Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability

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Abstract

Social media platforms trouble established ideas about the public/private divide. Due to their size, political influence, and abilities to regulate speech at scale, the largest platforms are often compared to governments. Consequently, their unaccountability to the public has prompted widespread concern. This article examines and critiques two related though distinct responses to this tension in academic and policy debates, here characterised as the *multistakeholderist* and *rule of law* responses. The multistakeholderist response aims to increase civil society's influence in platform governance through transparency, consultation and participation. The rule of law response – which is increasingly influential in Europe – extends the platform/state analogy to argue that platform governance should follow the same rule of law principles as public institutions.

This article evaluates both responses' abilities to make social media platforms more democratically accountable, concluding that both are limited. Both reflect a 'tech exceptionalism' which understands social media companies as different from other companies, and therefore requiring special accountability mechanisms. The proposed solutions – subjecting platforms only to accountability from other private actors, or subjecting them to the same principles as states – overlook the insights of legal realism and law and political economy: that corporate power is constituted by state regulation. Both responses aspire to strengthen democratic accountability without substantially changing the legal foundations for digital markets or the market structures they have produced, which is unlikely to succeed. Multistakeholderist initiatives will likely exacerbate unequal participation, since abilities to influence platforms through market pressure, public criticism and consultation are highly unequally distributed. Rule of law approaches implicitly approve vast concentrations of corporate power, provided they follow rule of law principles – which are designed to constrain presumptively democratic states, not to ensure corporations act in the public interest.

Instead, the article advocates reforms guided by an ideal of economic democracy, which emphasises democratic control over markets and aims to redistribute ownership and control of media and communications infrastructure. This suggests two areas for intervention: substantive legal constraints on corporate activities such as surveillance advertising, and reforms aiming to promote pluralism in online media by reducing market concentration and providing non-commercial or public-service digital infrastructure.

1. Introduction

Social media platforms are widely seen as troubling established distinctions between public and private power. Prominent media commentators describe Facebook, the world's largest and most serially controversial platform, as an authoritarian state and 'hostile foreign power' (LaFrance, 2021), a 'dictatorship' and 'global empire' (Cadwalladr, 2020) and a 'failed state' (Posetti and Bontcheva, 2021). Academics have also compared major platforms' economic and political power to that of states (L. Taylor, 2021), arguing that they have assumed traditionally governmental responsibilities like regulating speech (Klonick, 2018; Keller, 2019) and resolving associated legal disputes (Pasquale, 2018; Van Loo, 2020).

The power of large platforms, and their association with policy issues ranging from hate speech and political violence to misinformation, has prompted a similarly widespread consensus that these powerful corporations must be made more accountable to the public interest (however that is understood). In recent years, countries around the world have introduced new hard- and soft-law regulation of social media, and academic and policy literature on the topic has exploded. This paper examines and critiques two influential schools of thought as to how platforms can be made more accountable, here characterised as the *multistakeholderist* and *rule of law* responses.

The former seeks to strengthen civil society influence in platform governance, through diverse proposals including public-facing transparency, consultation with civil society on products and policies, and formalised institutions for civil society participation like 'social media councils'. The latter extends the platform/state analogy to argue that, since platforms exercise comparable power to states, they should follow the same rule of law principles as public institutions: for example, applying transparent and consistent policies, respecting human rights, and giving individuals notice and opportunities to challenge decisions.

These responses are based on different assumptions about platforms' power and legitimacy[1]. Multistakeholderism sees collective consultation and participation as grounds for legitimacy, while rule of law advocates value individual rights and procedural fairness. Multistakeholderism also emphasises voluntary corporate social responsibility commitments, minimising direct state regulation for both normative and pragmatic reasons; platforms should instead be pressured into behaving more responsibly by other private actors. In contrast, rule of law literature typically advocates active state intervention and hard law to ensure respect for rule of law norms. At the same time, in practice there are overlaps between their policy recommendations and the authors advocating them. They can be seen operating in tandem in initiatives like the EU's Digital Services Act (DSA), a complex regulation with elements drawing from both responses. As will be shown, they also share some common assumptions and limitations.

Specifically, this paper evaluates their capacity to strengthen the democratic accountability of social media platforms, and identifies important limitations in this regard. Accountability can be defined as a relationship in which an actor must explain their conduct to a forum which can question, judge and impose consequences on them (Bovens, 2006). Democratic accountability is here understood to mean broad-based and effective public participation in such relationships and processes, on maximally equal terms. The element of equal participation is important: policies which merely increase platforms' accountability to other powerful stakeholders or elite groups cannot be considered democratic. In this regard, both responses have important analytical and practical limitations.

[1] This paper's identification of somewhat stylised responses within policy debates, which can overlap in practice but are driven by identifiably different impulses and principles, takes inspiration from Viljoen's (2021) analysis of 'lawfulness' and 'ethics' responses in technology policy.

Analytically, both are inflected by a 'tech exceptionalism' which conceives platform companies as fundamentally different to other types of companies, and thus requiring novel accountability mechanisms. Instead of drawing on scholarship and historical experience suggesting how public services and economic resources can be managed democratically in the public interest, the multistakeholderist response advocates a marketised form of accountability which subjects platforms to the discipline of other private actors, while the rule of law response extends principles traditionally applied to state institutions into the private sector.

In this respect, both have an incomplete account of the relationship between public and private power, which insufficiently emphasises the insights of legal realism and law and political economy. Corporations like Meta, Alphabet and ByteDance[2] do not operate in a realm of private markets and civil society which can and should be separate from state power, as multistakeholderist responses suggest. Nor do they represent a new power centre displacing the state in certain fields, as rule of law responses suggest. As with all corporate power, their existence, the markets they operate in, and their ability to attain their current size and influence have all been constituted by state action, which provides the legal foundations for their activities. Effective accountability thus requires active state intervention, not only to regulate particular corporate decision-making procedures, but to reconfigure the legal foundations structuring the ownership, control and governance of online communications infrastructure.

Practically, as a result, both responses' abilities to democratise platform governance will be severely limited. Multistakeholderist initiatives will likely exacerbate unequal participation, since abilities to influence platforms through market pressure, public criticism and consultation are highly unequally distributed. Rule of law approaches implicitly approve the contemporary industry's vast concentrations of corporate power, provided platforms follow rule of law principles – which are designed to act as minimal constraints on presumptively democratically legitimate governments, not to ensure that corporations act in the public interest.

Drawing on scholarship in law and political economy, political economy of the media and digital constitutionalism, the article argues that social media regulation should instead be guided by an ideal of economic democracy. Given the extensive social and political power of contemporary social media platforms, democratic accountability should not be limited to their content policies, but should also extend to the institutions, market structures, economic resources and infrastructure of the social media industry[3]. This suggests two areas for intervention. First, governments should consider stronger substantive restrictions on harmful corporate activities, such as surveillance advertising. Second, they should pursue structural market reforms aiming to promote media pluralism. Competition law interventions – which feature prominently in mainstream social media policy debates – could play a role, but simply increasing the number of privately-owned, largely advertiser-funded platforms will not provide meaningful pluralism or democratic accountability. Reforms should additionally seek to establish and promote non-commercial and participatory governance models.

2. Multistakeholderist and rule of law responses

a. Multistakeholderism

[2] Respectively, the owners of Facebook and Instagram; YouTube; and TikTok.

[3] Because the multistakeholderist and rule of law literature analysed in this article centres on social media governance, and in order to draw out the distinctive policy considerations that are relevant in the media context, the discussion of potential reforms focuses only on social media. However, some of the arguments made here could be relevant for the platform economy more generally.

The term multistakeholderism has long been applied to internet governance bodies like ICANN (which manages the assignment of domain names), which are not directly run or overseen by states, but bring together industry and civil society stakeholders to reach decisions with no single point of authority (Raymond and DeNardis, 2015; Radu, 2019). It is here used to describe interventions seeking to increase civil society influence in social media governance. Examples include transparency initiatives which facilitate scrutiny and public criticism; more or less formal consultation procedures within individual companies; and industry-wide institutions for dialogue between platforms and civil society. These forms of multistakeholder participation differ from older multistakeholderist internet governance institutions in that there is a single point of authority: the company which owns a given platform.

Unsurprisingly, NGOs focused on digital rights and/or freedom of expression have led calls for greater civil society participation (Electronic Frontier Foundation, 2015; York, 2020; Article 19, 2021; Abrougui et al., 2022). Leading academics also argue that transparency and civil society consultation would strengthen the quality and legitimacy of platforms' decision-making (Bloch-Wehba, 2019; Suzor, 2019; douek, 2022), as have the current and former UN Special Rapporteurs for Freedom of Expression, Irene Khan (2021) and David Kaye (2019). Kaye (2019) is also a notable advocate of 'social media councils'. Originally proposed by Article 19 (2018, 2021), these would be independent institutions bringing together civil society experts to review content moderation decisions, provide general policy guidance, and facilitate multistakeholder discussions. Academics have endorsed and developed this idea; open questions include possibilities for user representation, (inter)national scope, and whether industry compliance would be purely voluntary or somehow legally mandated or incentivised (Tworek, 2019; Fertmann and Kettemann, 2021).

As this last point illustrates, advocates of multistakeholderism favour different modes of governance to promote civil society participation (Gorwa, 2019). Some advocates emphasise corporate social responsibility, arguing that platform companies 'could' or 'should' pursue actions like improving transparency reports and consulting systematically with NGOs (Bloch-Wehba, 2019; York, 2020). Such arguments may be presented explicitly as the alternative to state regulation that threatens free speech (Article 19, 2018), or accompany warnings against stricter state speech regulation (Kaye, 2019; Khan, 2021). On the other hand, some advocates call for state regulation to support multistakeholderist objectives – directly facilitating civil society involvement, for example by introducing legally-binding transparency obligations, or indirectly strengthening it, for example by increasing market competition and thereby consumer pressure on companies (Zuckerman and York, 2019). In general, though, multistakeholderist advocacy downplays direct state regulation of companies' products and policies, instead emphasising the capacity of open debate, public pressure and targeted activism to ensure platform companies act responsibly.

This is for both normative and practical reasons. Normatively, multistakeholderism pursues democratic accountability in platform governance, but reflects concerns about direct state regulation of online communications (similarly to older advocacy for multistakeholderist internet governance, where it was seen as the alternative to intergovernmentalism: Radu, 2019). Facing what douek (2020) calls the 'Gordian knot' of content moderation (and media law generally), in which state and corporate power over the boundaries of permissible speech seem equally unacceptable, multistakeholderist initiatives have been called the 'least-worst' option (douek, 2020; Fertmann and Kettemann, p3). Threats to political freedoms and free speech are minimised by bypassing state involvement, or limiting it to the supporting role of facilitating civil society input (Kaye, 2019). Civil society groups are then envisaged as representing the wider public, with participation by diverse expert groups permitting quasi-objective assessments of the public interest (Dvoskin, 2021, 2022), and holding platforms accountable through public criticism.

Practically, in the US, the First Amendment makes most direct state speech regulation impossible. Social media companies also have First Amendment rights, and protected 'speech' is understood broadly, including the presentation of content in search results or news feeds (Pasquale, 2016). Thus, US legislators are barred not only from directly regulating moderation policies, but also (arguably) many other aspects of content governance, such as algorithmic recommendations (Keller, 2021). In any case, due to legislative gridlock at federal level, the US has been less active than other major jurisdictions in reforming social media regulation (Morar and Martins dos Santos, 2020); a series of legislative proposals have stalled (Riley and Morar, 2021)[4]. Unsurprisingly, therefore, multistakeholderist responses figure particularly prominently in US debates. Whether arguing for more or less strict regulation of user content, US NGOs have found it advantageous to argue that platforms legally *can* moderate speech however they want, but *should* be guided by consultation and advocacy to moderate it in certain ways (Dvoskin, 2021).

Under civil society pressure, major platforms have already introduced numerous consultation and participation initiatives. Most prominently, in 2020 Facebook (now Meta) launched its Oversight Board, a legally independent but Meta-funded body of civil society luminaries tasked with reviewing selected moderation decisions and offering policy advice. As Klonick (2020) details, not only is the Board itself a formal institution for ongoing civil society input; its creation followed extensive and geographically wide-ranging consultations with civil society. Other major platforms have convened less formal advisory councils (Fertmann et al., 2022), and most have procedures to solicit civil society input on major content policy decisions (Dvoskin, 2021; for a detailed account of Meta's procedures see Kettemann and Schulz, 2020). Industry-wide self-regulatory organisations like the Global Internet Forum to Counter Terrorism (GIFCT) and Global Network Initiative (GNI) prominently include civil society representatives (Dvoskin, 2021; Fertmann et al., 2022). Article 19 is in talks with major companies about establishing a pilot social media council in Ireland, although none have yet made formal commitments (Article 19, personal communication, June 20 2022),

Although European legislators have increasingly favoured hard regulation of content governance, multistakeholderism also plays a role. In the Commission's codes of conduct on hate speech and disinformation (European Commission, 2016, 2022a), major platforms voluntarily committed to 'strengthen partnerships with CSOs' (European Commission, 2016, p2) for purposes including 'trusted flagger' schemes where civil society experts help identify harmful content, promoting counterspeech against hateful ideas, researching harmful content, and promoting public media literacy. The DSA, which will require the largest platforms to conduct regular risk assessments regarding issues like public health and fundamental rights, states that these should include civil society consultation 'where appropriate' (Recital 59). Article 35(2) also mandates the Commission to bring together platform companies, 'civil society organisations and other interested parties' to establish codes of conduct on addressing systemic risks; Article 17(10) of the 2019 Copyright Directive includes a similar provision. The coalition agreement for the German government elected in 2021 also notably states that it will work on implementing social media councils, although further details remain vague (Bundesregierung, 2021).

b. Rule of law

The rule of law response can be understood as one strand within the loosely-defined field of digital constitutionalism, a term which has emerged for various scholarship aiming to '[articulate] limits

[4] The notable exception is the 2018 FOSTA-SESTA legislation, which removed platforms' immunity from intermediary liability for content related to sex trafficking, which legally includes consensual sex work. The exceptional bipartisan support for this reform, despite evidence that it would increase the vulnerability of sex workers and trafficking victims, has been described as 'moral gentrification and sexual humanitarian creep' (Musto et al., 2021).

on the exercise of power in a networked society', drawing particularly on public law principles (Suzor, 2018, p4; De Gregorio, 2022a, p4; see also Celeste, 2019). Tech companies are understood as posing novel threats to human rights and liberal-democratic norms, representing a 'new constitutional moment' (Celeste, 2019, p77) which requires a rethinking of constitutional norms to more effectively constrain private power (Padovani and Santaniello, 2018; Suzor, 2020; De Gregorio, 2022a). Generally, however, this rethinking remains firmly within a liberal framework focused on individual rights, procedural fairness, and legal constraints on the exercise of power.

Beyond this broad orientation, analyses and proposals put forward under the banner of digital constitutionalism vary widely. Descriptively, the term has been used to analyse developments like 'internet bills of rights' (Gill et al., 2015); shareholder influence (De Gregorio, 2022a; De Gregorio et al., 2022); and the increasing emphasis on individual rights and procedural fairness in European platform regulation (De Gregorio, 2021, 2022a). Normatively, it has been used to evaluate company policies against rule of law standards (Suzor, 2018); demand corporate social responsibility initiatives (Suzor, 2020); advocate proactive state regulation to strengthen media pluralism and fundamental rights (De Gregorio, 2020, 2022a); and argue for increased user participation (Schramm, 2022). In this paper, the 'rule of law response' refers to digital constitutionalism scholarship which focuses on enforcing rule of law principles, human rights and procedural justice norms against platform companies, as well as literature which does not explicitly identify with digital constitutionalism, but makes similar arguments. This is the main form in which digital constitutionalism has actually been implemented in Europe, where platform regulation is primarily oriented towards rule of law principles (De Gregorio, 2021, 2022a, 2022b), as opposed to, for example, democratic participation (Schramm, 2022; Griffin, 2022c).

The rule of law is a complex and contested concept, but generally centres around the principles that the law should be clear and applied predictably and consistently to everyone, thus enabling people to foresee legal consequences and constraining the government's ability to treat people arbitrarily or unfairly. While 'thin' accounts focus on formal properties like clarity and consistency (Raz, 1979), 'thick' accounts hold that the rule of law additionally requires some level of substantive fairness and human rights protection (Bingham, 2011). In these academic accounts, and in common usage[5], it is generally a state-centric concept. Although there is no inherent reason that 'thin' accounts of principles necessary for rules to effectively guide human conduct are relevant only to rules made by governments, theorists like Raz (1979) frame them as constraining government action, and discuss the procedural and institutional norms necessary for fair and consistent application of the law in terms of state institutions like courts and police. Similarly, human rights norms are traditionally conceived as primarily binding state institutions (Jørgenson, 2019). Thus, of the various strands of digital constitutionalism, rule of law accounts appear particularly strongly influenced by the platform/state analogy. Both the general principles of the rule of law (such as clear and consistent application of rules) and specific institutions instantiating them (such as judicial review and procedural fairness norms) were originally conceived as constraints on state power; they are now being redeployed against private companies considered to exercise state-like powers.

Rule of law scholarship particularly emphasises procedural fairness, both in particular moderation decisions (De Gregorio, 2019), and in the formulation and publication of content policies. For example, Suzor (2018, p1) argues policies should be 'consensual, transparent, equally applied and relatively stable, and fairly enforced. These are the core values of good governance.' They are also classic elements of 'thin' accounts of the rule of law. Advocates often explicitly draw on judicial

[5] See for example the EU's rule of law reporting, which addresses state institutions such as judicial independence and anti-corruption rules (European Commission, 2022b).

institutions and procedures[6]: for example, Van Loo (2020) argues platforms should introduce a system of common law-style precedent to make decision-making more consistent, and appeals procedures (potentially including an industry-wide 'platform supreme court': p33) to protect user rights. Authors such as Suzor (2019, 2020), Sander (2019) and De Gregorio (2019, 2022a) additionally emphasise respect for human rights in platforms' substantive policies, and fair procedures as a means to this end, reflecting 'thicker' accounts of the rule of law.

Various justifications are offered for focusing on procedural fairness and human rights. First, as with multistakeholderism, rule of law norms have been presented as a way to cut the 'Gordian knot' of media regulation, by permitting state regulation which focuses on procedure over substance (Suzor, 2020; Klausa, 2022). Echoing 'thin' accounts which regard the rule of law as necessary to prevent certain abuses of power and to enable the government to achieve desirable aims, but insufficient for good government (Raz, 1979), douek (2022) argues that transparency and consistency cannot address all policy issues, but would somewhat improve platform governance and hopefully facilitate more substantive reforms. Other scholars more strongly emphasise the independent value of procedural fairness, arguing that since particular platform decisions and policies are highly contested, as are paths forward for more substantive regulation, procedural fairness norms are the best way to strengthen platforms' actual and/or perceived legitimacy (Van Loo, 2020; Klausa, 2022). This echoes Fuller's (1969) argument that formal rule of law norms do have intrinsic moral value, since treating people impartially and consistently entails some minimal level of fairness and respect. Similarly, scholars who emphasise human rights have argued that because they are universally-shared (Suzor, 2020) or foundational EU values (De Gregorio, 2022a), they can provide broad-based support and legitimacy for platform governance.

Some advocates favour voluntary industry compliance with rule of law norms (Suzor, 2020; Santa Clara Principles, 2021). Suzor (2020, p165) argues that this will not only protect freedom of expression better than binding state regulation, but can also better achieve 'cultural change' within platform companies. However, most other authors cited here advocate some level of state regulation to enforce procedural and human rights norms (e.g. Van Loo, 2020; De Gregorio, 2019, 2022a; Klausa, 2022). Compared to multistakeholderism, rule of law scholarship appears to reflect greater misgivings about corporate platforms' power over public discourse, and thus tends to favour stronger legal controls on their activities.

Recent EU platform regulations have heavily emphasised fair procedures and individual rights protection (Wilman, 2021; Keller, 2022; Griffin, 2022b; De Gregorio, 2021, 2022a, 2022b). The Copyright Directive and 2021 Terrorist Content Regulation, which both oblige platforms to remove certain content and have raised freedom of expression concerns, address these concerns primarily by requiring platforms to follow procedural fairness norms (e.g. giving notice of decisions, allowing users to appeal); be transparent about their content moderation rules; and have regard to users' fundamental rights. The DSA will establish more comprehensive rule of law obligations, requiring all platforms to publish clear and accessible content policies, apply them consistently with consideration of users' fundamental rights, publish regular public transparency reports, operate internal appeals processes, and allow users recourse to independent out-of-court dispute settlement. In De Gregorio's (2022a) assessment, underlying all these obligations is a liberal ethos which aims to protect individual autonomy and dignity by enabling individuals to understand and contest decisions which affect them. This reflects a general orientation in EU technology law towards understanding rights and dignity in 'personalistic' terms (De Gregorio, 2022a, p222) and emphasising individual rights over collective values (Griffin, 2022b). As Klausa (2022) analyses,

[6] douek (2022) criticises the widespread analogy between content moderation and judicial decision-making, arguing that it misrepresents large-scale, partly-automated and bureaucratised moderation processes. She suggests drawing, instead, on principles and procedures used to constrain government bureaucracies, such as transparency and auditing.

German domestic law has also recently developed particularly extensive procedural regulation of social media through the 2017 NetzDG law, which regulates how platforms operate their internal moderation systems, and through court cases which read procedural protections into platforms' contractual terms and conditions.

3. The flaws of multistakeholderist and rule of law responses

a. Analytical limitations

The multistakeholderist and rule of law responses share two important analytical limitations, which limit the potential for meaningful democratic accountability. First, both are inflected by 'tech exceptionalism': the belief that companies operating digital platforms differ fundamentally from other companies, leading to a focus on novel theoretical, political and regulatory responses. These take as their starting point, and thus stabilise and legitimise, current configurations of corporate power; they also overshadow established avenues to democratise control of important infrastructure which would more directly confront private power. Second, both responses reflect an incomplete account of the relationship between public and private power, which obscures the state's role in constituting and enabling platform companies. Accordingly, they overlook the state interventions that would most effectively hold them accountable.

i. Tech exceptionalism

In the legal context, 'technological exceptionalism' describes the view that new technologies cause transformative social changes, necessitating novel legal responses (Jones, 2018). Analysing legal responses to milestone technologies including cameras and the internet, Jones (2018) concludes that while technologies obviously cause social changes, these do not reflect essential features producing the same effects across different contexts, but are conditioned by pre-existing legal and social contexts. This leads her to reject the technological exceptionalist thesis.

The term has since been used in a slightly different sense by academics (Popiel, 2018; Allensworth, 2021), journalists and policy figures (Eisenstat and Gilman, 2022; How, 2022) to describe the belief – heavily promoted by industry lobbying – that the tech industry is exceptionally socially beneficial, and should therefore be only very lightly regulated. These accounts draw on Morozov's (2013) concepts of 'internet-centrism' and 'solutionism' – the beliefs that the internet has uniquely dramatic, deterministic effects on society, and that social problems have technological solutions – and Barbrook and Cameron's (1996) account of the 'Californian Ideology' which 'blends technological determinism, utopianism, and libertarianism' (Popiel, 2018, p573). Analysing US tech lobbying, Popiel (2018, p573) summarises the industry's key messages as follows: 'the centrality of the tech sector to economic growth, the self-evident imperative of sustaining the Internet economy, and regulation as the enemy of innovation and, by extension, social progress'.

Evidently, the multistakeholderist and rule of law literature is far from uncritically positive about social media. As such, the form of tech exceptionalism criticised here aligns more with Jones' (2018) account. However, the other work cited is important in highlighting the industry's role in strategically promoting exceptionalist ideas. Even highly critical discussion of the tech industry is often influenced by industry discourses of unprecedented innovation and transformative social change (Vinsel, 2021). Popiel's (2018) study of lobbying draws on Pickard's (2014) concept of 'discursive capture', in which terminology and ideas from industry discourse dominate policy debates, closing off consideration of certain policy options. Similarly, more recent analyses of tech industry lobbying and research funding programmes highlight their efforts not to fend off all regulation, but instead to shift attention to 'the criticism they can structurally live with' (Clarke et

al., 2021). Despite their critical attitudes towards social media platforms, both responses resonate with industry-promoted ideas that platform companies are special, and therefore require unconventional regulatory responses.

In particular, they echo industry discourses which portray social media companies as having a unique, state-like role as governors of vital public spaces. Companies often publicly describe their users as active participants in community self-governance, and themselves as representatives of those users' interests; Muldoon (2022) terms this 'community-washing'. For example, Meta CEO Mark Zuckerberg once famously stated that 'Facebook is more like a government than a traditional company' (Foer, 2017). He has also repeatedly used 'global community' rhetoric (Hoffmann et al., 2016; Zuckerberg, 2017), framing the user base as a polity – the next step up after moving 'from tribes to cities to nations' – and Facebook as its governing authority, with public responsibilities ranging from promoting civic engagement to facilitating natural disaster responses (Zuckerberg, 2017). Both responses align with such framings. The rule of law response directly analogises platform companies to states, while the multistakeholderist response suggests that platform companies can autonomously ascertain and represent the public interest – as mediated through civil society – as a substitute for direct state intervention.

Consequently, both may reinforce the image of platforms as benevolent stewards of the public interest, rather than companies pursuing private gain. Constitutional language which analogises platforms to elected governments can be powerfully legitimising (Cowls et al., 2022). Similarly, multistakeholderist responses which emphasise platforms' responsibility to listen to civil society often effectively claim that platforms should – and, if pushed, will – do the right thing, and that with sufficient input from civil society they can fairly represent and serve their 'communities'. Such arguments contribute to 'the moralisation of the "good" company through corporate social responsibility' (Baars, 2019, p132), obscuring the fact that corporations are legally set up to pursue public-interest goals only insofar as it serves their economic interests.

It also serves platform companies by discouraging consideration of policy responses drawing on experience in other heavily-regulated industries. Platform companies are by no means the first corporations to control vital public infrastructure, or exercise power affecting the rights and interests of millions. However, framing them as *sui generis* centres of private power, more analogous to states than other companies, implicitly discourages comparisons which might prompt consideration of more structural reforms. For example, framing them as operating key social infrastructure, analogous to energy, telecommunications or transport companies, would evoke very different policy responses (Rahman, 2018a, 2018b). While most countries have deregulated these sectors in the last decades, a broad consensus persists that they cannot function as free markets, but require active state oversight – ranging from interventionist regulations like price caps and universal service obligations to full nationalisation. Alternatively, comparisons with other media intermediaries like newspapers or TV networks might point to policies promoting media pluralism and independence, including public-service and/or non-commercial alternatives (Pickard, 2022a).

The emphasis on novel institutions for platform regulation thus functions as a form of discursive capture (Pickard, 2014): in this case, distracting from structural reforms that have proved functional, albeit imperfect, in comparable industries. Instead, the multistakeholderist and rule of law responses frame social media policy as detached from broader questions about power, ownership and control of communications infrastructure, pointing to solutions in which currently-dominant corporations simply exercise their power more responsibly. As such, they are largely favourable to industry interests.

ii. Public and private power

Second, both responses obscure the extent to which the operation of markets represents an exercise of state power and policy choices, which should also be democratically controlled. The multistakeholderist response effectively suggests that while platforms fulfil political functions and responsibilities, they are and should properly remain a distinct power centre in society, separate from the state. Since direct regulation of content governance would give governments too much power to restrict free speech, platforms should instead be held accountable to the public through market forces including consumer choice and civil society advocacy, which further mobilises and channels consumer pressure, as well as influencing company strategies by providing information and advice. The rule of law response also portrays platforms as emerging power centres fulfilling state-like functions while acting outside state control, but considers this more inherently problematic. If platforms take over functions traditionally assigned to government, this not only circumvents the direct involvement of public institutions, reducing democratic input; it also circumvents the accountability mechanisms which traditionally constrained government action, thus permitting the unaccountable and arbitrary exercise of power. The solution is therefore to extend rule of law norms into the private sphere, so that platforms fulfilling state-like responsibilities must comply with the principles that traditionally constrain state power.

These accounts of platform companies' power as independent from and/or competing with state power overlook the insights of legal realism and critical legal studies, recently rearticulated by law and political economy scholars: that corporate power and the markets in which it operates, seemingly independently, are constituted by law and rely on continual state support (Britton-Purdy et al., 2020). Markets are constituted by the law of contract, property, the rules of (im)permissible conduct in negotiations, the (im)permissible forms of economic coordination, and so on (Kennedy, 1991; Paul, 2019); the particular rules the state sets determine the relative bargaining power of different parties, and thus the functioning and outcomes of markets. Detailed analyses of the law governing information-based industries (Cohen, 2019), data markets (Vatanparast, 2021), and financial markets (Pistor, 2019) – the last of which also decisively shaped the development of the contemporary tech industry – show that state policy choices not only provide the legal foundations for these markets to operate at all, but have structured them in ways that systematically favour established corporate interests.

It should be noted that most of the above literature comes from a US perspective. Globally, the picture of markets as constituted and ultimately controlled by state policy choices is more complicated, since economic policies are also significantly constrained by Global North-dominated international institutions (Slobodian, 2018). States have varying abilities to effectively regulate multinational, largely US-based companies, which may have significant leverage over governments, for example because they control key infrastructure or investment[7]. However, this paper's primary focus is European law. As the world's largest economic bloc, with well-resourced and developed regulatory institutions, it is evident that the EU has significant autonomy to regulate even foreign companies, and that EU and member state laws play important roles in structuring global social media markets (Bradford, 2019).

First, EU law permits the existence of the predominant social media business model, based on hosting user-generated content and profiling users to sell targeted advertising. Without the qualified

[7] Kwet's (2019) work on digital colonialism analyses how Global North-based corporations exercise power in Global South countries, and government involvement in these relationships. While not all countries have the US' power to shape global tech markets, Global South governments should not be assumed to lack agency or regulatory capacity. For example, Nigeria banned Twitter in 2021 before allowing it to resume service under certain conditions (Akinwotu, 2022), and India banned Facebook/Meta's controversial Free Basics limited internet access service (Vaidhyanathan, 2018b).

intermediary liability immunity set out in Article 14 of the 2000 E-Commerce Directive, businesses hosting large quantities of user-generated content could not exist in their current form: they would have to either invest vastly more resources in preventing illegal activity, or collapse under the weight of liability for all illegal content shared by users (Wilman, 2021).

Business models based on consumer profiling further rely on privacy and contract law regimes which permit companies to freely appropriate and exploit data about their consumers, while protecting their exclusive access to the databases constructed on this basis through contract, trade secrecy, intellectual property and anti-hacking laws (Cohen, 2019; Pistor, 2020). In the EU, economic exploitation of personal data is more restricted than in the US, in particular by the 2018 General Data Protection Regulation's (GDPR) legal basis, data minimisation and purpose limitation requirements. Nonetheless, current interpretations of GDPR and of platforms' contracts with users are basically permissive of surveillance-based business models. For example, the Irish data protection authority has held that GDPR permits Meta's profiling and targeted advertising because they are essential for the performance of its contract to provide users with a free service (Vergnolle, 2021b). Moreover, in the European Parliament debates over the draft DSA, a proposal to completely ban personalised advertising gained some support, but was ultimately rejected (EDRi, 2022)[8]. Surveillance-capitalist business models cannot therefore be understood as an exogenous threat to state power. States have chosen to provide the necessary legal foundations and to permit the continuance of these business models.

Second, the EU and member state laws structuring social media markets directly shape content governance and censorship practices, which are central concerns of the multistakeholderist and rule of law literature. Two examples can illustrate this: the influence of mobile app stores on content moderation policies, and the series of German cases in which contract law has been used to bring constitutional rights-based challenges to platforms' terms and conditions.

First, social media depend on customers accessing them via mobile apps, meaning their platform design and policies must comply with rules set by the dominant app stores, Apple's App Store and Google Play. Both, especially Apple, have extensive requirements for the moderation policies of apps offering user-generated content. Apple famously banned 'free speech' platform Parler in 2021 until it introduced stricter policies on racism and hate speech (Perez, 2021). It also requires strict moderation of sexually explicit content, which is a key reason that most mainstream platforms ban it (Tiidenberg, 2019) (the most notable exception, OnlyFans, does not offer its main platform through an iOS app: Shaw, 2021). Such bans are disproportionately enforced against, and particularly harmful to, marginalised social groups such as queer and trans people and sex workers, preventing them from sharing sexual health advice, safely reaching clients, or simply expressing non-normative sexual and gender identities (Bronstein, 2020; Blunt and Stardust, 2021; Waldman, 2021; Katyal and Jung, 2021; Monea, 2022).

While EU law does not require such bans, it has enabled this dynamic to emerge: it authorises business models which encourage reliance on mobile apps to maximise data collection; permits platforms to arbitrarily ban broad categories of content; and has permitted the emergence of an app store duopoly. Notably, the Commission has investigated Apple for potential abuse of dominance regarding its 30% commission on in-app payments, but has chosen not to intervene in its use of market dominance to enforce blanket bans on sexual content across a wide swathe of the internet (Griffin, 2022a).

[8] The Parliament ultimately successfully proposed a watered-down ban on personalised targeting of children, and targeting adults based on certain 'sensitive' data like race. Following the ECJ's recent ruling in *OT v Vyriausioji tarnybinės etikos komisija* [2022] that data permitting the inference of sensitive characteristics can also qualify as sensitive data, the scope of this latter prohibition may be broader than originally envisioned.

Second, the significance of contract law in shaping the balance of power between platforms and users has been highlighted by recent German case law. German courts have broad latitude to interpret contracts so as to fairly balance relevant rights and interests; clearly unfair terms can be invalidated. Contractual claims against platforms can therefore be used to challenge their moderation policies for unfairly restricting users' constitutional rights. Platforms' contractual terms and conditions typically provide that they have near-absolute discretion to moderate user content (Suzor, 2018); however, several German courts have interpreted such terms as restricting platforms' discretion (Holznagel, 2021; Klausa, 2022). In 2021, the highest civil court established that Facebook was entitled to operate moderation policies banning legal content, in line with its own freedom of expression and freedom to conduct a business, but that its terms must be interpreted as requiring it to give users notice and an explanation (*Bundesgerichtshof III ZR 179/20 und III ZR 192/20* [2021]).

These cases illustrate how platforms' content moderation policies and processes operate within national legal frameworks. The Bundesgerichtshof used contractual interpretation to impose procedural obligations, in line with a rule of law approach to accountability (Klausa, 2022). However, contract law could equally impose substantive obligations: for example, it might be argued that the blanket bans on sexual content discussed above strike an unfair balance between the parties' rights and interests. Interpreting contracts as giving platforms complete discretion over substantive policies, provided they follow certain procedural requirements, represents a state policy choice about how social media should operate.

Cohen (2019) suggests that platforms' interactions with users, regulators and other stakeholders – including self-regulatory initiatives, consultations and the establishment of procedural norms which become industry best practices – have performative functions, stabilising and legitimising norms and (dis)entitlements which strengthen corporate power. Both responses can be understood through this lens as stabilising current forms of market ordering: multistakeholderist policies call for increased public pressure on platforms within the current marketised landscape, while rule of law policies focus on public law-style regulations which operate independently of or parallel to the rules structuring the market. Both largely overlook the extent to which the current privatised and concentrated social media market dominated by surveillance-capitalist business models, and the operations of companies within that market structure, are shaped by state policies which are also potential levers for democratic accountability.

b. Practical limitations

By drawing the boundaries of acceptable policy interventions in a way that excludes policies shaping market structures, both responses significantly limit their ability to strengthen platforms' democratic accountability. First, both simply overlook many potentially-effective policy interventions. Second, assuming that the social media industry will continue to be structured as a wholly-privatised market with a few dominant corporations significantly limits the potential for equal participation and accountability. Finally, both responses risk undermining accountability by legitimising the power of currently-dominant corporations, increasing their influence over the content of regulation, and thus entrenching their influence over platform governance.

i. Oversights

Even assuming that multistakeholderist and rule of law policies are in themselves effective in strengthening accountability, they will not be implemented in a vacuum. If governments pursue such policies while simultaneously enforcing market regulations which actively strengthen

unaccountable corporate power (for example, by favouring market concentration or protecting platforms' rights to govern content in accordance with business imperatives), this will undercut their effectiveness.

On the other hand, regulations targeting market dynamics, incentives and power structures offer promising ways to strengthen democratic accountability, which the literature around both responses tends to overlook. Many of the most-discussed policy issues around social media, such as surveillance and tendencies to promote sensationalist, extreme, divisive and/or misleading content[9], are linked to the targeted advertising-based business model which currently dominates the industry, as well as the entrenched market power of a few large platforms, which hinders the emergence of alternative models with widespread appeal (Zuboff, 2019; Bennett et al., 2021; Golia, 2021). In failing to consider reforms which reduce the market power of surveillance-capitalist corporations and promote alternative business models and governance structures, both responses therefore limit their ability to address some of the issues which most concern the public.

Some possible interventions and guiding principles are discussed in section 4. At this stage, however, it is relevant to note that regulations targeting market structures offer another way to cut douek's (2020) 'Gordian knot', which is a key impetus for both responses (see section 2). The dangers of strengthening state control over online media in order to limit corporate power are real and significant, especially in a context where authoritarianism is gaining ground around the world, while media and internet freedom are widely being eroded (UNESCO, 2022a). Nonetheless, as this section outlines, both responses' capacities to provide democratic accountability are limited. Structural reforms aiming to decrease concentrated corporate power, increase public input and incentivise platforms to pursue public-interest goals are a better way to strengthen accountability while minimising substantive state regulation of online speech.

ii. Unequal accountability

Market-based governance structures inevitably accord differing levels of participation and power to different groups, since markets are characterised by unequal distribution of resources (Kampourakis, 2021). In assuming the continuance not only of a wholly-privatised market for social media services, but of the particular form that market currently takes, both responses can at best offer highly unequal forms of accountability, in which powerful stakeholders and privileged consumers exercise disproportionate influence.

These most importantly include business interests. While both responses aim to force platforms to pursue public-interest objectives, they assume the continuance of today's highly-concentrated corporate market. Even if they are constrained by stakeholder influence and/or regulation, the strategies corporations pursue within these constraints will always be guided by their shareholders' economic interests. As the previous subsection discussed, these often directly conflict with the public interest: for example, former Facebook employees have claimed that company executives repeatedly rejected product changes designed to avoid showing users harmful content because they would reduce engagement (Hao, 2021).

[9] Social media platforms are frequently accused of promoting such content because it attracts user engagement, thus maximising time on site, data collection and ad revenue (Vaidhyanathan, 2018a; Bennett et al., 2021; Barrett and Hendrix, 2022). Given the diversity among platforms and user experiences, it is impossible to confidently claim or disprove that platforms generally and consistently promote such content (Silverman, 2022). However, there is abundant evidence of harmful content being promoted by specific platforms in specific contexts (Kaiser and Rauchfleisch, 2018; Horwitz and Seetharaman, 2020; Barry et al., 2021; Center for Countering Digital Hate, 2021; Zadrozny, 2021; Merrill and Oremus, 2021; Contreras, 2022).

Current industry structures also accord significant influence to other business interest groups, including infrastructure providers like Apple (see section 3(a)(ii)) and – in particular – advertisers. Platform content governance has always focused on creating environments which serve advertiser interests, protecting advertisers' brands from associations with controversial, depressing or non-family-friendly content and putting consumers in the mood to shop (Klonick, 2018; Gillespie, 2018). With harmful social media content attracting increasing attention in recent years, some indications suggest advertisers are trying to increase their influence. For example, following public discussions of online hate speech sparked by 2020's Black Lives Matter protests, the World Federation of Advertisers negotiated with major platforms to align their definitions of prohibited hate speech with industry 'brand safety' standards (WFA, 2020). Meta recently announced that it would allow advertisers to exclude certain content categories, initially including 'news and politics' and 'debated social issues', and generally based on the GARM industry association's brand suitability framework (Meta, 2022). By deciding which types of content are monetisable, advertisers determine what creators are (not) incentivised to produce, and what content becomes visible and widely distributed, since platforms are disincentivised from promoting content which is not attracting ad revenue (JoergSprave, 2018; Glatt, 2022).

There is no reason to expect advertisers' preferences to align with the public interest. For example, platforms' dominance in advertising sales has been one factor contributing to the long-term decline of news media (Pickard, 2020), while increasing their dependence on social media traffic to reach audiences (Bell and Owen, 2017; Cornia et al., 2018). Advertisers' aversion to serious news content, as well as racial inequality, LGBTQ+ issues and other content related to marginalised groups, is already a widespread problem in display advertising, affecting the revenue of media covering these topics (CHEQ, 2019; Parker, 2021). If brand safety tools like Meta's are widely adopted, such content will likely also become less visible on social media, with worrying implications for the financial sustainability of news outlets and the ability of marginalised groups to participate in public debate. This illustrates how allowing market dynamics to freely determine how media content is produced and distributed fundamentally undermines democratic accountability.

Insofar as they aim to strengthen civil society's ability to provide advice and mobilise pressure from consumers and other stakeholders, multistakeholderist approaches embrace marketised governance mechanisms. Platforms are expected to continue pursuing their own economic interests, but with the benefit of better information, and facing greater economic pressure from stakeholders to be seen to be acting responsibly. Such approaches will likely further exacerbate issues of unequal representation. Governance models aiming to make private institutions more permeable to influence from civil society and other market actors inevitably produce very unequal representation, given enormous disparities in resources and influence among civil society groups, consumers and other stakeholders (Kampourakis, 2021)

One obvious aspect of this is geographical inequality. Wealthier consumers are far more valuable to platforms as advertising prospects. Accordingly, any public criticism which threatens platforms' popularity is much more salient in wealthier countries. The large-scale 2021 'Facebook Files' leak showed that Meta neglects basic safety measures in lower-income markets and lacks basic moderation capabilities in widely-spoken languages, such as most dialects of Arabic; overall, of the total time moderators spent working on disinformation, 87% was focused on the US (Scheck et al., 2021). In 2018, each US consumer was worth four times more to Meta than the global average (Fowler, 2018), making it economically rational to invest more in US customer experience and stakeholder relationships. Policies like transparency measures which aim to increase public scrutiny and criticism should generally be expected to disproportionately benefit high-income consumers.

Wealthy countries also have better-resourced civil society and research institutions, which are correspondingly better able to mobilise pressure from consumers and policymakers, and gain a seat at the table in consultation processes. One highly visible illustration of this is Meta's Oversight Board: a quarter of its initial 20 members were from the US and none from India, the company's largest market (Vaidhyanathan, 2020). However, this is a broader problem, since major platforms now solicit civil society input on many levels of internal decision-making, often in ways that are less visible to the public (Kettemann and Schulz, 2018; Dvoskin, 2021). All forms of participation demand a direct outlay of time and resources by the organisations involved, as well as baseline resources such as technical and legal expertise. Disparities in the resources available to NGOs, both within and between countries, therefore imply different capacities for participation at all levels. Further disparities arise from factors such as the concentration and commitment of the interest groups represented (Dvoskin, 2021), and their ability to mobilise media support. Overall, therefore, multistakeholderist approaches can be expected to systematically disadvantage poorer users and other groups, such as sex workers, whose social marginalisation makes it more difficult for them to mobilise support and effectively put pressure on companies.

In contrast, the rule of law response reflects a commitment to formal equality between users, and the public more generally. A key argument is that platforms' policies must be clear, transparent and consistently applied, while due process protections and human rights should attach equally to all individuals, preventing arbitrary differences in treatment. However, extensive scholarship from a variety of feminist, queer and critical race theory perspectives (among others) has criticised the capacity of formally equal rights and consistent policies to offer substantive equality (Crenshaw, 1988; Brown and Halley, 2002; MacKinnon, 2011; Adler, 2018). These criticisms are highly relevant in the social media context.

Utilising procedural protections – such as by reading the explanation for a moderation decision, in combination with the platforms' policies and legal obligations, and deciding whether it is worth challenging – requires time, information and cognitive resources which are unequally distributed (Hoffmann, 2019; Griffin, 2022b). Moreover, many forms of unfair and biased governance are fundamentally very difficult for individuals to challenge. For example, where content is demoted (not recommended to other users) rather than removed entirely, it is difficult to identify whether a post has been demoted at all, let alone whether the demotion was somehow unfair (Griffin, 2022b). Finally, detaching procedures from substantive policies overlooks the potential for consistent rules to have unequal impacts. For example, as experts have repeatedly pointed out, Facebook's 'real name policy' disproportionately harms abuse victims, queer and trans people, and other vulnerable groups who are more endangered by linking online activity to offline identities (Bivens, 2015; Haimson and Hoffmann, 2016; Chemaly, 2019). The policy does, however, have obvious economic advantages for Meta, whose ability to link each account to a single, identifiable consumer is a valuable proposition for advertisers (Bivens, 2015; Gillespie, 2018).

As this last example illustrates, the rule of law response also ultimately embraces market forces as the primary determinant of platform policies. Platforms can set their own rules and design their products however best serves their business interests, provided they offer users access on procedurally fair and non-discriminatory terms. This reflects an inherent limitation of applying rule of law principles to private companies. Formal rule of law norms such as transparency, consistency and fair procedures – and even the substantive principles included in 'thicker' accounts, such as respecting certain basic rights of minorities – say little about the substantive goals that power should be used to pursue. In their original context, this can be justified because those goals are at least in principle determined by the electorate; the rule of law imposes certain constraints to prevent majoritarianism and abuses of power, but within those constraints democratic states should have freedom of action. Such norms are therefore structurally inadequate to regulate multinational

corporations, whose substantive goals are not democratically determined. Repurposing rule of law norms for this very different context may prevent some egregious abuses of power, but will not hold corporations accountable for their overall practices, strategies and objectives.

iii. Strengthening corporate power

Finally, despite seeking to constrain corporate power and increase democratic accountability, both responses may stabilise and strengthen currently-dominant social media companies in ways that undercut this goal. This is probably particularly true of the multistakeholderist response, given that leading platform companies have themselves consistently advocated multistakeholderist approaches, typically favouring 'self-regulation [through] tech-driven efforts, with liability dispersed through networks of engaged stakeholders, and some degree of external, independent, and often non-governmental oversight' (Popiel, 2022, p139). Companies appear to see corporate social responsibility initiatives, combined with stakeholder consultation and limited external oversight, as the most effective strategy to increase perceived legitimacy while fending off public criticism and more intrusive regulation.

In general, multistakeholderist governance structures expand the influence of private power in shaping regulation and norms (Zalnieriute, 2017; Cohen, 2019; Kampourakis, 2021). Not only do platform companies exercise significant control over access to consultation processes, selecting which civil society actors they engage with most (Dvoskin, 2021); they also exercise significant influence over the whole field of potential stakeholders, and the public debates and research that inform civil society activism, since NGOs are highly dependent on external funding (Appelman and Leerssen, 2022). Major platforms are highly active in funding civil society organisations and academic research, and can use this to selectively favour preferred topics and positions (Clarke et al., 2021).

Rule of law policies apparently give social media companies less room to manoeuvre, in that they have no direct input in setting rules. Nonetheless, companies may have extensive influence over these rules and their practical interpretation. Corporations' resources and practical expertise often mean that their preferred interpretations and 'best practices' gain currency in other institutions (Edelman, 2016; Waldman, 2020). How rule of law norms are operationalised in a novel context can be influenced by pre-existing industry practices, developed primarily to maximise profits. For example, the DSA's procedural rules for content moderation strongly resemble the regulatory principles Meta has consistently advocated, plausibly because it mostly already follows these procedures and therefore considers them low-cost for itself but disadvantageous for competitors (Sankin, 2021). The DSA may therefore have the unintended consequence of imposing dominant companies' current content moderation practices as industry standards, reducing smaller platforms' capacity to develop potentially superior tools, governance structures and business models (Keller, 2022; douek, 2022).

Furthermore, both responses could stabilise and entrench dominant companies' power by strengthening their perceived legitimacy, without meaningfully strengthening democratic accountability. Advocating for procedural regulation, Van Loo (2020) cites psychological research showing that perceptions of legitimate decision-making are more influenced by procedure than substantive decisions (Tyler, 1992). This is not necessarily positive. Tyler and McGraw (1986) also argued that procedural fairness norms effectively induce 'political quiescence', socialising people into accepting unjust decisions by giving the (misleading) impression that they have meaningful input. Ultimately, (self-)regulation focused on corporate decision-making procedures – whether emphasising stakeholder input or rule of law norms – diverts attention from the inherently

undemocratic nature of having 'a core global communication and information infrastructure…in the hands of a single profit-driven entity' (Pickard, 2022a, p17).

This may be particularly true of the rule of law response, since the idealistic language of lawfulness and constitutional values is powerfully legitimising (Baars, 2019; Viljoen, 2021; Cowls et al., 2022). Discussing corporate accountability and regulation using terminology normally used for elected governments may misleadingly associate corporate platforms with democratic legitimacy and public-interest objectives (Griffin, 2021; Cowls et al., 2022), not only for the public but also in expert debates. Suzor (2018, p4) at one point suggests that 'the project of digital constitutionalism [is] to rethink how the exercise of power ought to be limited (made legitimate) in the digital age.' Directly equating limits on power with legitimacy may be unintentional, but is nonetheless revealing. Focusing exclusively on how power is constrained sidelines questions that should be central: what objectives is it used to pursue, and in whose interests?

4. Democratic accountability

a. Economic democracy in online media

This paper's central normative concern is democratic accountability of social media platforms, understood to require meaningful public oversight and influence over their decisions, and public participation on maximally broad and equal terms. Completely equal participation in any public forum is of course impossible (Fraser, 1990). Nonetheless, key normative standards for any system of media governance aspiring to be democratic should be how widely it disperses power among the public (Jolly and Pickard, 2021), and the representation of social groups who have generally been denied power and participation (Young, 1990). As the previous section outlined, policies which strengthen participation, procedural protections and/or legal rights within the current structures of market ordering have major deficiencies in these respects.

Instead, drawing on legal scholarship which shows how state policies create, structure and delimit markets, this paper advocates policy interventions aiming to restructure the social media industry to disperse power more widely and equitably. This can be achieved, on the one hand, by weakening the concentrated power of currently-dominant corporations, and on the other hand, by pursuing policies to increase media pluralism and the representation of currently-underrepresented interests, including through promoting online media with greater independence from market forces.

Some digital constitutionalism scholarship has recently turned towards focusing on democracy and equal representation (De Gregorio, 2020; Huq, 2022; Schramm, 2022). For example, Schramm (2022) argues for 'enhanced user participation' through institutions such as 'petition, voting, representation, or consultation'. This is an important starting point for more widespread participation, but does not go far enough. In the absence of structural reforms reallocating control of social media companies and the infrastructural resources they manage, such institutions would amount to increasing user input into top-layer policy decisions, while leaving untouched the lower-level strategic and business decisions which frame and constrain questions about content policy, the corporate structures within which these decisions are made, and the corporate cultures and social norms shaping their implementation.

For example, it is easy to imagine users voting, petitioning or being consulted on specific content policies, such as whether nudity policies should include an exception for photos of breastfeeding[10]. It is more difficult to envisage how users could directly influence how much platforms invest in

[10] This example, and the factors identified as shaping policy construction and implementation, are drawn from Gillespie (2018) and Monea (2022).

automated and manual moderation systems that could more reliably understand the context in which naked breasts are depicted; how those systems should be designed and configured; and the context of gendered norms among platform staff, and society generally, which influence how concepts like 'nudity', 'sexual content' and 'female breasts' are understood and applied – even though factors like these might have far more influence on people's ability to express themselves in practice.

As such, democratic accountability cannot rely solely on classically 'political' means of participation and representation such as voting and consultation, but also requires economic democracy. This term has primarily been used in discussing worker power within enterprises (Dahl, 1985; Schweickart, 1992; Palladino, 2021; Cumbers et al., 2022), but has also been used more broadly to describe collective, democratic control over economic resources, markets, and essential goods and services (Hutchinson et al., 2002; Coote and Shaheen, 2012; Johanisova and Wolf, 2012). As feminist and ecological theorists highlight, companies depend on and impact many more people than their workers (Fraser and Jaeggi, 2018). That is particularly evident for global platforms, whose influence over media, communications and politics requires accountability to the public beyond their workforce (Muldoon, 2022). This paper therefore follows Johanisova and Wolf's (2012) more expansive conceptualisation of economic democracy as checks on power and equal participation in governing all areas of economic power, potentially extending to 'regulation of market mechanisms and corporate activities, support for social enterprises, democratic money creation processes, the traditional institution of the commons, redistribution of income and capital assets and support for a diversity of production scales and modes' (p563). Regardless of one's views on the appropriate implementation of these various forms of democratisation across the economy as a whole, there are strong arguments that, even within contemporary capitalist systems, the infrastructural importance and political power of large social media companies require special measures to ensure democratic accountability, like those that already exist in other sectors providing core social infrastructure (Rahman, 2018a).

The multistakeholderist and rule of law responses focus on traditionally 'political' accountability structures – public debate, consultation, human rights, and procedural fairness norms drawn from judicial procedure and administrative law – while excluding consideration of ownership and market structures. As such, they reflect the characteristic distinction capitalist systems draw between political and economic institutions and decisions, which can be understood as artificially limiting democratic accountability (Wood, 1981). A subset of decisions about resource allocation and the development of production are excluded from political debate and direct democratic control, and instead defined as the responsibility of individual people and businesses – even though the market structures which enable and constrain individual decisions rest on the coercive rule-making and enforcement powers of political institutions (Wood, 1981; Kennedy, 1991). In the social media context, today's privatised, concentrated corporate market does not represent a given set of constraints within which democratic decision-making must now take place, but is itself a state policy choice which can be reformed to strengthen democratic accountability.

Such possibilities are already raised by the EU's Digital Markets Act (DMA), which imposes detailed prescriptive and prohibitive obligations on large 'gatekeeper' tech companies to strengthen market competition. These have been analysed as seeking to proactively prevent undesirable outcomes by restructuring digital markets, instead of intervening afterwards: specifically, by increasing competition, redistributing economic power from larger to smaller companies, and facilitating the emergence of European competitors (Yasar, 2022). The DMA remains firmly within a pro-market framework centring competition between profit-oriented companies, which is inadequate for the media context (Pickard, 2022b), as the next section discusses. Nonetheless, it

illustrates European regulators' capacity and, to some extent, willingness to structurally reform social media markets.

Accordingly, an important starting point for economic democracy in social media would be to reject both equations and sharp distinctions between corporate and state power, emphasising instead corporate power's entanglement with and dependence on the state. Notably, Suzor, a leading rule of law advocate and Meta Oversight Board member, recently argued that analysing and regulating platforms demands new metaphors that do not analogise them to states (European Law School Network, 2022, 40:20). This could be one line of inquiry, but another could be to question the necessity of (new) metaphors. In Gorwa's (2019, p859) words, 'platform companies are companies.' While highlighting some distinctive policy considerations raised by tech platforms, he argues against tech exceptionalism, suggesting platform governance scholarship should be more informed by 'the substantial scholarship which has examined the role of influential global corporations in public life and public affairs around the world' (p860). Unaccountable corporate power over key social infrastructure, including communications and media, is not a novel phenomenon (Rahman, 2018a; Pickard, 2022a). Equally, while this issue has hardly been 'solved', there exist many tested and (to some extent) successful solutions, ranging from unionisation and worker empowerment in individual organisations, to industry-level regulatory reform, to the complete or partial removal of some sectors from corporate control through nationalisation and/or public options.

A further important element must be a cautious approach to state power and the concept of 'public values', which often appears in scholarship criticising corporate platforms and calling for alternative governance models (Van Dijck, 2020; Helberger, 2020; L. Taylor, 2021; Mansell and Steinmüller, 2022). Theoretically, the concept of public values is fraught with difficulty; the normative consensuses it seeks to identify are generally elusive (Fukumoto and Bozeman, 2018). In this context, it often effectively functions as a negative concept, defined by opposition to the private interests platforms currently serve. This only takes us so far in proposing positive visions for reform. Fundamental questions about the boundaries of acceptable speech, how 'legal but harmful' speech should be governed, and how the media can best serve society remain unresolved. Regulation cannot simply be understood as translating clearly-understood and widely-shared values into policy: identifying policy goals and priorities entails political conflict (Appelman, 2022).

The multistakeholderist and rule of law responses' scepticism towards direct government regulation of these issues is also justified. Media regulation which suppresses political dissent is on the rise worldwide (UNESCO, 2022), including to some extent Europe (Van Hoboken, 2019) and other democracies like the UK (Harbinja et al., 2019). Notable recent social media reforms like the Australian News Media Bargaining Code (O'Shea, 2021; Cagle, 2022) and EU Copyright Directive (Bridy, 2020) were heavily influenced by and primarily benefit powerful business lobbies like media conglomerates and the copyright industries, at best serving to swap one form of unaccountable elite power for another. As Viljoen (2021) argues, critiques of private power should not simply assume the democratic accountability and legitimacy of state regulation, which also often secures elite interests. In light of these points, economic democracy is a useful point of orientation because it deemphasises centralised state regulation, instead seeking to disperse power.

b. Areas for potential reform

These considerations suggest two broad areas for prospective reforms, both of which have been emphasised by progressive political economy scholars. First, stronger substantive regulation of social media, which not only prescribes procedures but more fundamentally reorients platforms'

business activities. Second, interventions aiming to increase media pluralism and decrease concentrated corporate power, including through the promotion of non-commercial alternatives.

i. Substantive regulation

One key element could be banning or severely restricting surveillance advertising – as the EU considered but rejected during the DSA negotiations – and instead promoting various alternative funding models such as contextual advertising (Iwańska, 2020), subscriptions and public subsidies. As section 4(a) suggested, any such reform should be based on broad-based democratic debate and contestation; nonetheless, several factors speak for banning surveillance advertising. First, as extensive privacy scholarship has explored, the collection and cross-company sharing of detailed personal information raises several concerns, many of which appear to resonate widely with the public (FRA, 2020). It can reveal highly sensitive personal information, including to state authorities (Nurik, 2022); raises concerns about individual autonomy and manipulation, especially in relation to politics (Zuboff, 2019; Dobber et al., 2019); and enables new forms of discrimination which most affect already-marginalised groups (Gandy, 1993; Wachter, 2020).

Second, as section 3(b)(ii) discussed, surveillance advertising-based models are widely thought to incentivise the promotion of harmful content and behaviour. More broadly, research in political economy of the media shows that advertiser-funded media tend to distort public debate toward topics serving corporate interests; to underproduce content important for democracy, such as critical and investigative journalism; and to underserve minority groups and viewpoints (Chomsky and Herman, 1988; Baker, 1992; Pickard, 2020; Jolly and Pickard, 2021; Pickard and Harloe, 2022). The direct influence of 'brand safety' concerns on the content platforms choose to promote, demonetise or censor – discussed in section 3(b)(ii) – freshly illustrates Baker's (1992, p2009) claim that 'private entities in general and advertisers in particular constitute the most consistent and the most pernicious "censors" of media content.'

Third, in line with the principle of economic democracy – that the construction and functioning of markets should not be artificially excluded from democratic debate and contestation – surveillance advertising should not just be considered as a problem in itself, but also as a question of the direction of economic production and the allocation of resources which could be used elsewhere (Schneider, 2021). One aspect of this is the crisis in news media funding, exacerbated by the large-scale redirection of advertising spending towards online surveillance advertising (Pickard, 2020). More recently, critics have raised concerns about the industry's financial sustainability (Hwang, 2020), and its environmental sustainability in the broader context of ecological emergency (Kwet, 2022), since it centrally relies on 'generation of artificial needs' and stimulating consumption (Landwehr et al., 2022, p4). A final relevant aspect is opportunity costs. As one former Facebook data scientist has said, 'The best minds of my generation are thinking about how to make people click ads' (Tufekci, 2018). The level of investment and human capital currently poured into developing sophisticated profiling and ad-targeting technology, and whether they could be invested in technologies that better serve the public interest, should be open to public debate and intervention.

Another strand of regulatory reform should be strengthening implementation and enforcement. Illustrating this, many commentators (Ryan and Toner, 2021; Burgess, 2022; Massé, 2022) and some European regulators (Vergnolle, 2021a; C. Taylor, 2021) consider that under-enforcement, especially by Ireland, has hampered the effectiveness of GDPR. A recent leak suggested that Meta has been systematically violating GDPR since it came into force (Francesci-Biacchierai, 2022). As Rahman (2018a) suggests, democratic accountability requires not only better substantive rules, but more accountable and responsive regulatory agencies; he argues enforcement should focus on

structural issues reinforcing unequal distribution of power and resources, such as market concentration and financialisation, not just the details of corporate conduct. As noted above, the DMA is making some steps in this direction. The DSA also has potential, as Articles 50-66 will give fairly extensive oversight powers to the Commission and national Digital Services Coordinators, such as requesting documentary disclosure and conducting on-site inspections. It remains to be seen how effectively these will be deployed in practice, and with what objectives.

ii. Media pluralism and demarketisation

Media pluralism is here understood as decentralising and dispersing control over media production and distribution, increasing the diversity of viewpoints represented, promoting diverse funding and governance structures, and increasing the visibility and participation of marginalised communities. As well as more broadly facilitating democratic debate (Jolly and Pickard, 2021) and social justice struggles (Themba-Nixon and Rubin, 2003), this represents the most promising way to enhance democratic participation in platform governance, while steering a course between authoritarian state control and unaccountable corporate power. As Schneider (2021) notes, regulatory reforms like those discussed above could already strengthen pluralism, since preventing exploitative corporate practices makes it easier for organisations which avoid those practices to compete and succeed. However, several further reforms could help restructure the social media industry to increase pluralism and reduce the dominance of market forces.

Reforms promoting pluralism and demarketisation in the contemporary surveillance-capitalist tech industry must address an ecosystem of diverse services and infrastructures, requiring different interventions (Landwehr et al., 2022; Tarnoff, 2019, 2022). In the social media context, one important implication of this is that media pluralism has multiple aspects. One is pluralism and diversity *of* social media, allowing users to choose between platforms offering different functionalities and business models; the other is pluralism and diversity *on* social media, i.e. in the types of media and viewpoints that are created and distributed.

In current policy debates, diversity *of* platforms is primarily viewed through the lens of competition. Many interventions to increase competition between platforms have been proposed, most prominently competition law interventions and interoperability obligations. Competition reform and enforcement could break up existing monopolies and proactively prevent further concentration, for example by stopping dominant platforms from acquiring smaller competitors (Rahman, 2018a; Thompson, 2019; Doctorow, 2020). Interoperability represents a further important remedy against network effects which favour concentration in communications markets. Without interoperability, which allows users of different platforms to communicate and share content, platforms with more users have an inherent advantage. Regulations mandating technical interoperability for common social media functions would make it easier for users to switch between platforms, and for new platforms to succeed with small user bases (Doctorow, 2020; Brown and Korff, 2020; Landwehr et al., 2022). This could allow the emergence of platforms serving niche interests, promoting technological innovation and provision for currently-underserved user groups (such as people with disabilities: Ellcessor, 2016). It would also increase the autonomy and bargaining power of content creators. For example, Instagram would be less able to force photographers to invest in producing resource-intensive videos (Griffin, 2022d) and consumers who prefer photos to watch them (Jennings, 2022) if those users could easily switch to another photo-sharing app without losing their contacts, followers or content.

However, increasing market competition between platforms is not a sufficient solution. First, competition and diversity are not synonymous. If the industry remains predominately privately-owned and marketised, smaller platforms will, to some extent, have the same economic incentives

as today's giants (Muldoon, 2020; Pickard, 2022b). Indeed, with platforms competing to cater to advertiser interests, profit from user data, etc., current problems could be exacerbated (Kwet, 2022). Second, as section 3(b)(ii) discussed, market dynamics are fundamentally in tension with equal accountability. This is particularly the case in media, where marketised systems systematically underproduce important public goods and underserve minorities (Baker, 1992; Pickard, 2022a) and competition has historically been considered inadequate to ensure pluralism (Helberger, 2020). Media pluralism therefore also requires demarketisation: reducing the influence of market forces on media content, and promoting non-commercial alternatives.

Demarketisation is particularly relevant to increasing pluralism *on* social media platforms. As creator studies scholarship has shown, platforms' control over content hosting, visibility and monetisation enables them to translate their own economic incentives into strong incentives for content creators to produce the kinds of content that best serve the platform and its advertisers (Bishop, 2018, 2019, 2022; Cotter, 2018; Glatt, 2022). This has direct implications for diversity and representation, since major platforms often appear to more strongly promote (and thus incentivise production of) content conforming to hegemonic gender, racial, beauty and class norms (Bishop, 2018, 2022; Matamoros-Fernàndez et al., 2021; Glatt, 2022). These dynamics by no means only affect professional social media influencers. Small businesses, artists and craftspeople often depend strongly on social media to attract customers (Griffin, 2022d), and media studies scholarship shows how social media incentives influence journalistic content (Cornia et al., 2018; Petre, 2021), while Bucher (2012) argues even casual users adjust their behaviour in response to visibility incentives. To increase pluralism and diverse representation, we need social media spaces where the rewards for content creation are not driven purely by market incentives (Cheung, 2021).

Here, there are various promising proposals to use public funding to support platforms which are not driven solely by commercial goals, but are set up with objectives like serving diverse communities, strengthening pluralism, and promoting public-interest media content (Clark and Aufderheide, 2011). One option is direct public ownership, which would not have to mean direct state control (Pickard, 2022b). Existing independent public-service media organisations like the BBC are imperfect, but have functioned for decades, command widespread respect, and have produced and commissioned diverse media content which would not have thrived in wholly commercial markets (UNESCO, 2022b). One option could be extending their funding and remits to provide public-service, non-commercial social media platforms (Clark and Aufderheide, 2011; Landwehr et al., 2022); another could be establishing new specialist institutions, modelled on existing public-service media institutions or on other independent public utilities (Muldoon, 2020).

Public ownership could be appropriate for the most widely-used platforms, which should focus on serving a maximally broad and diverse audience among the public as a whole. It could also be particularly appropriate for more basic technical infrastructure on which digital services rely, including telecommunications networks and data centres (Tarnoff, 2022). Public management of such infrastructure could further facilitate the emergence of smaller companies and non-commercial platforms by offering them favourable access (Cullen, 2018). Public policies like subsidies, tax breaks and favourable legal environments could also promote non-commercial models like worker- or user-owned cooperatives (Schneider, 2021); these might be particularly appropriate for smaller or more niche platforms serving particular communities (Muldoon, 2022).

Finally, to demarketise and democratise online media and communications, the ecosystem approach (Landwehr et al., 2022) should not be limited to considering digital services, but also the broader systems of media and knowledge production with which online media are interdependent. Increasing support and funding for non-commercial media institutions like local journalism and libraries would promote the production of information and media content not bound by market

incentives, and increase opportunities and financial support for content creators, indirectly promoting more democratic and pluralistic online media (Kapczynski, 2022; Pickard, 2022b).

5. Conclusion

This article has identified the core claims and assumptions of two influential schools of thought addressing social media platforms' accountability to the public. Despite their differences – the multistakeholderist response focusing on collective participation, voluntary cooperation and public pressure, the rule of law response on mandatory legal obligations, individual rights and detailed procedural rules – they share some underlying assumptions. In particular, these include the 'tech exceptionalist' belief that social media platforms represent a new and distinctive centre of political power; an understanding of this power as independent from and potentially competing with the state; a reliance on political institutions and discourse to constrain it; and an unwillingness to consider structural economic reforms.

Both responses therefore overlook the state's indispensable role in enabling platform companies' rise to power, their continuities with other manifestations of entangled state and corporate power, and the capacity of governments – especially those of relatively influential jurisdictions like the EU and its member states – to reshape social media markets. Both responses assume these markets will continue to exist in their current form and relegate the state's role to demanding better corporate behaviour, or clearing the way for civil society to do so. Both thus severely limit their capacity to secure democratic accountability, and are likely to ultimately strengthen and stabilise the power of currently-dominant corporations.

Since these corporations' power rests on their control of essential economic resources and infrastructure, and since markets inherently involve unequal representation of those with unequal resources, any policy response which limits consideration to political structures and institutions while leaving current market structures untouched will fail to provide democratic and equal accountability. Thus, this article has argued for reforms aiming to restructure social media markets to prevent socially harmful business models, reduce concentrated corporate power, strengthen media pluralism, and open up spaces for media production and communication which are free from market forces, guided by an ideal of economic democracy. This must involve shifting our focus away from corporations and towards the state as the locus of democratic accountability, and centring in our analysis the public foundations of private power.

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