance Innovation with Community Forums on AI*, META: NEWSROOM (Apr. 3, 2024), <https://about.fb.com/news/2024/04/leading-the-way-in-governance-innovation-with-community-forums-on-ai/>; Samuel Chang, Estelle Ciesla, Michael Finch, James S. Fishkin, Lodewijk L. Gelauff, Ashish Goel, Ricky Hernandez Marquez, Shoaib Mohammed & Alice Siu, *DELIBERATIVE DEMOCRACY LAB, CTR. ON DEMOCRACY, DEV. & THE RULE OF L., STANFORD UNIV., META COMMUNITY FORUM: RESULTS ANALYSIS, APRIL 2024* (2024), <https://cddl.fsi.stanford.edu/publication/meta-community-forum-results-analysis>.

Platform federalism can benefit from citizens' assemblies without dwelling on grandiose aspirations for the elimination of societal conflict through deliberation, and with some mitigation against co-optation risks. An earlier fixation with citizens' assemblies and mini-publics has now given way to questioning and less ambitious proposals.³⁹⁷ Rather than supplanting politics, such mechanisms are now offered as complements to political processes that feed them high-quality insight³⁹⁸ or as narrowly administered complements to particular problems in democratic institutions.³⁹⁹ Assemblies under platform federalism are just instruments in enabling collective user organization.

2. *Platform-Users Collective Bargaining*

But there is still something missing from the constitutional parallel the Article has drawn thus far: how are platform interests represented? State *and federal* interests are typically represented in constitution-making processes.⁴⁰⁰ Mini-publics allow user communities to engage in the making and amending of the platform compact. But while constitutional convention members may speak on behalf of both state and federal interests, users cannot. So, the platform assembly is missing the platform (or federal) perspective. Yet it would be bizarre to have platform companies' representatives be a part of those spaces. A better approach would be to preserve the integrity of users' assemblies and have platforms engage in a different type of exercise with the resulting collective user demands: bargaining. Charlotte Garden's discussion of platform unions is highly informative here.⁴⁰¹

Garden's vision for collective bargaining offers important insight and is similarly grounded in countervailing power.⁴⁰² Under the model of platform unions, the object of the negotiation would be the terms of use, privacy policies, and even the content policies—the equivalents of the negotiated labor

397. Cf. Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark D. Warren, *Deliberative Democracy: An Introduction*, in THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 3–8 (André Bächtiger, John S. Dryzek, Jane J. Mansbridge, & Mark Warren eds., 2018) (discussing first- and second-generation deliberative democracy proposals).

398. See CRISTINA LAFONT, *DEMOCRACY WITHOUT SHORTCUTS: A PARTICIPATORY CONCEPTION OF DELIBERATIVE DEMOCRACY* 135–36 (2019).

399. See generally Samuel Bagg, *Sortition as Anti-corruption: Popular Oversight Against Elite Capture*, 68 AM. J. POL. SCI. 93 (2024); see also Nicole Curato & Marit Böker, *Linking Mini-Publics to the Deliberative System: A Research Agenda*, 49 POL'Y SCIS. 173, 186–87 (2016) (arguing mini-publics may have a role in a systemic understanding of democratic deliberation).

400. Cf. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 378–79 (1995).

401. Garden, *supra* note 393 (drawing on labor unions to propose user collective bargaining in platform regulation); see also Sari Mazzurco, *Democratizing Platform Privacy*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 792 (2021) (proposing an industrial democracy framework for users to counteract platform hegemony over processing of personal information).

402. See Garden, *supra* note 393, at 2061 (“[P]latform users are individually powerless to influence their treatment by platforms—but collectively powerful.”).

contract.⁴⁰³ Yet much authority lies in the judgment of how the policies apply.⁴⁰⁴ And such documents would require frequent revisions, sometimes because of emerging events that require a response, possibly outside of the timeline of protracted contract negotiations. Platform federalism provides a structure that allows users not just to set user-platform exchange terms but also to become governors themselves.

3. *Exit: Collective Data Portability*

Collective organization endows users with institutional structures they currently lack. This allows users to come to their own decisions and solve coordination problems that are currently solved by platforms, thereby amassing political power. It provides them with mechanisms to take the seat of the “new governors.” It also allows users to bargain with platforms about what kind of services they want and on what terms. This latter aspect stands for “voice” in Albert Hirschman’s terms, which Jack Balkin articulated for platform governance.⁴⁰⁵ Where Balkin discusses end-users’ individual choices, countervailing platform power gives them collective voice and exit options.⁴⁰⁶

Collective organization bolsters users’ voice and “other sources of power” that users may muster, such as “strikes, consumer boycotts, and the like.”⁴⁰⁷ Reddit’s API protests are one example of a collective exercise of user voice that platform federalism would protect.⁴⁰⁸

Exit is trickier. The limitations of individual exit are made evident in the Twitter diaspora after its acquisition. Each user is disincentivized from leaving the platform and missing out on its (diminished) utility until a critical mass leaves. That is a challenge known to plague individual rights to data portability: it requires “many individuals . . . to act in lockstep.”⁴⁰⁹ This raises a clear coordination problem.⁴¹⁰ Users may scatter across platforms. Users with high followings stand to lose what they might have taken years to build. And yet a model that allows such users to take their audiences with them has complications. One important question is privacy: when a user exits to another platform, that user’s individual choice seems insufficient to allow them to take their followers’

403. Cf. *id.* at 2062.

404. See *supra* Part III.B.3.

405. See Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 UC DAVIS L. REV. 1149, 1199–200 (2018) (citing ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1972)).

406. Hirschman himself touched on collective action as impeding voice and noted that “institutions can be designed in such a way that the cost of individual and collective action would be decreased.” HIRSCHMAN, *supra* note 405, at 41–42.

407. Garden, *supra* note 393, at 2095.

408. See Levenson, *supra* note 363; Peters, *supra* note 364.

409. VIKTOR MAYER-SCHÖNBERGER & THOMAS RAMGE, *ACCESS RULES* 120 (2022).

410. See Solon Barocas & Karen Levy, *Privacy Dependencies*, 95 WASH. L. REV. 555, 565–66 (2020).

data with them. The tragedy then is that the more restricted data portability is, the less plausible Hirschman's exit becomes.

Under platform federalism, *collective* data portability can significantly mitigate coordination problems.⁴¹¹ Communities can deliberate about exit options and avoid a pulverized diaspora. Collective decision-making also helps address privacy concerns. For example, consider a Twitter user who chose to leave for Bluesky having their data ported to Gab because of a single contact on their network. If communities make this decision, there is more reason to think they will be aligned with what community members want, and members could still opt out without making the whole project of portability infeasible. Compare that with what taking user rights seriously in portability entails from an entirely individual perspective: Users could have an on-off toggle for *any* portability, which leaves them vulnerable to Bluesky-Gab situations like the one just described. If users are instead to opt in to each instance of portability, they will face the same decision fatigue that plagues cookie consent banners.

Collective decision-making is crucial to the platform federalism bargain because it makes the option of exit credible. It helps users assert some leverage in their negotiations with platforms. Even if the entire user base does not leave the platform—an act requiring a degree of coordination that is unlikely, except in the most extraordinary circumstances—communities may still coalesce into meso-level groupings that do. This perspective also illuminates an important mechanism for addressing irreconcilable differences across communities. For instance, if a community is responsible for considerable, asymmetrical costs to platform operation, threatening the equilibrium set by the compact, other communities may vote to remove it. The evicted community and its members could still find another platform.

D. Striking the Platform Federalism Bargain

There is no uniform compact for platform federalism. Different communities and platforms are likely to reach different bargains and hence different compacts. The important issues for both users and platforms will vary. This Section nonetheless addresses some feasibility objections and briefly discusses what may be expected in the negotiation process.

1. Platforms' Interests in Content Policies and Distribution, and UX

If platforms' interests are judged by their current content regulation preferences, it may appear that any devolution of power to communities that implicates the abrogation of platforms' content policies (for example, "defederalizing" nudity policies) would constitute a concession and

411. Cf. Gabriel Nicholas, *Taking It with You: Platform Barriers to Entry and the Limits of Data Portability*, 27 MICH. TECH. L. REV. 263, 287 (2021) (defining "*collective portability*: the ability for users to easily transfer their data to another platform in its original unit and alongside other users they used it with").

hence a contested point in negotiation. It is true that some areas may indeed be more sensitive to platforms, particularly due to advertiser pressure for brand safety.⁴¹² Yet much will likely be irrelevant to platforms. In fact, it might be in platforms' interest to extricate themselves from content policies.

Put bluntly, relieving platforms of the burden of content-ranking and content-removal decisions allows them to profit without having to care about the public sphere. In fact, a version of this is what platforms have advocated for a long time. They positioned themselves as technology companies, not media companies.⁴¹³ That incorrect account was, of course, convenient.⁴¹⁴ So, a skeptic could say, is the discourse of platform federalism.

Yet the objection is overstated. First and foremost, the strategies for countervailing platform power that this Article discusses assume companies still run platform operations, which entails costs. Different proposals might indeed save platforms more or less money, for instance, by allowing them to spend less on content moderation line workers. *That* is likely to be a highly litigated negotiation point.

Second, divesting platforms of political power would also serve their interests in a different way. If companies think that involvement in politics is bad for business, then extricating themselves from the politics of content governance could be wise for business. Congress summons executives to testify about content moderation controversies. This amps up the regulatory pressure they face. Negative publicity can harm platforms too, by driving away advertisers and degrading stock prices.⁴¹⁵ If platforms could plausibly argue that the problem is out of their hands, their exposure could decrease. One might say that platforms could scapegoat users.

Changes to content distribution and user experience (UX) are more likely to implicate platforms' interests. Optimization priorities in social media recommendation systems can be much more consequential to platforms' bottom lines than policies on acceptable content. Julie Cohen contrasts platforms' content moderation pledges to their reluctance "to allow interrogation of underlying practices of optimizing for *immoderation* in the first place,"⁴¹⁶ and Jack Balkin describes content moderation as the fire department that fights content amplification's arsonists.⁴¹⁷ UX must also be considered; Arvind

412. See generally Rachel Griffin, *From Brand Safety to Suitability: Advertisers in Platform Governance*, INTERNET POL'Y REV., July 11, 2023.

413. See Balkin, *supra* note 405, at 1183.

414. See *supra* notes 157–159 and accompanying text.

415. Cf. Klonick, *supra* note 1 (noting that advertising revenue is a primary driver of content moderation decisions).

416. COHEN, *supra* note 20, at 250.

417. See Balkin, *supra* note 39, at 252.

Narayanan has argued that TikTok's success owes more to the fluidity of scrolling through short videos than to magically superior ranking algorithms.⁴¹⁸

2. *Platform Federalism's Operation Costs*

Content distribution and UX are likely to matter more to companies because they affect platform revenue. However, discharging the powers that the platform compact assigns to the platform will also create costs. Yet some arrangements could reduce them, at least in some areas.

If communities are devolved power and engage in moderation themselves, the platform side of the ledger will look better. The volunteer work of user moderators is indeed a relevant question for platforms like Reddit.⁴¹⁹ Companies could also reduce costs in other ways. If procedural justice approaches to platform governance are right,⁴²⁰ then the decision-making legitimacy that community moderation provides should help promote adherence to content policies. But there will be other areas where platform costs will not come down; one example is platform safety that requires sophisticated knowledge about global cybersecurity threat actors.⁴²¹

E. Potential Modifications

Though platform federalism assumes community organization, modifications to the model are possible. For instance, on creator-based platforms like YouTube and TikTok, creators themselves could take the place of user communities. This would bring the model closer to a traditional labor law model of bargaining.⁴²² Creators need not be expected to speak on behalf of their followers. Two options are then possible. One option is a triad format in which followers, creators, and platforms bargain, which would certainly add complexity to negotiations. Another option would be to leave followers out of the bargaining entirely and rely on platforms and creators to account for the effects on "regular users." This model offers much less in terms of countervailing power; under it, regular users have at most consumer choice. Yet it might still be worthwhile as a mechanism for diffusing platforms' concentrated political power.

418. See Arvind Narayanan, *TikTok's Secret Sauce*, KNIGHT FIRST AMEND. INST. (Dec. 15, 2022), <http://knightcolumbia.org/blog/tiktoks-secret-sauce>.

419. See generally Hanlin Li, Brent Hecht & Stevie Chancellor, *Measuring the Monetary Value of Online Volunteer Work*, 16 PROC. INT'L AAAI CONF. ON WEB & SOC. MEDIA 596 (2022).

420. See Tom Tyler, Matt Katsaros, Tracey Meares & Sudhir Venkatesh, *Social Media Governance: Can Social Media Companies Motivate Voluntary Rule Following Behavior Among Their Users?*, 17 J. EXPERIMENTAL CRIMINOLOGY 109, 112–14 (2021).

421. Cf. Camille François & Herb Lin, *The Strategic Surprise of Russian Information Operations on Social Media in 2016 in the United States: Mapping a Blind Spot*, 6 J. CYBER POL'Y 9, 17 (2021) (describing expansion of Facebook's cybersecurity team).

422. See generally Garden, *supra* note 393.

Characterizing TikTok as a creator platform is certainly a simplification. Its allure is that anyone can create videos that go viral. The line between content consumers and creators, although real, is not rigid. TikTok is often described as an overwhelmingly algorithmic platform, although user following still plays a role.⁴²³ Algorithmic distribution is not inconsistent with platform federalism. Each community can deliberate about ranking within its space, and communities across the platform can deliberate about user feed ranking.⁴²⁴ The problem is that platforms like TikTok lack community components on which platform federalism relies to organize countervailing power. Mini-publics can still help, though they will be subject to the limitations discussed above.

Other proposals may aid in modifying the platform federalism model. For instance, Weyl and colleagues' "prosocial media" proposal offers another thoughtful alternative that uses a variety of systems, including language models, to bridge perspectives across communities.⁴²⁵ Their model envisions content labeling with "social provenance" to indicate which communities a piece of content bridges or balances, creating an environment where users encounter diverse perspectives through algorithmic curation. This may lead to the devolution of power from platforms to users. Yet while users are sorted into communities based on shared attitudes, the model depends primarily on individual user deliberation in response to algorithmically curated community inputs rather than collective discourse.

F. How Do We Get There?

1. Through Regulatory Subsidies

While platforms have portrayed themselves as natural products of technological evolution and market forces, legislation underwrites their current governance authority—particularly Section 230.⁴²⁶ Indeed, it is now well-accepted that "[l]aw played . . . a significant role in Silicon Valley's rise and its global success"⁴²⁷ Even after *Moody*,⁴²⁸ this legal shield remains important by enabling platforms to avoid debilitating litigation costs that might otherwise make their business models unsustainable.⁴²⁹

423. See NARAYANAN, *supra* note 47, at 11.

424. See *supra* Part V.C.1.

425. Cf. E. Glen Weyl, Luke Thorburn, Emillie de Keulenaar, Jacob Mchangama, Divya Siddarth & Audrey Tang, *Community by Design*, (Feb. 18, 2025) (unpublished manuscript) (on file with the author), <https://arxiv.org/abs/2502.10834>.

426. Telecommunications Act of 1996, Pub. L. No. 104-104, tit. V, § 509, 110 Stat. 133 (codified as 47 U.S.C. § 230).

427. Chander, *supra* note 121, at 642.

428. *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). See *supra* notes 148–54 and accompanying text.

429. Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 39–42 (2019) (discussing how Section 230 facilitates early dismissal of claims against platforms).

If Section 230 immunity represents a regulatory subsidy beyond what the First Amendment requires,⁴³⁰ it can legitimately be conditioned on platforms adopting governance structures that redistribute some of their power to users.⁴³¹

2. *Platforms' Own Accord*

Using regulatory subsidies to create countervailing power depends on whether platforms deem the incentives worth the cost in loss of authority. One way to look at this is that platforms would give up political power in exchange for preserving liability protections, which are often depicted as economically existential.⁴³²

But there is another way to look at the question, one where platforms really have nothing to lose. From the skeptic's perspective, again,⁴³³ countervailing platform power discourse would allow platforms to profit unburdened by any concern for the public. The costs may be overstated and, under platform federalism, would depend on the bargain struck for the platform compact. But from this perspective, platforms might voluntarily adopt the proposal.

Although one could certainly argue that divesting from power—as called for in this Article—is in the platforms' own interests, the platforms have been quite averse to such risk-taking. Consider, for instance, Meta and its Oversight Board. The company was willing to spend hundreds of millions of dollars to create and fund the board's operation. It invested heavily in the project, which CEO Mark Zuckerberg described as establishing “[a] structure, almost like a Supreme Court, that is made up of independent folks who don’t work for Facebook, who ultimately make the final judgment call on what should be acceptable speech.”⁴³⁴ Critics rightly noted that the Board created a perfect scapegoat for Facebook.⁴³⁵ Still, the company practically limited the Board's

430. See Balkin, *supra* note 39, at 253 (defining “[t]he difference between what the First Amendment requires and what Section 230 provides” as a regulatory subsidy and calling for the law to “condition the immunity on social media companies agreeing to accept a new set of public interest obligations for the digital age”). See also Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1008–09 (2008) (“In essence, the CDA, and even the DMCA, subsidize new intermediary models by protecting them from otherwise applicable law, but only as a matter of legislative grace.”); Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 501–02 (2016) (arguing that intermediary liability immunities “might be conditioned on platforms adopting internal processes designed to give those entirely de-indexed some right to a fair hearing and explanation for the action”).

431. Cf. Lakier, *supra* note 37, at 2368 (describing Section 230 as non-First Amendment free speech law that is anti-redistributive, “reinforc[ing] the power that the social media companies already possess over those who use the platform to speak.”).

432. See Goldman, *supra* note 429, at 41.

433. See *supra* notes 413–421 and accompanying text.

434. Ezra Klein, *Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next*, VOX, Apr. 2, 2018, <https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge>.

435. See Kadri, *supra* note 333, at 191–92 (discussing scapegoating as a motivation for the establishment of Meta's Oversight Board).

binding authority over the fraction of cases it is capable of hearing from a sea of user appeals. As a consequence, Meta is unilaterally left to apply its decisions to similar cases; broader considerations are just recommendations that Meta must respond to but need not adopt.⁴³⁶ And that is not to mention that much else is completely outside of the Board's authority, like content ranking, platform design and affordances.⁴³⁷ Even though the company went to great pains to hand-pick the Board's members,⁴³⁸ and has invested so much in it, both materially and discursively, it still would not cede power. The company still wanted to be in control.⁴³⁹

In short, even though platforms could benefit from voluntarily forgoing authority, they are unlikely to embrace the uncertainty that countervailing power would create absent changes to their incentive structures.

3. *Through a Regulatory Mandate*

The most forceful option would be to mandate a framework like platform federalism or countervailing power modifications of it. Some prudential and doctrinal reasons argue against this path.

Prudentially, the platform buy-in that the regulatory subsidies approach would entail would smooth the jump-starting of the model. If platforms choose to adopt platform federalism (or a modified version), they are less likely to adopt an obstructionist stance. Platforms that decide not to embark on it are also less likely to oppose it.

Doctrinally, a mandate would veer into uncharted waters. Leveraging regulatory subsidies explores the room left by the *Moody* Court in its reliance on cases such as *PruneYard Shopping Center v. Robins* and *Turner Broadcasting System, Inc. v. FCC*.⁴⁴⁰ However, a mandate would go further. The access requirement in *PruneYard* prevented shopping mall owners from suppressing reasonable petitioning on their grounds, but it did not foreclose the use of their real estate for any expressive purpose.⁴⁴¹ Because shopping malls are rarely in the business of speech, that was not a question in *PruneYard*. It was in *Turner*, and the mandate upheld there did not go as far as a mandate would in the context of social media. While cable operators were required to use some of their channel capacity to carry broadcasters, they still retained authority over the remainder.⁴⁴²

436. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2462–64 (2020).

437. See Kadri, *supra* note 333, at 190.

438. See Klonick, *supra* note 436, at 2451–62.

439. Cf. Lemert, *supra* note 349, at 104–05 (arguing that Delaware corporate law prevented Meta from ceding control to the Oversight Board).

440. See *Moody v. NetChoice, LLC*, 603 U.S. 707, 729–30 (2024).

441. Cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (noting that the mall owners were free to disavow any connection with messages and to dissociate themselves from speakers or handbillers).

442. See *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 630–31 (1994).

This is by no means a full doctrinal analysis. Platform federalism could try to account for this. For instance, a mandate might preserve some spaces where platforms have full authority, akin to federal districts in federal systems.⁴⁴³ Still, a mandate would present risks that could undermine the project.

VI.

CONCLUSION

The new governors control social media. This is political power. Their decisions may have deformed the public sphere, reflected deep pathologies that are older, or both. One thing is certain: they are the ones who decide. Most people recognize this as too much power, and they are correct. The legal protections that helped elevate platforms were justified as serving users. They should now be reoriented to serve the many rather than entrench the rule of the few.

Yet platform rule endures because it seems inevitable. One reform project finds it easier to fantasize about an ungoverned social media than to design another form of governance. The price of the other project's program for better governance is acquiescence to platform command. This Article rejects that choice. Neither project will overcome the central problem of the digital public sphere: the concentration of political power.

A more democratic order for social media begins not with the question of how platforms should govern, but who should govern. This Article has offered a prototype for that arrangement: it has defended platform federalism not as a panacea, but as a way to conquer platform power by dividing it.

443. I thank Thomas Kadri for prompting me to think about federal districts.

