

From a Network to a Dilemma: The Legitimacy of Social Media

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ABSTRACT

Social media platforms are facing a legitimation crisis. Without a significant change in their relationship with the public, they have reason to fear massive abandonment by users and crippling government regulation. Aware of this threat, platforms have tried to mimic legitimation strategies deployed by older, venerable institutions such as successful corporations, major media outlets, government bureaucracies, and even supreme courts. This is not surprising: New organizations routinely legitimate themselves by mimicking older ones. However, we show that in the case of social media platforms, these strategies are deeply misguided, but for different reasons.

The first set of legitimation strategies mimics legal institutions such as bureaucracies and constitutional courts. These attempts fundamentally misunderstand the reason why law is legitimated in modern societies. Platforms seem to think that merely adopting legal symbolism and forms can provide legitimation on its own. However, law in modern societies is legitimated not only through procedural and formal justice, but also because it exists in the context of a state and is perceived as authored by the political community. By stressing the how of law, platforms miss the fundamental question: Why should we allow Mark Zuckerberg, Bytedance, or the Twitter board to possess such incredible power over the digital public sphere?

The second set of legitimation strategies focuses on mimicking powerful non-legal organizations such as large tech firms and mass media outlets. These attempts fail in a different way. By echoing the arguments of

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We thank Jack Balkin, Robert Post, Chinmayi Arun, and Rafael Bezerra Nunes for their insightful comments and support. We also would like to note that this Article was finalized before Elon Musk completed the purchase of Twitter, and we therefore do not analyze the storm that followed it. However, we think that Musk's takeover, the ensuing loss of trust, the departure of advertisers, and the rising threats by E.U. and U.S. regulators, support the point that legitimacy is crucial for social media platforms' success.

corporations and civil society organizations, platforms do attempt to provide an answer to why they should exert power over the public sphere. However, these answers are fundamentally flawed: Social media platforms are too public to be fully private and too concerned with profit to be believed to act in the public interest.

Thus, social media platforms are currently unable to resolve their legitimation crisis. However, it is unlikely that they are going to disappear: An alternative to a public sphere without legitimate platforms is not a future without platforms but a future with delegitimated, tyrannical ones. We believe that the failures described in this Article reveal that successfully providing a reason as to why platform power is legitimate will require a significant change in the way social media platforms operate, conduct their business, and ultimately conceive of themselves.

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INTRODUCTION

The Social Dilemma, a Netflix documentary released in 2020,¹ provoked intense debate by accusing social media of manipulating users, causing suicide and self-harm among teenagers, spurring anger, and eroding democracy.² The documentary's director described social media as a "dystopian matrix."³ People seem to forget, however, that this was not the first major blockbuster about social media. The film *The Social Network*, a dramatic adaptation about the founding of Facebook, was released a mere decade before,⁴ and it did not purport to critique the nascent social networks directly.⁵ Rather, it portrayed Mark Zuckerberg being unkind to his girlfriend and stealing the idea for Facebook from his classmates.⁶ Watched as two parts of the same saga, however, these movies tell the story of a legitimization crisis.

The fate of these movies closely tracked the descent of social media platforms into the crisis.⁷ Increasingly, global society has stopped seeing the massive power employed by platforms as appropriate.⁸ Initially, the public

¹ THE SOCIAL DILEMMA (Netflix 2020).

² See Tonya Mosley & Allison Hagan, *'The Social Dilemma' Director Says the Internet Is Undermining Democracy*, WBUR (Sept. 18, 2020), <https://perma.cc/M7TX-L9HM>.

³ Matthew Carey, *"This Has Gone Way Too Far": 'The Social Dilemma' Director Jeff Orlowski on Dangers of Social Media*, DEADLINE (Jan. 22, 2021), <https://perma.cc/K83M-F25W>.

⁴ THE SOCIAL NETWORK (Columbia Pictures 2010).

⁵ Linda Holmes, *'The Social Network' Is a Great Movie, but Don't Overload the Allegory*, NPR (Oct. 10, 2010, 12:06 PM ET), <https://perma.cc/H3DF-JKPE> (reviewing reviews considering *The Social Network* a social critique and concluding that "*The Social Network* isn't about an entire nation of narcissists; it's about two young men whose friendship is quite tragically broken by ambition and ego and hurt feelings. Go for a riveting personal story, not for a lecture about social media.").

⁶ It should be noted that none of the accusations implied by the film had public implications: everyone who was harmed could be compensated by judicial agreement. We are not the first to note that the focus on Zuckerberg's supposed character "feels stupid" in light of later developments on the role of social media. Kaitlyn Tiffany, *In 2010, The Social Network Was Searing—Now it Looks Quaint*, VERGE (Mar. 17, 2017), <https://perma.cc/25VC-JG29>; see also *id.* ("Zuckerberg isn't a villain because he treated some people badly when he was 20 years old. If anything, he's a villain because he's one of the most powerful people alive, and nobody asked him to be.").

⁷ Evelyn Douek, *Facebook's "Oversight Board": Move Fast with Stable Infrastructure and Humility*, 21 N.C. J.L. & TECH. 1, 4 (2019) ("[C]ontent moderation practices [are] receiving unprecedented public scrutiny and suffering a crisis of legitimacy . . .").

⁸ See, e.g., Uta Russmann & Andreas Hess, *News Consumption and Trust in Online and Social Media: An In-Depth Qualitative Study of Young Adults in Austria*, INT'L J. COMMUN. 14, 14 (2020) ("While the public's trust in traditional media such as broadcast and print

granted Facebook, and the rest of social media,⁹ ample social license¹⁰ to perform their activities without questioning the legitimacy of their power. Initially, commentators met claims about Facebook's political influence with skepticism,¹¹ and the inherent dangers and dramatic impact of the digitalization of our public sphere and the rise of social media platforms was not widely understood. The initial dangers associated with Facebook and MySpace were, for instance, privacy violations¹² and the possible enabling of sexual offenses¹³—harmful, no doubt, but dangers that were not perceived as systemic or public. As late as 2009, some admonished that there was no good reason to stay out of social media.¹⁴

However, over the last decade and after a succession of well-known scandals, the massive influence wielded by social media platforms (mainly through content moderation and recommendation algorithms) came into sharp focus.¹⁵ Public awareness led to public critique and resistance, which

media is actually increasing, trust in online media and social media continues to fall, eroded by misinformation and disinformation.”); Debra Aho Williamson, *User Trust in Social Platforms Is Falling, According to Our New Study*, INSIDER INTEL (Sept. 19, 2022), <https://perma.cc/SSV9-CMUJ> (showing a large decline in U.S. social media users' trust in social media companies' respect for privacy concerns); see also *infra* notes 15, 46-50 and accompanying text.

⁹ In the context of this Article, we use “social media” to denote large, open digital platforms on which the public can broadcast user-generated content, such as Facebook, Twitter, Instagram, LinkedIn, YouTube, TikTok, etc. This excludes instant messengers like WhatsApp in which messages remain generally private.

¹⁰ See *infra* note 68 (discussing social license).

¹¹ The headline of a story by *The New York Times* in 2008 expressed the sentiment that Facebook is no kingmaker. See Saul Hansell, *Facebook Is No Kingmaker*, N.Y. TIMES BITS (Jan. 14, 2008), <https://perma.cc/LAR8-5BCB> (observing that, contrary to some insinuations, Facebook was “not a particularly powerful medium to broadcast mass messages.”).

¹² See, e.g., Louise Story & Brad Stone, *Facebook Retreats on Online Tracking*, N.Y. TIMES (Nov. 30, 2007), <https://perma.cc/G4AK-ATNJ> (describing complaints about possible violations of privacy).

¹³ See David Gelles, *Facebook Targets Sex Offenders*, FIN. TIMES (Dec. 7, 2009), <https://perma.cc/7F7F-W35N> (quoting an activist complaining that “[s]ocial networking websites have become the private hunting grounds for sexual predators” and reviewing Facebook's actions against this threat).

¹⁴ See Farhad Manjoo, *You Have No Friends: Everyone Else is on Facebook. Why Aren't You?*, SLATE (Jan. 14, 2009), <https://perma.cc/8ZBA-CSTP> (“There is no longer any good reason to avoid Facebook.”). Naturally, the author came to regret his optimism. Farhad Manjoo, *I Was Wrong About Facebook*, N.Y. TIMES (July 21, 2022), <https://perma.cc/EFF5-CYPE> (“I had the matter exactly backward. Had we all decided to leave Facebook then or at any time since, the internet and perhaps the world might now be a better place.”).

¹⁵ See Roger McNamee, *Twitter Is Brilliant. The Damage It's Done Is Undeniable*, TIME (May 2, 2022, 3:56 PM EDT), <https://perma.cc/Q73H-LR4Q> (“In 2016 and 2017, few

spurred a full-blown legitimation crisis. No longer was it enough for platforms to behave like Silicon Valley start-ups—moving fast and breaking things. Increasingly, they needed to face the challenges of political forms of legitimation.¹⁶ Today, social media platforms are widely perceived as impacting the public sphere in an irresponsible and damaging way.¹⁷

This is an existential danger for these platforms and the corporations that oversee them. If seen as illegitimate, social media platforms will meet constant resistance by users¹⁸ and massive regulation by governments.¹⁹ Platforms, therefore, urgently need to legitimate the powers they wield. Power without legitimacy is feeble and ineffective.²⁰

Social media platforms have deployed diverse legitimation techniques in attempting to attain salvation. As this Article shows, they have invested much of their energy in what we call “legal legitimation strategies.”²¹ As

people understood that Facebook, Instagram, YouTube, Google, and Twitter could cause widespread harm. Beginning with the Cambridge Analytica scandal in 2018, policy makers and journalists began to dig into the culture, business models, and algorithms of internet platforms.”); *see also* Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 *Geo. L. Tech. Rev.* 198, 198-99 (2018) (“But as those promises have begun to sour, and the reality of these platforms’ impact on public life has become more obvious and complicated, these companies are beginning to actually grapple with how best to be stewards of public culture, a responsibility that was not evident to them at the start.”).

¹⁶ “Move fast and break things” was Facebook’s motto until 2014. The abandonment of this motto is in itself indicative of public attitudes towards social media. In 2009, Zuckerberg could explain in interviews that “[u]nless you are breaking stuff . . . you are not moving fast enough.” Henry Blodget, *Mark Zuckerberg on Innovation*, *Bus. Insider* (Oct. 1, 2009), <https://perma.cc/3FRJ-YPFV>. In 2014, Facebook was forced to change the motto to “move fast with stable infrastructure.” *See* Drake Baer, *Mark Zuckerberg Explains Why Facebook Doesn’t ‘Move Fast and Break Things’ Anymore*, *Bus. Insider* (May 2, 2014), <https://perma.cc/7JNU-A3SY>. By the end of the decade, the motto was considered “untenable.” *See* Hemant Taneja, *The Era of “Move Fast and Break Things” Is Over*, *Harv. Bus. Rev.* (Jan. 22, 2019), <https://perma.cc/MU46-Q3ZZ>; Greg Satell, *Why “Move Fast and Break Things” Does Not Work Anymore*, *Harv. Bus. Rev.* (Dec. 10, 2019), <https://perma.cc/P6YP-GK4P> (“If we continue to move fast and break things, we are likely to break something important.”).

¹⁷ *See supra* note 15; *infra* notes 46-50.

¹⁸ BEN BRADFORD ET AL., REPORT OF THE FACEBOOK DATA TRANSPARENCY ADVISORY GROUP 39 (The Just. Collaboratory of Yale L. Sch. 2019) (“[U]nhappy customers are less likely to use the site and more likely to seek alternatives to it.”); *see also* Douek, *supra* note 7, at 19 (“[B]ecause ‘exit’ (i.e. leaving the platform) is easier than physical exit from a state, the costs of illegitimate decisions may be even greater.”).

¹⁹ Social media platforms’ initiatives at self-regulation are widely perceived as attempts to gain legitimacy and preempt state regulation. *See, e.g.*, Marietje Schaake, *Big Tech Calls for ‘Regulation’ but Is Fuzzy on the Details*, *Fin. Times* (July 26, 2021), <https://perma.cc/G4YF-VCDV> (“Mark Zuckerberg has created the Facebook oversight board hoping to avoid independent oversight.”).

²⁰ On the relationship between power and legitimacy, *see infra* Part I.

²¹ *See infra* Part II.

they, and others, recognize that they wield powers that are like those exerted by “governments,”²² platforms decided to develop their own governmental structures: a bureaucracy, laws, and a court. We argue, however, that these quasi-legal institutions cannot fully legitimate content moderation. In fact, this legalization strategy is based on a misunderstanding of the legitimizing function of law.²³ It may be possible to turn content moderation into a more transparent, predictable, even fairer endeavor. However, the legitimacy of law relies not only on procedures, but also on why we accept law to rule our lives (namely, in democracies, because we accept the law as a product of the will of the political community).²⁴ Currently, social media platforms lack a good answer for why they should dominate important aspects of our online and offline lives. As a commentator caustically stated, if they are indeed a government, they are North Korea.²⁵ We argue that if social media platforms are to successfully legitimate their power, they must first provide an answer as to *why* they should wield this power, and not merely polish the way in which they do so.

Gaining legitimacy is clearly a central concern of social media platforms. How and whether they gain legitimacy should also concern us all. For democratic politics to work, they require “trusted and trustworthy intermediate institutions that are guided by professional and public-regarding norms.”²⁶ It is late to think that platforms should not be some of these intermediate institutions. The alternative to a future with platforms that are not legitimated is not a future without platforms, but a future with delegitimated ones. This means that, in the digital public sphere, what we need are social media platforms that are both trustworthy and legitimate. Currently, we have neither. This Article is an exploration on how we might achieve both.

²² See Henry Farrell, Margaret Levi & Tim O’Reilly, *Mark Zuckerberg Runs a Nation-State, and He’s the King*, Vox (Apr. 10, 2018, 7:44 AM EDT), <https://perma.cc/395V-SHTE> (discussing Zuckerberg’s assertion that “[i]n a lot of ways Facebook is more like a government than a traditional company”).

²³ See *infra* Part IV.

²⁴ *Id.*

²⁵ Carole Cadwalladr, *Facebook Is out of Control. If It Were a Country It Would Be North Korea*, GUARDIAN (July 5, 2020), <https://perma.cc/6KFY-DZTP>; see also Adrienne LaFrance, *The Largest Autocracy on Earth*, ATLANTIC (Sept. 27, 2021), <https://perma.cc/RZF3-EEPT>.

²⁶ Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 72 (2021) (“A public sphere does not work properly without trusted and trustworthy intermediate institutions that are guided by professional and public-regarding norms.”).

In Part I, we explore the reasons the legitimation hurdles facing social media platforms are uniquely challenging. Sociologists have found that new organizations deal with legitimation challenges by modeling themselves after other similarly situated entities. The fact that a well-established organization has survived for so long gives newer aspirants reasons to mimic it, both to exploit the cognitive ease with which it has been accepted and to avoid the mistakes it might have made on the way.²⁷ Just to cite a few heterogeneous examples, political parties mimic the graphic design of their ideological predecessors,²⁸ informal dispute settlement bodies model themselves after regular courts,²⁹ and companies take similar names to those of their established competitors.³⁰

For social media platforms, however, legitimation through emulation (technically, “mimetic isomorphism”³¹) is far from straightforward. Social media platforms are novel entities, unable to jump into a previously defined organizational field and mimic its legitimation techniques: They are just too different to anything that came before. What should a social media platform look like in order to gain legitimacy? Should it resemble a nation-state or the United Nations? A company or an NGO?

The fact that this question is hard to answer, however, has not stopped social media platforms from emphatically trying. In fact, we identify four entities social media platforms have tried to mimic: state bureaucracies, supreme courts, technology companies, and civil society organizations. Social media platforms, of course, do not stand equally with each of these categories: While they are certainly not governments that have courts, they are large private companies, and they could choose to closely resemble civil

²⁷ See *infra* Part I.

²⁸ See, e.g., Matteo CM Casiraghi, Luigi Curini & Eugenio Cusumano, *The Colors of Ideology: Chromatic Isomorphism and Political Party Logos*, PARTY POL. (Online) (May 29, 2022), <https://perma.cc/D6NM-QB8V> (noting “parties’ chromatic isomorphism” in Western European politics).

²⁹ Susan Corby & Paul L. Latreille, *Employment Tribunals and the Civil Courts: Isomorphism Exemplified*, 41 INDUS. L.J. 387, 388 (2012) (arguing that the “evolution of [employment tribunals] to become more like the civil courts both in practices and in structure can be explained by . . . institutional isomorphism”).

³⁰ Mary Ann Glynn & Rikki Abzug, *Institutionalizing Identity: Symbolic Isomorphism and Organizational Names*, 45 ACAD. MGMT. J. 267, 277 (2002) (“[W]e found support for the interplay between organizational identity and institutionalism, in that organizational nomenclature was isomorphic with cultural patterns that, in turn, increased the legitimacy of the organizations.”).

³¹ For this concept, see Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147, 150 (2017).

society organizations. What matters, however, is that they have tried to learn something from the ways in which these venerable entities have legitimated their power. The ways in which platforms have failed in their legitimation attempts can tell us something about what they are or can be.

In Part II, we explore the first two attempts at an answer: state bureaucracies and supreme courts. As commentators and platforms alike have noted, platform power resembles (in its breadth and depth) that of nation-state governments. It is no surprise that platforms have tried to legitimate their power in a similar way to those employed by states. Initially, they set up a body of rules that strives to resemble a legal code, to be applied evenly by a faithful, professionalized bureaucracy. The decisions made by these bureaucrats, furthermore, can be appealed by users in a pseudo-administrative process. Facebook was the one to move further in this direction, creating the “Oversight Board” (informally dubbed “Facebook’s Supreme Court”³²). The Board, which was explicitly set up to “legitimate” Facebook’s decisions,³³ is composed by legal experts given financial independence and job security and meant to make reasoned decisions based on both Facebook’s internal guidelines and international human rights laws.³⁴

In Part III, we explore two alternative ways in which platforms try to legitimate their power. First, social media platforms often claim that they are merely tech companies and should enjoy the same leeway to act as Tesla or Apple. By emphasizing the fact that they are private, innovative, for-profit corporations, they attempt to deemphasize their unprecedented domination of the digital public sphere. We do not expect much of private corporations, merely that they provide value to their consumers and stakeholders and (sometimes) that they not actively harm the public-interest. Their legitimacy is derived, at least in part, from the overall legitimacy of the private market in capitalist societies. Platforms sometimes insist that this is the low standard according to which they should be measured.³⁵

Alternatively, social and political pressure sometimes forces social media platforms to abandon private power legitimation and lean into their public power and responsibilities. Civil society organizations—the media,

³² See *infra* notes 127-130 and accompanying text.

³³ See *infra* Part II.B.

³⁴ See generally Ruby O’Kane, *Meta’s Private Speech Governance and the Role of the Oversight Board: Lessons from the Board’s First Decisions*, 25 STAN. TECH. L. REV. 167 (2022).

³⁵ See *infra* notes 190-193 and accompanying text.

universities, NGOs—gain legitimacy by convincing the public that they operate mainly for the common good, rather than for selfish reasons. They claim that they deserve our trust. The main instance in which social media platforms claimed (reluctantly) that we should trust them to responsibly work for the public good is the battle against misinformation, especially in cases like U.S. election tampering, COVID-19, and the Ukraine war. Unlike corporations, which can ultimately justify their actions by saying that “this is just business,” civil society organizations rely on public trust—they want us to believe they are acting for our benefit.

Finally, in Part IV, we analyze the reason why all of these legitimation strategies have failed. We argue that legal legitimation strategies, such as establishing a bureaucracy or courts, are bound to fail. The fact that social media platforms are pinning their hopes on legal legitimation strategies shows that they fundamentally misunderstand the grounds for legal legitimacy. We do not follow law only because it is applied in a predictable way and through fair procedures. Rather, we allow law to rule fundamental aspects of our lives because we perceive that it is an emanation of the political community. Therefore, social media platforms can use legal legitimation techniques only to legitimate *how* content moderation is exercised but not to legitimate *why* it is that platforms and their boards or CEOs are the ones who should hold such unparalleled power over our digital public sphere, with fundamental consequences for our lives—online and offline, private and public.

By contrast, the alternative strategies (legitimation through status as a technology company or civil society organization) fail because, although they do provide answers as to why platforms should exert power over our digital public sphere, the answers fail to gain social plausibility. Simply, it is socially implausible to conceive of social media platforms as “merely tech companies,” as if they are not radically transforming our public sphere. At the same time, as platforms’ reluctance to accept civil society responsibilities combines with their addiction to surveillance-based ad-revenues, civil society legitimation is currently beyond reach.

To truly become legitimate custodians of our digital public sphere, social media platforms will have to find a convincing answer as to why they deserve authority and power over us. It is likely that the pursuit of such an answer will require them to transform into institutions more worthy of our trust. Those that fail to legitimate their power are going to have that power—and the profits that flow from it—curbed by both states and users.

I. THE CHALLENGE OF SOCIAL MEDIA LEGITIMACY

Social media platforms exert unprecedented power.³⁶ With the help of both human and automated agents, they amass, analyze, and adjudicate information at an enormous scale: In only one quarter of 2022, “Facebook took down 914,500,000 pieces of content, YouTube took down 3,987,509 channels and 4,496,933 videos, and . . . TikTok removed 102,305,516 videos.”³⁷

The enormity of these numbers validates a common perception: Social media platforms, by controlling the content on their sites, are changing the ways we communicate in the public sphere. Each platform unilaterally decides how we inform ourselves,³⁸ the sources of information we can share,³⁹ the forms of art that are permissible,⁴⁰ and even the insults we can post.⁴¹ Why do we permit social media companies—all of which emerged in the last two decades, and many much more recently—to exercise such radical power over the content that we share?

This was not always considered such a pressing question. In 2008, in one of the first public warnings about what we would now call “content moderation,” a *New York Times* columnist asked Google’s counsel whether that activity was that of a judge or of an editor. She replied that it was neither: rather, Google’s aim was to conform to existing foreign and domestic regulations.⁴² In the same article, free speech scholar Tim Wu found what looked like the right analogy about why Google had social license to moderate content: “To love Google, you have to be a little bit of a

³⁶ See Alexis Papazoglou, *Facebook Is a New Form of Power*, NEW REPUBLIC (July 22, 2019), <https://perma.cc/8QT5-N3RQ> (“The kind of power that Facebook is acquiring is neither that of a mere company, nor that of a government; it is creating a new paradigm of power altogether.”).

³⁷ Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 537-38 (2022).

³⁸ For a general review of the challenges posed by algorithmic recommendation, see Gilad Abiri & Xinyu Huang, *The People’s (Republic) Algorithms*, 12 NOTRE DAME J. INT’L & COMPAR. L. 16, 20-22 (2022).

³⁹ On the source-checking activity of social media platforms, see discussion *infra* Part III.B.

⁴⁰ See generally Jonathan Peters, *Sexual Content and Social Media Moderation*, 59 WASHBURN L.J. 469, 469-70 (2020) (reviewing instances of social media censorship over art because of nudity policies).

⁴¹ ÁNGEL DÍAZ & LAURA HECHT-FELLELLA, BRENNAN CTR. FOR JUST., DOUBLE STANDARDS IN SOCIAL MEDIA CONTENT MODERATION 8-9 (2021), <https://perma.cc/MQD7-48TT> (reviewing “harassment” policies on different platforms, including the regulation of insults).

⁴² See Jeffrey Rosen, *Google’s Gatekeepers*, N.Y. TIMES MAG. (Nov. 28, 2008), <https://perma.cc/VP27-LSMS>.

monarchist, you have to have faith in the way people traditionally felt about the king.”⁴³

The plausibility of the monarchist analogy did not last for long.⁴⁴ Wu was prescient, however, about one thing: Social media platforms “live and die on trust, and as soon as you lose trust in Google, it’s over for them.”⁴⁵ In order to exert such control over their users’ online activities, these companies needed legitimacy, and this legitimacy was hard to earn and easy to lose.

Social media platforms’ need for legitimacy reached crisis levels in the latter half of the 2010s. In 2018, *The Economist* coined the term “techlash” to describe a shift in public attitudes toward large tech companies, which were increasingly seen as “BAADD”: “too big, anti-competitive, addictive and destructive to democracy.”⁴⁶ Soon after, a series of scandals came to light in quick succession: Facebook was accused of enabling election interference and facilitating ethnic cleansing,⁴⁷ Twitter was accused of furthering political polarization,⁴⁸ YouTube was accused of helping the recruitment of extremists,⁴⁹ and Instagram was accused of contributing to teenagers’ mental health problems, including suicide and self-harm.⁵⁰

⁴³ *Id.*

⁴⁴ *See id.* (“Google’s claim on our trust is a fragile thing. After all, it’s hard to be a company whose mission is to give people all the information they want and to insist at the same time on deciding what information they get.”).

⁴⁵ *Id.*

⁴⁶ Eve Smith, *The Techlash Against Amazon, Facebook and Google—and What They Can Do*, *ECONOMIST* (Jan. 20, 2018), <https://perma.cc/U99Y-H34Z>.

⁴⁷ *See* Leo Kelion, *Facebook and Twitter Grilled over US Election Actions*, *BBC NEWS* (Nov. 17, 2020), <https://perma.cc/6DMV-VCPW> (“Facebook and Twitter’s chief executives have been challenged over their handling of the US election in their latest appearance before the US Senate.”); Dan Milmo, *Rohingya Sue Facebook for £150bn over Myanmar Genocide*, *GUARDIAN* (Dec. 6, 2021, 12:03 PM EST), <https://perma.cc/J6CU-7YEY> (“Facebook’s negligence facilitated the genocide of Rohingya Muslims in Myanmar after the social media network’s algorithms amplified hate speech and the platform failed to take down inflammatory posts, according to legal action launched in the US and the UK.”).

⁴⁸ *See* Paul Barrett, Justin Hendrix & Grant Sims, *How Tech Platforms Fuel U.S. Political Polarization and What Government Can Do About It*, *BROOKINGS* (Sept. 27, 2021), <https://perma.cc/AX6W-RJBS> (concluding that “platforms like Facebook, YouTube, and Twitter likely are not the root causes of political polarization, but they do exacerbate it”).

⁴⁹ *See* Shira Ovide, *The YouTube Rabbit Hole Is Nuanced*, *N.Y. TIMES* (Apr. 21, 2022), <https://perma.cc/SW7Q-PSQC> (citing academics concluding that “[o]ur results make clear that YouTube continues to provide a platform for alternative and extreme content to be distributed to vulnerable audiences”).

⁵⁰ *See* Ian Russell, *My Daughter Was Driven to Suicide by Social Media. It’s Time for Facebook to Stop Monetizing Misery.*, *WASH. POST* (Oct. 25, 2021, 12:45 PM EDT), <https://perma.cc/974P-CLMF>.

Social media companies' contributory role in these harms has spurred public debate on the role of social media platforms in our lives and democracies. Germany, for instance, regulated hate speech in social media in response to this concern.⁵¹ Both the United States and the European Union have subpoenaed social media platforms' top officers,⁵² and at the time of this writing, speculation exists about sought-after, wide-ranging regulation.⁵³

Controversies over platforms' content moderation practices put into question the source of their legitimacy. Intentionally or not, social media platforms actively shape public discourse: They select what can and cannot be said, they recommend to each user (each voter!) what they would like to read or watch, and they have the ability to promote some political campaigns over others. Why would people readily accept that for-profit companies—neither directly elected by nor accountable to the general public—are exerting such power?

Generally, power is wielded through two primary tools: coercion and legitimacy.⁵⁴ A ruler can coerce her subjects into abiding by her wishes only up to a certain degree. Except in extreme cases like slavery,⁵⁵ it is impossible for a ruler to detect and punish every minor deviation: Every ruler, to some extent, requires voluntary cooperation from those whose collaboration is needed to maintain the enterprise.⁵⁶ To the extent coercion falls short, rulers

⁵¹ See Claudia E. Haupt, *Regulating Speech Online: Free Speech Values in Constitutional Frames*, 99 WASH. U. L. REV. 751, 760-67 (2021) (analyzing the German Network Enforcement Act).

⁵² See, e.g., Hannah Murphy, *Tech CEOs Face Senate Scolding over Content Moderation*, FIN. TIMES (Oct. 28, 2020), <https://perma.cc/69A8-6CFG> ("Social media chief executives [of Twitter, Facebook, and Google] faced a blaze of criticism from both sides of the political spectrum for their approach to moderating content, at a bruising Senate hearing just days before a US presidential election.")

⁵³ See Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 304 (2021) ("Everyone wants to regulate the big tech companies . . . Scholars and politicians on all sides are proposing to remove their immunity from liability, require them to take certain acts, prevent them from taking others, or even break them up entirely.")

⁵⁴ On the trade-off between coercion and legitimacy in securing subjects' obedience with power, see DAVID BEETHAM, *THE LEGITIMATION OF POWER* 25-37 (1991).

⁵⁵ *Id.* at 30 (using slavery as an example of the rare situations in which "the legitimacy of a power relationship is unnecessary to the goals of the powerful").

⁵⁶ *Id.* at 29-30 ("Wherever the goals of the powerful are dependent upon the degree of cooperation and the quality of performance on the part of subordinates, therefore, to that extent legitimacy is important for what they can achieve . . .").

need subjects to believe in the rightfulness of their domination. Without this legitimacy, domination, in any form, is doomed to fail.⁵⁷

Social media platforms are not governmental entities,⁵⁸ and most of their power is brought to bear through something akin to coercion—their content moderation decisions come in the form of *faits accomplis*, not polite requests. But coercion alone is insufficient to maintain social media companies' power. Most scholars⁵⁹ (and social media platforms themselves⁶⁰) agree that social media platforms need legitimacy—that is, voluntary cooperation from users—in order to preserve their rule, if only because exercising their power in a way perceived as illegitimate would cause users to leave for a different platform.⁶¹

Agreement, however, stops there. Precisely what model of legitimacy social media platforms should use remains unclear. Is it the same kind of legitimacy that a government requires (that is, legitimacy for giving orders and expecting compliance)? Or is it the kind of legitimacy that sustains private companies (that is, being seen as behaving appropriately according to established rules and beliefs⁶²)? The newness of social media renders answering these questions nearly impossible.

In this Article, we explore social media platforms' "sociological legitimacy," but defining this concept is no easy task.⁶³ The handbook will insist that "legitimacy" is usually (and sometimes promiscuously) used in two different senses: sociological and normative.

An authority is legitimate in the sociological sense when it is *perceived* by the target audience as being legitimate in a normative sense—that is, when those who are subject to the authority perceive it as obtained and

⁵⁷ *Id.* at 28 ("[W]hen legitimacy is eroded or absent . . . coercion has to be much more extensive and omnipresent, and that is costly to maintain. Moreover, the system of power has only one line of defence, that of force; and it can therefore collapse very rapidly . . .").

⁵⁸ *But see infra* Part II.A (analyzing the ways in which platforms project certain characteristics traditionally held by governments).

⁵⁹ *See, e.g.,* Douek, *supra* note 7, at 46-47 (describing Facebook's need for legitimacy).

⁶⁰ *See infra* note 128 and accompanying text (indicating Facebook's awareness that the creation of the Facebook Oversight Board was due to the need to legitimate content moderation).

⁶¹ *See supra* note 18.

⁶² *See infra* Part III.A.

⁶³ Most scholars addressing the issue of "legitimacy" consistently point to the complications of defining this term. *See, e.g.,* BEETHAM, *supra* note 54, at 3-4 ("[I]n addition to the inherent difficulty of deciding what makes power legitimate, there is the extra complication of divergent definitions offered by different groups of professionals.").

exerted in an appropriate way. We can think, for example, that the *ancien régime* or the Antebellum United States were abhorrent political systems while still acknowledging that many of their subjects perceived them to be good and legitimate. To make this analysis, therefore, we should investigate people's beliefs about the appropriateness of the authority, and then investigate whether the authority conforms its conduct to those beliefs.⁶⁴

Take Eastern European communism: One way of understanding its final demise is that there was a growing gap between the beliefs that were meant to sustain the appropriateness of the government and the lived reality of the people subject to the authority.⁶⁵ In this sense, the Soviet government suffered from a sociological legitimacy deficit, which is analytically independent of normative assessments about the correctness of Soviet-style communism. A similar dynamic might be happening with the U.S. Supreme Court and its current legitimacy crisis: As the Court is behaving in increasingly partisan ways, it contradicts the beliefs of those who are willing to grant the Court legitimacy only insofar as it conforms to their deeply held beliefs about the principled application of the Constitution and the rule of law.⁶⁶

The novelty of social media platforms makes legitimation extremely challenging. As social media burst into people's lives unexpectedly, society did not form solid beliefs about its appropriate role in our lives, private and public. Even during their first years, social media platforms did not face major attacks on their power's legitimacy.⁶⁷ A vivid public debate over the

⁶⁴ See *id.* at 11 ("A given power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs . . . We are making an assessment of the degree of congruence, or lack of it, between a given system of power and the beliefs, values and expectations that provide its justification.").

⁶⁵ See *id.* at 28-29.

⁶⁶ As the Supreme Court itself noted, its legitimacy is sustained upon being seen as applying the law in a principled way. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."). Therefore, as the Supreme Court is increasingly perceived as being divided along strong partisan lines, fewer people find reasons to find it a legitimate institution. Both the popular press and academics have made this point. See, e.g., Bruce Ackerman, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM PT), <https://perma.cc/H4WA-GWAU> (suggesting that political partisanship "will predictably destroy the court's legitimacy in the coming decade"); *America's Supreme Court Faces a Crisis of Legitimacy*, ECONOMIST (May 7, 2022), <https://perma.cc/45DC-HW3F> ("The court risks being seen as just another manifestation of America's extreme partisanship, and treated accordingly.").

⁶⁷ See *supra* notes 9-14 and accompanying text.

appropriate role of social media developed only in the second half of the 2010s, and the result is the current legitimation crisis—arguably one of the best moments to study legitimacy.⁶⁸

In this context, it makes sense that social media platforms have actively attempted to secure legitimacy for their actions. In doing so, they have fallen into a common pattern described by institutional sociologists: isomorphism. In order to appear legitimate, new organizations “tend to model themselves after similar organizations in their field that they perceive to be more legitimate or successful.”⁶⁹ That is, they try to mimic the tactics that successfully created trust and legitimacy for other similar entities. For example, international courts replicate the symbology and rhetoric of national courts,⁷⁰ and companies adopt similar corporate social responsibility rhetoric to one another.⁷¹ New organizations take advantage of what their predecessors have learned in overcoming their legitimation hurdles and also rely on the cognitive ease with which they have already been accepted in society.⁷²

However, mimicking previous organizations has not brought social media platforms out of their legitimation predicament. To effectively engage in isomorphic legitimation, digital platforms must correctly identify their

⁶⁸ This idea has been expounded both in the context of Supreme Court cases and corporate legitimacy. For the former, see, for example, Dino P. Christenson & David M. Glick, *Chief Justice Roberts’s Health Care Decision Disrobed: The Microfoundations of the Supreme Court’s Legitimacy*, 59 AM. J. POL. SCI. 403, 403 (2015) (“[W]hile high-salience cases are unusual, they are also the cases with the potential to provide the public with new information that makes reassessing the Court feasible.”). For the latter, see, for example, JOHN MORRISON, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE* 14 (2014) (“When it comes to the operations of companies, it is much easier to see where the social license has been lost than to point to examples where it is still present in operational terms. . . . Many times the social license is in place and therefore invisible in most respects.”); *id.* at 41 (“[I]t is much easier for an organization to see when it does not have social license for a specific activity than when it does.”); DAVID ROUGH, *THE SOCIAL LICENCE FOR FINANCIAL MARKETS: REACHING FOR THE END AND WHY IT COUNTS* 139 (2020) (“It is the loss of [society’s] trust [in financial markets] that has provoked talk of a social licence for financial markets . . .”).

⁶⁹ DiMaggio & Powell, *supra* note 31, at 152.

⁷⁰ See Sebastián Guidi, *International Court Legitimacy: A View from Democratic Constitutionalism* (Sep. 2022) (Ph.D. dissertation, Yale University) (on file with author).

⁷¹ See generally Christopher Marquis, Mary Ann Glynn & Gerald F. Davis, *Community Isomorphism and Corporate Social Action*, 32 ACAD. MGMT. REV. 925, 926 (2006) (“We propose that the nature and level of corporate social action are driven by community isomorphism.”). For more examples of isomorphism, see *supra* notes 28-30 and accompanying text.

⁷² For the mechanisms leading to isomorphism, see generally DiMaggio & Powell, *supra* note 31.

relevant organizational field.⁷³ For instance, a new cell phone manufacturer can learn a lot from Apple on how to create a trusted and loved brand but will likely learn much less from a fast-food chain. This task, however, is not as simple as it sounds. Are the legitimation hurdles of Facebook similar to those of Apple? Or perhaps the New York Times? The United States? The United Nations?

A complex response might be that social media platforms are a whole new animal. Legitimation occurs when a powerholder behaves according to the beliefs people have about the rightful way of exercising authority. When an entity is so new and unfamiliar, there is simply no definite set of beliefs about its proper place. This challenge is exacerbated by the fact that social media platforms need to legitimate their power among many different target groups.⁷⁴ Under such conditions, social media will struggle aimlessly to exercise its power in a legitimate way.

Social media platforms share many qualities with different fields. They are perceived as companies like any major corporation, public forums like town squares, information carriers like television channels, censors like authoritarian states, and accountable bodies like democracies. Yet, they are not fully any of these things. To determine what they are, we rely on the set of meanings constructed around them.⁷⁵ As long as we do not know what people think about digital media platforms, we do not fully know what they are, and therefore no one can fully know how they can become legitimate. The way of investigating what these companies really are is by analyzing the set of beliefs constructed around them.⁷⁶ Ironically, an effective lens through which to examine these beliefs is social media platforms' failed legitimation attempts.

⁷³ *Id.* at 148 (“The structure of an organizational field cannot be determined a priori but must be defined on the basis of empirical investigation. Fields only exist to the extent that they are institutionally defined.”).

⁷⁴ See Chinmayi Arun, *Facebook’s Faces*, 135 HARV. L. REV. F. 236, 246-56 (2022) (describing the different publics and states that Facebook targets in their legitimation campaigns).

⁷⁵ See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (Penguin Books ed. 1991) (1966) (describing the idea that our perception of reality is socially constructed). This idea as applied to political authority was famously phrased by Karl Marx. See 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 66 n.1 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., The Modern Library 1906) (1867) (“[O]ne man is king only because other men stand in the relation of subjects to him. They, on the contrary, imagine that they are subjects because he is king.”).

⁷⁶ See *supra* notes 64-68 and accompanying text.

II. THE *HOW* OF POWER: LEGALIZATION AND LEGITIMACY

In this part, we describe and analyze two forms of legal legitimization strategies undertaken by social media platforms: the development of a bureaucratic apparatus and the establishment of a court-like entity.

A. *Bureaucracies and Rule of Law*

The moderation systems of digital media platforms police the speech of billions of people. The scale in which they operate is almost unfathomable.⁷⁷ The only comparable institution in human history are state bureaucracies. Like the content moderation power of social media platforms, the power wielded by state bureaucracies is expansive, discretionary, and almost omnimodus. Scholars have often asked why bureaucrats should deserve to have authority over us. After all, they are neither elected nor directly accountable to us. How can we trust them not to misuse their power?⁷⁸

Bureaucracies have developed a set of features that help legitimate their power.⁷⁹ Below, we explore three large families of such features: formal, structural, and procedural. Each of these features has been mimicked by social media platforms in their attempt to gain legitimacy.

First, bureaucratic government legitimates itself by its formal characteristics. Bureaucratic governance promises us “a government of laws, and not of men,”⁸⁰ in which general rules are applied in an egalitarian, transparent, predictable, and depersonalized way. This insight has been explored both by sociologists and legal theorists. Among the former, Max Weber has influentially argued that “legal-rational” authority rests upon “a belief in the legality of enacted rules and the right of those elevated to

⁷⁷ See Douek, *supra* note 37, at 548 (noting “the unfathomable scale of content moderation”).

⁷⁸ See Bo Rothstein, *Political Legitimacy for Public Administration*, in SAGE HANDBOOK OF PUBLIC ADMINISTRATION 407, 410 (B. Guy Peters & Jon Pierre eds., 2d ed. 2012) (“Given that, in many cases, it is necessary to entrust the administrative agencies and/or individual civil servants with large amounts of discretionary power, how can the public, and especially the various ‘target groups’ to which the policy in question is directed, trust the administrative agencies not to misuse that power?”).

⁷⁹ The literature on bureaucratic legitimacy is vast, and it spans a wide array of academic areas. For a review of relevant U.S. American literature on bureaucratic legitimacy, see Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

⁸⁰ For a discussion of this phrase, originally attributed to John Adams, see Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1501 n.28 (1988).

authority under such rules to issue commands.”⁸¹ That is, a bureaucracy does not govern by virtue of the identity of its components, but rather by the fact that they are applying existing norms.⁸²

Additionally, these norms have the virtue of rationality: A legal order is a rational system to the extent it “represents an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules.”⁸³ This aspect of bureaucracies was further explored by legal theorists. Famously, Lon Fuller articulated a theory of the “inner morality of law,” one according to which any legal system has a tendency towards being “general, public, prospective, coherent, clear, stable, and practicable.”⁸⁴ A legal system that does not tend towards these features is not only morally questionable, but also untenable.⁸⁵ Professors Cass Sunstein and Adrian Vermeule have shown how judges and critics often evaluate bureaucratic action against these principles. That is, respecting these values, internal to the rule of law, is a precondition for bureaucratic legitimacy, at least in the United States.⁸⁶

⁸¹ 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215 (Ephraim Fischhoff et al. trans., Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1956).

⁸² See ANTHONY T. KRONMAN, *MAX WEBER* 46 (Stanford Univ. Press 1983) (1983) (“A related feature of legal-rational authority relationships is their dependence upon what Weber calls the principle of ‘formalistic impersonality’. Insofar as they ‘obey a person in authority’, the members of a legal-rational organization ‘do not owe this obedience to him as an individual, but to the impersonal order’.”).

⁸³ See WEBER, *supra* note 81, at 656. For other uses of the term “rationality” in Weber, see KRONMAN, *supra* note 82, at 73-75.

⁸⁴ Jeremy Waldron, *The Rule of Law*, STANFORD ENCYC. OF PHIL. (June 22, 2016), <https://perma.cc/P8XQ-QA3K>.

⁸⁵ Fuller made this point with a well-known fable about a sovereign named Rex, who eventually discovers that his legal system can only work at all if it possesses the characteristics we usually associate with the rule of law, such as the ones described in the text accompanying the previous footnote. See LON L. FULLER, *THE MORALITY OF LAW* 33-41 (2d ed. 1969) (1964); see also *id.* at 39 (adding that if we fail to accomplish such a system, we do not merely have “a bad system of law [but] something that is not properly called a system of law at all”). To be sure, Fuller did not think that any government action should be governed by this internal morality, since there are aspects of state action (such as military command) that are better served by a managerial approach. See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1968 (2018) (“In these cases (stipulating that government should be involved at all), Fuller himself thought that the appropriate mode of doing governmental business would be managerial rather than law-bound.”).

⁸⁶ See Sunstein & Vermeule, *supra* note 85, at 1927 (suggesting that “a Fullerian approach, emphasizing the morality of administrative law, helps to unify a disparate array of judge-made doctrines and perhaps even the field as a whole”); see also *id.* at 1928 (suggesting that “the critics [of administrative agencies] are tracking Fuller’s fundamental principles. . . . ensuring that the administrative state respects the internal morality of law”).

Second, bureaucracies gain legitimacy through their own composition. So-called “Weberian bureaucracies” have features that make them particularly apt to apply the law in an impartial and depersonalized way: They possess a hierarchical structure and are composed of civil servants with expertise in their specific fields, who perform their functions in stable careers.⁸⁷ In effective bureaucracies, everyone is interchangeable, as bureaucrats are not executing their individual will but rather the general laws. It is important, therefore, that they have the technical skills necessary to implement the laws and the attitudinal traits necessary not to supersede their personal preferences into their actions.

Finally, bureaucracies gain legitimacy through the procedures through which they execute their tasks. A prominent strand in the literature contends that “procedural justice” is the single most important strategy that an organization can deploy to gain the trust of its subjects.⁸⁸ If a subject perceives that she is being treated in a fair way, she will be more ready to accept an adverse decision.⁸⁹ This reliance on fair procedure as a precondition of administrative action is pervasive in administrative law.⁹⁰

These three characteristics of bureaucracies that tend to render them legitimate in the eyes of the public have been repeatedly touted by social media platforms in their attempts to legitimate their content moderation activity.

Social media platforms increasingly rely on rule-of-law rhetoric to justify their content moderation. It is common to hear platforms’ officials say that they themselves should not be the ones to be making this type of decision, but rather there should be an abstract set of rules that takes care of the

⁸⁷ Fritz Sager & Christian Rosser, *Weberian Bureaucracy*, OXFORD RSCH. ENCYC. POL. (Online) at 4 (Sept. 29, 2021), <https://perma.cc/ML2V-ERY5> (“In the purest type, the totality of the administrative staff is composed of individual officials . . . [who] are personally free and observe only substantive official obligations, are placed in a fixed official hierarchy, have defined official competences, are appointed by contract, . . . possess a specialized qualification . . . are appointed rather than elected, are remunerated in money by fixed salaries . . .”).

⁸⁸ See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 369-71 (2019) (citing, and criticizing, many scholars who maintain that “robust procedures . . . are needed to legitimize an administrative state that rests on a precarious constitutional foundation and that the public views with suspicion.”).

⁸⁹ Perhaps the most prominent scholar in this field is psychologist Tom Tyler, who defends the position that “people’s willingness to accept the constraints of the law and legal authorities is strongly linked to their evaluations of the procedural justice of the police and the courts.” Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

⁹⁰ See Bagley, *supra* note 88.

generality of them.⁹¹ Over time, they have relied on giving their content moderation activity a veneer of generality and transparency. For example, social media platforms have published their rules for content moderation (usually under the name of “community guidelines”),⁹² established “appeal” procedures,⁹³ and set up mechanisms to ensure that content moderators apply norms in an even and competent way.⁹⁴

It is interesting to notice that advocates have encouraged this type of feature in content moderation. The Santa Clara Principles on Content Moderation provide that “[social media platforms] should publish clear and precise rules and policies relating to when action will be taken with respect to users’ content or account” and that “due process considerations are integrated at all stages of the content moderation process.”⁹⁵

Platforms seem to take this type of advice seriously. Take Australian Professor Nicolas Suzor. In 2018, he published an academic article in which he “propose[d] a framework for evaluating the legitimacy of governance of platforms based on the values of the rule of law.”⁹⁶ After studying various platforms’ “terms of service,” he found that they were “written in a style that was not designed to be read or understood by users”⁹⁷ and that “they are all

⁹¹ See, e.g., Kurt Wagner, *Mark Zuckerberg Says He’s ‘Fundamentally Uncomfortable’ Making Content Decisions for Facebook*, VOX (Mar. 22, 2018, 10:40 AM EDT), <https://perma.cc/D4AJ-LJYX> (quoting Mark Zuckerberg saying that “I feel fundamentally uncomfortable sitting here in California in an office making content policy decisions for people around the world.”).

⁹² See, e.g., *Instagram Community Guidelines*, META, <https://perma.cc/Z7XM-EHXR>; *Community Guidelines*, TIKTOK, <https://perma.cc/WUU5-3CUR> (last updated Feb. 2022); see also *The Twitter Rules*, TWITTER, <https://perma.cc/SC5M-VWD5>; *Facebook Community Standards*, META, <https://perma.cc/L8AC-FJ23>.

⁹³ See, e.g., *How Do I Appeal Facebook’s Content Decision to the Oversight Board?*, FACEBOOK, <https://perma.cc/ZBV8-MSCS>; *Content Violations and Bans*, TIKTOK, <https://perma.cc/DZZ7-H5NU>; *About Suspended Accounts*, TWITTER, <https://perma.cc/6KKW-MUBC>.

⁹⁴ See Max Hoppenstedt & Daniel Stächelín, *A Visit to Facebook’s Recently Opened Center for Deleting Content*, VICE (Jan. 2, 2018), <https://perma.cc/9FCL-3KLL> (“Facebook spokespeople continually emphasized one goal: Quality assurance. To them it’s important to prevent a situation where one post is deleted by one employee that wouldn’t otherwise be deleted by another.”).

⁹⁵ Access Now et. al, *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, <https://perma.cc/6TXH-9RPX>; see also Céline Castets-Renard, *Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement*, 2020 ILL. J.L. TECH. & POL’Y 283, 322 (2020) (“The platforms must disclose their general rules and prove the respect of them, case by case.”).

⁹⁶ Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 SOC. MEDIA + SOC’Y (Online) at 2 (July 17, 2018), <https://perma.cc/B3YJ-EZCY>.

⁹⁷ *Id.* at 6.

able to be changed by the unilateral decision of the platform.”⁹⁸ Moreover, he found that the dispute resolution procedures set up in the terms of service tend to favor platforms themselves.⁹⁹ These features, Suzor thinks, impair the legitimacy of platform governance.¹⁰⁰ Suzor furthered this line of critique in a 2019 book titled *Lawless: The Secret Rules that Govern our Digital Lives*.¹⁰¹ The remarkable thing is that Suzor was not punished by platforms for his critiques. On the contrary, he was hired as a member of the Meta Oversight Board!¹⁰²

The content moderation apparatus developed by social media platforms closely mimics the hierarchical nature of a state bureaucracy. At Meta, for example, the content moderation apparatus for its Facebook platform consists of three tiers.¹⁰³ Tier 3 moderators do the bulk of the work,¹⁰⁴ by reviewing content that is flagged by users¹⁰⁵ and by algorithms.¹⁰⁶ Tier 2 moderators are usually direct supervisors of Tier 3 moderators, reviewing certain types of sensitive content (violence, terrorism) as well as randomly reviewing Tier 3 content decisions.¹⁰⁷ Tier 1 moderators are “typically lawyers or policymakers based at the company headquarters.”¹⁰⁸ The most complex cases get escalated to them, and they have an impact on the design of content moderation rules generally.¹⁰⁹

⁹⁸ *Id.* at 7.

⁹⁹ *See id.* at 8.

¹⁰⁰ *See id.* at 9.

¹⁰¹ NICOLAS SUZOR, *LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES* (2019).

¹⁰² Nicolas Suzor, *OVERSIGHT BD., META*, <https://perma.cc/FB5Y-PAJS>.

¹⁰³ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 *HARV. L. REV.* 1598, 1639-41 (2017) (describing the tier structure of Facebook’s content moderation apparatus).

¹⁰⁴ *See* JILLIAN C. YORK, *SILICON VALUES: THE FUTURE OF FREE SPEECH UNDER SURVEILLANCE CAPITALISM* 18 (2022) (“Tier 3 moderators do the bulk of basic content moderation . . .”).

¹⁰⁵ BRADFORD ET AL., *supra* note 18, at 12 (“The second way that Facebook identifies potentially-violating content on the platform is by users. Users have an option to flag content if they believe it violates the Standards.”).

¹⁰⁶ *Id.* at 11 (“Content that is submitted to Facebook is immediately screened by an automated process. This automated screening proactively identifies and blocks any content that matches certain content that Facebook has previously removed as terrorism related imagery or child exploitation.”).

¹⁰⁷ *See* YORK, *supra* note 104, at 18 (“Tier 2 moderators supervise them and review prioritized or escalated content . . .”).

¹⁰⁸ Klonick, *supra* note 103, at 1640; *see also* YORK, *supra* note 104, at 18 (“Tier 1 moderators are policymakers or lawyers . . .”).

¹⁰⁹ *See* YORK, *supra* note 104, at 18 (“Tier 1 moderators . . . deal with the most difficult content issues and are involved in adjusting policy in response to them.”).

In order to uniformly enforce its community guidelines, Meta also provides “intensive in-person training” to its content moderators, in order to minimize the application of the moderators’ own “cultural inclinations and biases,” instead imposing those of Meta.¹¹⁰ The goal is to train moderators “to exercise professional judgment concerning the application of a platform’s internal rules and, in applying these rules, moderators are expected to use legal concepts like relevance, reason through example and analogy, and apply multifactor tests.”¹¹¹ Moderators also get periodical “reports auditing their consistency and accuracy, and identifying areas where they need more practice,”¹¹² which further promotes uniformity.

Finally, social media platforms have increasingly relied on procedural rules to attempt to gain legitimacy for their decisions. Most platforms, for instance, allow for an “appeal” process, in which users can complain about their removed content, or flag content that they think should be removed.¹¹³

Social media platforms seem to believe that replicating good administrative practices will enhance their legitimacy. Meta has even hired Yale Law School’s Justice Collaboratory, an academic project dedicated to “exploring empirically the ways in which people form trust in and come to conclusions about legitimacy of institutions.”¹¹⁴ The Justice Collaboratory was co-founded by Professor Tom Tyler, famous for his empirical demonstrations of the relationship between procedural justice, legitimacy, and compliance with state institutions.¹¹⁵

The Justice Collaboratory’s final report, which emphasized procedural justice as a key tool for legitimacy, completely bought into the analogy between social media platforms and state bureaucracies.¹¹⁶ The report goes as far as to equate content moderation to police work, stating that since “[Meta] is effectively ‘policing’ content on [Facebook], the relationship between [Meta] and [Facebook] users is analogous to the relationship

¹¹⁰ *Id.* at 134; see also Hoppenstedt & Stächelin, *supra* note 94 (describing Facebook’s processes for ensuring that all employees “interpret and apply the deletion rules in the same way” by applying the rules set by the Policy Team).

¹¹¹ Klonick, *supra* note 103, at 1642.

¹¹² BRADFORD ET AL., *supra* note 18, at 13.

¹¹³ See sources cited *supra* note 93.

¹¹⁴ *Data Transparency Advisory Group*, JUST. COLLABORATORY OF YALE L. SCH., <https://perma.cc/GNW9-ECSW>.

¹¹⁵ His book, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2021), is routinely cited for the proposition that procedural justice leads to legitimacy, which, in turn, leads to greater compliance with the law.

¹¹⁶ See BRADFORD ET AL., *supra* note 18, at 34.

between the police and members of the public.”¹¹⁷ Given Tyler’s research, which shows that “judgments about legitimacy” are “strongly swayed by the processes and procedures by which authorities use their authority,” it follows that enhancing the procedures of Meta’s content moderation will increase users’ “acceptance of [Meta’s] judgments about appropriate and inappropriate content.”¹¹⁸ In conclusion, the report recommends Meta implement many of the procedural strategies that would work for state bureaucracies more generally,¹¹⁹ including reason-giving,¹²⁰ transparency of the rules leading to a decision,¹²¹ and allowing users to better express their own reasons for posting content deemed inappropriate.¹²² Meta received the report with enthusiasm, pledging to “continue[] to research and test ways to better inform users of our rules consistent with the principles of procedural justice and transparency” as a “core aspect of [Meta’s] content governance efforts.”¹²³ Meta, it seems, is trying to become better at being a Weberian bureaucracy.¹²⁴

B. Courts and Rule of Law

The most prominent and explicit attempt at legal legitimation remains, however, the Meta Oversight Board (the “Board”). Although it was

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 10 (“We identify a number of specific ways Facebook could build elements of procedural justice (participation and voice, fairness, conveying trustworthy motives, treating people with respect and dignity) into its process for Community Standards enforcement.”). Their features are roughly the same as those scholars of procedural justice deem conducive to further the legitimacy of legal authorities. *See*, for example, the summary made by the Justice Collaboratory at *Procedural Justice*, JUST. COLLABORATORY OF YALE L. SCH., <https://perma.cc/H44Y-H5DL>.

¹²⁰ *See* BRADFORD ET. AL, *supra* note 18, at 35-36 (suggesting that Facebook “[e]xplain[] why content does or does not violate the Standards”).

¹²¹ *See id.* at 36 (“Facebook could also give users a better sense of its motives, and better explain its decisions, by including more details about the purpose behind the rules.”); *id.* at 39-42 (suggesting that Facebook “mak[e] public documents more accessible and comprehensible”).

¹²² *See id.* at 37 (“Facebook could enhance procedural justice by giving users who choose to appeal the opportunity to write in a brief statement of why they believe the post is acceptable.”); *see also id.* (“Facebook could also give users more indirect participation and voice in the appeals process by recruiting panels of ‘juries’ comprising randomly selected groups of users.”).

¹²³ Radha Iyengar Plumb, *Exploring Feedback from Data and Governance Experts: A Research-Based Response to the Data Transparency Advisory Group Report*, META (May 23, 2019), <https://perma.cc/7755-KD7H>.

¹²⁴ *See supra* note 87 and accompanying text.

considered an attempt to preempt government regulation,¹²⁵ the creation of the Board was met with excitement from the media and legal scholars as a “pretty promising innovation.”¹²⁶

Since its inception, the Board has been informally referred to as “Facebook’s Supreme Court.” This was done not only by Mark Zuckerberg himself,¹²⁷ but also by the Board’s founding ideologue, Harvard law professor Noah Feldman.¹²⁸ The Board itself would soon adopt international human rights standards, explicitly establishing Meta’s internal rules as its own “law.” As a clear example, the Board considers the relevant “community guidelines” (for Instagram and Facebook) sufficient for content moderation to respect the principle of legality.¹²⁹ The idea, in short, was that the Board would enhance Meta’s legitimacy, just as the Supreme Court is meant to enhance the U.S. government’s legitimacy.¹³⁰

¹²⁵ See Schaake, *supra* note 19 (“Mark Zuckerberg has created the Facebook oversight board hoping to avoid independent oversight.”); John Thornhill, *Don’t Leave Framing Free Expression to Facebook’s ‘Supreme Court’*, FIN. TIMES (May 6, 2021), <https://perma.cc/7NUU-QCJN> (“Sir Nick Clegg, Facebook’s head of global affairs, said the lack of agreed regulation meant that Facebook had no option but to fill the void and had committed \$130m to develop the oversight board.”).

¹²⁶ Thornhill, *supra* note 125 (quoting David Kaye); see also Nick Huber, *Content Moderation Dilemma Tests Big Tech’s Reach*, FIN. TIMES, (Dec. 3, 2019) <https://perma.cc/8AD5-572H> (noting “Alexander Brown, a reader in political and legal theory at the University of East Anglia who is writing a report about online hate speech for the Council of Europe, says the move is a positive one. Facebook’s commitment to abide by the board’s rulings is unprecedented and will create accountability and transparency in content moderation, he says,” although also citing more skeptical views); Kate Klonick & Thomas Kadri, *How to Make Facebook’s ‘Supreme Court’ Work*, N.Y. TIMES (Nov. 17, 2018), <https://perma.cc/2HKP-MNND> (“The idea of a Supreme Court of Facebook is promising in theory. But how all this will function ultimately rests on choices that Mr. Zuckerberg has yet to make.”); Hannah Murphy, *Trump Decision Reveals Limits of Facebook’s ‘Supreme Court’*, FIN. TIMES (May 6, 2021), <https://perma.cc/FWJ3-3LH6> (“Nate Persily, a professor at Stanford Law School, said the oversight board was the best solution outside of government intervention. ‘Facebook has taken on the burden of this experiment,’ he said.”).

¹²⁷ See Ezra Klein, *Mark Zuckerberg on Facebook’s Hardest Year, and What Comes Next*, VOX (Apr. 2, 2018, 6:00 AM EDT), <https://perma.cc/MT38-4U3S>.

¹²⁸ See Mark Sullivan, *Exclusive: The Harvard Professor Behind Facebook’s Oversight Board Defends Its Role*, FAST CO. (July 8, 2019), <https://perma.cc/FB28-K86R>.

¹²⁹ See OVERSIGHT BD., META, ANNUAL REPORT 2021, at 9 (2022), <https://perma.cc/S3K4-WHRU> (“Does the restriction comply with the principle of legality? We look at whether the rules Meta relied on in reaching its decision are accessible and sufficiently clear for users to understand and follow. It is important that rules are clear so those tasked with enforcing them can make fair and consistent decisions.”).

¹³⁰ See Josh COWLS et al., *Constitutional Metaphors: Facebook’s ‘Supreme Court’ and the Legitimation of Platform Governance*, NEW MEDIA & SOC’Y (Online) at 8 (Apr. 5, 2022), <https://perma.cc/GY5Q-287F> (“[T]he socio-cultural symbolism of supreme courts has

The Supreme Court analogy caught on very quickly. In a *New York Times* piece, for instance, two specialized legal scholars gave advice to the brand-new Board on how it could do its job “right” if it took the lessons the U.S. Supreme Court had so painfully learned.¹³¹ So powerful did the analogy become, that commentators even fear that the metaphor will swallow itself and change the very meaning of what a supreme court means to accommodate the Board.¹³²

It should be noted how remarkable the set-up of the Board is. The creation of a bureaucratic pseudo-state within digital platforms was not only a legitimating strategy, but also arguably a necessary part of any task accomplished at such a massive scale. The legitimation that comes with the legal elements, in this sense, could be seen as a byproduct.¹³³ This is not true, however, for the Board. Legitimacy not being a concern, it would be perfectly reasonable to imagine a content moderation system that does not depend on an external entity akin to a supreme court. However, the Board was set up precisely and explicitly to mimic a supreme court and to legitimate content moderation undertaken by Meta.

The relationship between the Board and Meta’s content moderation bureaucracy is analogous to that between an administrative state and the judicial review of administrative actions. Judicial review legitimates administrative actions in a similar way to how the Board attempts to legitimate Facebook’s content moderation. In administrative law, it has been famously noted that “[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate.”¹³⁴ If digital platforms wanted to buy completely into the legalistic legitimation model, some form of judicial review was somehow inevitable.

been appropriated . . . to confer legitimacy on the [Oversight Board] itself and, by extension, on Facebook’s own role and status as a ‘governor.’”).

¹³¹ Klonick & Kadri, *supra* note 126 (explaining lessons the Oversight Board could learn from the U.S. Supreme Court concerning due process, representation, and independence).

¹³² See Cows et al., *supra* note 130, at 19 (noting that “[s]imply put, perpetual, uncritical utterances referring to the [Oversight Board] as a ‘supreme court’ may ultimately make it so,” and later deeming this risk “undesirable”).

¹³³ See *supra* note 85 (discussing Rex’s fable). In Rex’s story, the characteristics that legitimate a legal system (predictability, clarity, and the like) are also necessary for the system to function as such (as subjects need those features in a system to adapt their actions to it).

¹³⁴ LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

Indeed, the introduction of courts has been a legitimating device for governmental regimes since time immemorial. As the expert Martin Shapiro notes, “governing authorities seek to maintain or increase their legitimacy through the courts.”¹³⁵ The very existence of courts legitimates government activity: “By showing itself willing to allow decisions to be challenged on the basis of legality, a government accepts that it is fallible.”¹³⁶

Meta tried to draw on this legitimating role that courts have traditionally performed on governments. This explains why the Board was designed in a strikingly parallel way to a supreme or constitutional court. Like most supreme courts, the Board has members who are mostly legal professionals with high qualifications,¹³⁷ enjoy some degree of financial independence,¹³⁸ and have fixed terms.¹³⁹ Also like courts, Board members have the task of explaining, in writing, the reasoning that purportedly leads to their decisions,¹⁴⁰ and that reasoning needs to be grounded in a specific set of written documents.¹⁴¹ Similar to courts in many legal systems, the Board relies on its own previous decisions as “sources of authority.”¹⁴² In its institutional motto, the Board promises the following: “Independent Judgment. Transparency. Legitimacy.”¹⁴³

¹³⁵ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 22 (1981).

¹³⁶ Thomas Poole, *Legitimacy, Rights and Judicial Review*, 25 OXFORD J. LEGAL STUD. 697, 720 (2005).

¹³⁷ See OVERSIGHT BD., META, OVERSIGHT BOARD CHARTER 3 (2019), <https://perma.cc/L6ZH-PVC8> (“[M]embers must possess and exhibit a broad range of knowledge, competencies, diversity, and expertise.”).

¹³⁸ See *id.* (“The trust will arrange for compensation of members for their service on the board [which] will not be conditioned or withheld based on the outcome of board decisions.”).

¹³⁹ See *id.* (“Each member will serve for a three-year term.”).

¹⁴⁰ OVERSIGHT BD., META, OVERSIGHT BOARD BYLAWS 17 (2022), <https://perma.cc/C3PE-EXM9> (“After concluding deliberations, a board panel will draft a written decision, which will include: a determination on the content; the rationale for reaching that decision; and, if desired, a policy advisory statement. The decision will also include any concurring or dissenting viewpoints, if the panel cannot reach consensus.”).

¹⁴¹ In fact, the Board treats Community Standards as “law” following the legality principle. See *infra* note 159 and accompanying text.

¹⁴² See, e.g., OVERSIGHT BD., META, CASE DECISION 2022-001-FB-UR (June 17, 2022) [hereinafter KNIN CARTOON CASE], <https://perma.cc/YKT4-BBPM>; see also OVERSIGHT BD., *supra* note 137, at 5 (“For each decision, any prior board decisions will have precedential value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are substantially similar.”).

¹⁴³ See OVERSIGHT BD., META, <https://perma.cc/9Q3P-56BU> (displaying the Board’s motto in its website header); see also OVERSIGHT BD., *supra* note 140, at 7 (prescribing that Board members “exercise neutral, independent judgment and render decisions impartially”).

Mimicking a court for legitimating purposes requires walking a fine line. Not all judicial-like institutions dare to call themselves a court—not calling the World Trade Organization Settlement Dispute Body a “court,” for example, was a conscious decision that highlights the stakes of the nominating strategy.¹⁴⁴ Nor do states liberally grant permission to call oneself a court. President Charles de Gaulle famously denied visas to the members of the Russell-Sartre International War Crimes Tribunal who were willing to sit in France, under the argument that “justice of any sort, in principle as in execution, emanates from the State.”¹⁴⁵ Courts themselves reserve the word “court” to specific entities: According to the European Court of Human Rights case law, a dispute-solving institution that does not satisfy minimum levels of independence, impartiality, and professional merit is not just a bad court—it is not a court at all.¹⁴⁶

Meta avoided the name “court” in official documents. However, the analogy had already been thrown into the world, and it has kept being used by commentators.¹⁴⁷ Crucially, the Board itself seems to have bought into the analogy. It is hard to read a Board decision and not see an organ that perceives itself to be a court. A few elements in its decisions, on their face banal, make this point in a poignant way.

¹⁴⁴ See Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, in *LEGITIMACY AND INTERNATIONAL COURTS* 354, 358 n.13 (Nienke Grossman et al. eds., 2018).

¹⁴⁵ Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 179, 201 (1985) (adding that “[n]ow such would seem to be the case with regard to the activity envisaged by Lord Russell and his friends, since they intend to give a juridical form to their investigations and the semblance of a verdict to their conclusions”).

¹⁴⁶ *Le Compte v. Belgium*, App. No. 6878/75, ¶ 55 (June 23, 1981), <https://perma.cc/MTD6-7EN4> (“The fact that [an organ] exercises judicial functions does not suffice. . . . [U]se of the term ‘tribunal’ is warranted only for an organ which satisfies a series of further requirements — independence of the executive and of the parties to the case, duration of its members’ terms of office, guarantees afforded by its procedure” (citations omitted)); see also *Ástráðsson v. Iceland*, App No. 26374/18, ¶ 220 (Dec. 1, 2020), <https://perma.cc/8CUZ-Q3GZ> (“In the Court’s view, in addition to the above, it is inherent in the very notion of a ‘tribunal’ that it be composed of judges selected on the basis of merit — that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law.”). A similar view is sometimes espoused by domestic supreme courts: “our contemporary understanding is such that a decision without principled justification would be no judicial act at all.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992).

¹⁴⁷ See Cowls et al., *supra* note 130, at 11 fig.1 (quantifying the use of the metaphor by mass media); see also Thomas Kadri, *Justice Zuckerberg and Juridical Discourse for Platforms*, 136 *HARV. L. REV. F.* 163, 169-76 (2022) (reviewing the utilization of the analogy between the Board and a supreme court).

First, the Board charter states that decisions have “precedential value.”¹⁴⁸ In fact, the Board routinely lists its relevant previous decisions as “sources of authority.”¹⁴⁹ This seemingly mundane practice reveals a lot about the Board’s self-conception. Not all decision-making institutions need rely on their precedents; the only ones that need to are those that pertain to issue a coherent set of decisions that can be taken as a source of inspiration.¹⁵⁰ Regular courts in civil law countries, for instance, have traditionally avoided relying on their own precedents as a sign of respect towards the ultimate authority of the legislator.¹⁵¹ The fact that the Board relies on precedent not only shows it is a court, but also one with significant powers. Paraphrasing Chief Justice Charles Evans Hughes, Meta’s law is what the Board says it is.¹⁵²

Second, the application by the Board of international human rights law also reveals the extent to which it has bought into its own court-like role. The Board Charter mandates that the Board “pay particular attention to the impact of removing content in light of human rights norms protecting free expression.”¹⁵³ This seemingly light passage is, again, of enormous significance. What does it mean that Meta thinks that human rights law is applicable to itself?

There is an ongoing discussion about the extent to which human rights obligations apply to private actors in general, and large corporations in particular.¹⁵⁴ However, one would expect companies to fight back on these

¹⁴⁸ See *supra* note 142 and accompanying text.

¹⁴⁹ See *supra* note 142 and accompanying text.

¹⁵⁰ The fact that a court treats its own previous decisions as “case law” reveals a great deal about the court’s self-conception of its role in laying down the law of the land. See, e.g., MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 340 (Oxford U. Press 2009) (2004) (“[N]eedless to say, the greatest symbol of this enormous American judicial power, the concept that functions simultaneously as essential cause and effect in the construction and maintenance of the American judge’s remarkable discursive, interpretive, and normative power, is the very notion of *case law*.”).

¹⁵¹ See, e.g., JOHN HENRY MERRYMAN, *The Sources of Law*, in *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 20, 20-26 (1969) (explaining how civil law courts do not take judicial precedents as a source of law as a matter of respect for the legislator).

¹⁵² See Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court’s Remaking of America*, in “A COUNTRY I DO NOT RECOGNIZE”: THE LEGAL ASSAULT ON AMERICAN VALUES 1, 47 (Robert H. Bork ed., 2005) (quoting Chief Justice Charles Evan Hughes saying, “We are under a Constitution, but the Constitution is what the judges say it is”).

¹⁵³ OVERSIGHT Bd., *supra* note 137, at 5.

¹⁵⁴ For a recent review, see Florian Wettstein et al., *International Business and Human Rights: A Research Agenda*, 54 J. WORLD BUS. 54 (2019).

obligations: Why would anyone want to be subject to strict norms regulating one's conduct?

The fact that Meta wants to be regulated by human rights norms concerning speech illustrates the extent to which it perceives itself as a government. In applying human rights norms, the Board commits to realizing the three-part test entailed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR). As reconstructed by the Board, "ICCPR Article 19 requires that where restrictions on expression are imposed by a state, they must meet the requirements of legality, legitimate aim, and necessity and proportionality."¹⁵⁵

As it should be noted, the Board itself recalls that Article 19 applies to restrictions "imposed by a state."¹⁵⁶ However, the Board obviates this extremely relevant fact and proceeds to apply Article 19 as if Meta was a state.¹⁵⁷

The Board first analyzes the requirement of "legality." Again according to the Board's own reconstruction of the UN Human Rights Committee:

The principle of legality requires rules used by states to limit expression to be clear and accessible. The legality standard also requires that rules restricting expression "may not confer unfettered discretion for the restriction of freedom of expression on those charged with [their] execution" and "provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not." Individuals must have enough information to determine if and how their expression may be limited, so that they can adjust their behavior accordingly. Applied to Meta's content rules for Facebook, users should be able to understand what is allowed and what is prohibited, and reviewers should have clear guidance on how to apply these standards.¹⁵⁸

In order to test whether one of Meta's restrictions complies with this requirement, the Board normally checks whether the relevant clauses in the

¹⁵⁵ KNIN CARTOON CASE, *supra* note 142 (citation omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *See Id.*

¹⁵⁸ *Id.* (citation omitted).

Instagram Community Guidelines and Facebook Community Standards are precise and clear enough.¹⁵⁹

In its legality analysis, the Board routinely cites General Comment No. 34 of the Human Rights Committee, starting in paragraph 25. Paragraph 24, however, makes an obvious point: in order to comply with the principle of legality, restrictions to speech must be made by “law,” which normally means a general act issued by legislative authority.¹⁶⁰ The readiness of the Board to equate Facebook’s “community standards” with general acts issued by representative institutions is remarkable.

This problem remains in the following steps of the test. Recall that restrictions on speech, as according to the ICCPR and embraced by the Board, must serve a legitimate aim and be proportionate. Again, the Board performs these analyses reasoning as if Meta was the right person to make these calls.

Take proportionality, a highly contested juridical concept. If proportionality analysis is possible at all, it must assume competing values to be defended and some way of obtaining a common metric.¹⁶¹ This operation necessarily entails that the same organ can measure and appreciate how these values are promoted or endangered, for example, through speech. This means that, by granting Meta the right to issue “proportionate” restrictions, the Board is granting Meta the power to weigh competing values against each other and rank their relative weights. However, an elementary

¹⁵⁹ Most of the decisions of the Oversight Board so far have included some consideration of whether the Community Standards were “clear” enough for users to use as a guide for their conduct. *See, e.g.*, OVERSIGHT BD., META, CASE DECISION 2021-010-FB-UA (Sept. 27, 2021) [hereinafter PROTESTS IN COLOMBIA CASE], <https://perma.cc/4XVE-23BT> (analyzing whether the “newsworthiness allowance” was clear enough in Facebook’s Community Standards, and recommending that Facebook “[d]evelop and publicize clear criteria for content reviewers for escalating for additional review public interest content that potentially violates the Community Standards but may be eligible for the newsworthiness allowance”).

¹⁶⁰ Hum. Rts. Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, at 6 (2011) (“Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.”). The Inter-American Court of Human Rights has also established that “restrictions to basic rights [can] only be established by a law passed by the Legislature in accordance with the Constitution.” *See* The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 22 (May 9, 1986).

¹⁶¹ The issue of commensurability in proportionality analysis is still a controversial one. *See, e.g.*, Bruce Chapman, *Incommensurability, Proportionality, and Defeasibility*, 12 L., PROBABILITY & RISK 259, 260-61 (2013) (“For some this is precisely what makes the metaphor of balancing so controversial, since it appears to presuppose (indeed, for some it seems to require) some kind of commensurability between any two principles or values which otherwise might look to have a very different nature.”).

democratic intuition is that the organ best suited to make these comparisons is a democratically elected legislature—which takes us back to the democratic element of the legality principle, which the Board chooses to ignore.

Has creating a court-like entity helped Meta gain legitimacy? It is perhaps too soon to tell. The Board was established very recently, and therefore it could be argued that its legitimacy may build over time.¹⁶² However, things do not look good. Most coverage of the Board has been about its very existence; its decisions about controversial topics normally go unnoticed by the general public¹⁶³ (with one prominent exception).¹⁶⁴ A precondition for the Board legitimating Meta's content moderation decisions among the public is that the public is aware of the Board's activity.¹⁶⁵ For now, at least, the Board is not fulfilling its legitimizing function.

III. THE *WHY* OF POWER: CORPORATIONS AND CIVIL SOCIETY

Although legalization represented the core of social media platforms efforts to gain legitimacy, they were by no means the only such efforts. In

¹⁶² For a connection between a court's legitimacy and its age, see James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 355 (1998) ("What is important for the legitimacy of national high courts is the accumulation of satisfied constituents, not the accumulation of years. As satisfaction accumulates, a more enduring allegiance to the institution develops."); and Douek, *supra* note 7, at 8 ("[T]he FOB . . . does not have a reservoir of legitimacy to draw on when making deeply contested decisions. The FOB will need to establish its legitimacy over time, and its task will be all the more challenging in these circumstances.").

¹⁶³ It is hard to find mass media coverage of the Board's decisions in the countries in which they are to be applied. For instance, the news database Factiva only reports one mass media story in Spanish covering the PROTESTS IN COLOMBIA CASE, *supra* note 159, overturning the removal of a video where protestors used an expletive against the Colombian president. See Forbes Staff, *Consejo Asesor de Facebook Permite Llamar "Marica" al Presidente de Duque por Considerarlo Noticioso*, FORBES COLUMBIA (Sept. 27, 2021), <https://perma.cc/6EVX-CXJG>.

¹⁶⁴ Facebook, Twitter, and other social media platforms banned then-President Donald Trump after his statements about the storming of the Capitol on January 6, 2021. This decision aroused controversy about the power of private corporations to wield such power over the public sphere. In May, the Board confirmed Facebook's decision, which aroused public attention. See Cowls et al., *supra* note 130, at 14-15 (documenting a spike of media attention about the Board after the Trump case).

¹⁶⁵ Gibson et al., *supra* note 162, at 345 ("Simply put, to know courts is to love them, because to know them is to be exposed to a series of legitimizing messages focused on the symbols of justice, judicial objectivity, and impartiality.").

this part we discuss the two major non-legal alternatives: corporate legitimacy and civil society legitimacy.

A. *Corporate Legitimacy*

In a very straightforward sense, social media platforms are very large private companies. Why would they not try to gain legitimacy just in the way large private companies do in late capitalism? Just as for everyone else, “legitimacy is a precondition of the company’s license to operate in society,”¹⁶⁶ and the importance of legitimacy for the functioning of companies has become greater in the last decades.¹⁶⁷ In moments in which companies could be perceived as subject to both the “invisible hand of the market” and to effective government regulation, they did not face significant legitimation hurdles: Coca-Cola was no different than your next-door grocery store.¹⁶⁸ As large companies lost this innocence and became increasingly perceived as political actors, they needed new ways to legitimate their actions in society,¹⁶⁹ which increasingly include broadcasting a “political” brand that furthers and defends the “right” values.¹⁷⁰

However, large companies are still able to exert an impressive amount of power relying on the premise that they are private actors pursuing private ends. They control the time their employees spend in the bathroom, the opinions they post on social media, and even who they choose to marry, all under the ideology that they and their employees are legal equals entering

¹⁶⁶ Jacob Dahl Rendtorff, *The Concept of Business Legitimacy: Learnings from Suchman*, in HANDBOOK OF BUSINESS LEGITIMACY: RESPONSIBILITY, ETHICS AND SOCIETY 3, 5 (Jacob Dahl Rendtorff ed., 2020).

¹⁶⁷ See *id.* (“The prioritization of legitimacy and legitimization has grown from the periphery and today [is] at the center of a company’s existence and prosperity, including its ethical and political profile. Only a few decades ago, a company’s legitimacy was more or less given by common norms, by control and by central regulation via law. Today, legitimacy and legitimization are basic mechanisms in fundamentally new forms of political governance that rely on mutual reflections and continuous tests of legitimacy.”).

¹⁶⁸ Andreas Suchanek, *The Problem of Corporate Legitimacy*, in HANDBOOK OF BUSINESS LEGITIMACY: RESPONSIBILITY, ETHICS AND SOCIETY, *supra* note 166, at 31, 32 (describing a time in which “the problem of corporate legitimacy was not existent”).

¹⁶⁹ See *id.* (“Corporations were no longer perceived only as actors in the economic system, subject to market forces and oriented toward profits, thereby led by the ‘invisible hand’; they became a political actor, and as a consequence, the problem of their legitimacy became a relevant topic.” (citation omitted)).

¹⁷⁰ See generally JOE ZAMMIT-LUCIA, *THE NEW POLITICAL CAPITALISM: HOW BUSINESSES AND SOCIETIES CAN THRIVE IN A DEEPLY POLITICIZED WORLD* (2022) (discussing the ways in which adopting a political stance have become essential for businesses).

egalitarian contracts.¹⁷¹ This kind of power is ubiquitous and, up to very recently, rarely questioned.¹⁷² As Naomi Klein put it, people might regard many of these actions as just “businesses mak[ing] business decisions.”¹⁷³ This is bewildering: as Elizabeth Anderson notes, this kind of power would be considered tyrannical if exerted by a public authority.¹⁷⁴

Large corporations in general have an ambiguous relationship with their status as private actors in the market. On one hand, as corporations grow larger, they attempt to have their brand become a part of the larger culture. Especially in the last decades, large corporations seem to convey that it is not enough for them to show that they create value in the market, but rather that they further the right values.¹⁷⁵ On the other hand, however, when they need to protect themselves from public pressure or regulatory threats, they retreat into their basic private law personality: this is just business.¹⁷⁶

This tension is illustrated by how companies choose to expand and defend their brands. Enter Barbie, the uber-popular doll created by Mattel. Barbie has represented a model of femininity for generations, showing a type of ideal woman that changed with time. Barbie was not just a doll: it was an “icon” that “colonised girls’ imagination,”¹⁷⁷ and according to her creator, it “enabled girls to become ‘anything they want.’”¹⁷⁸ Through Barbie, Mattel

¹⁷¹ ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 57 (2017) (“Not just theorists of the firm, but public discourse too, tend to represent employees as if they were independent contractors. This makes it seem as if the workplace is a continuation of arm’s-length market transactions, as if the labor contract were no different from a purchase from Smith’s butcher, baker, or brewer.”).

¹⁷² See Stephen Macedo, *Introduction, in id.* at vii-viii (“Today’s free market thinking—among scholars, intellectuals, and politicians—radically misconstrues the condition of most private sector workers and is blind to the degree of arbitrary and unaccountable power to which private sector workers are subject.”).

¹⁷³ NAOMI KLEIN, *NO LOGO: NO SPACE, NO CHOICE, NO JOBS* 168 (1999) (“In large part, the complacency surrounding the Wal-Mart and Blockbuster strain of censorship occurs because most people are apt to think of corporate decisions as non-ideological. Businesses make business decisions, we tell ourselves—even when the effects of those decisions are clearly political.”).

¹⁷⁴ In fact, she calls them communist dictatorships. See ANDERSON, *supra* note 171, at 39 (“Most workers in the United States are governed by communist dictatorships in their work lives.”).

¹⁷⁵ ZAMMIT-LUCIA, *supra* note 170, at 241 (“What is almost certain is that there won’t be many brands that can afford to continue to ignore the moral and political characteristics attached to them.”).

¹⁷⁶ See generally JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* (2004) (describing how economic utility was the bedrock of corporate legitimacy in the United States for most of its history).

¹⁷⁷ *Life in Plastic*, *ECONOMIST* (Dec. 19, 2002), <https://perma.cc/WP4U-5FU8>.

¹⁷⁸ *Id.* (quoting Ruth Handler, one of Mattel’s founders).

had a real impact in culture and fashion worldwide.¹⁷⁹ And yet, when pop band Aqua issued a song criticizing Barbie for its supposed superficiality (“Life in plastic, it’s fantastic!”),¹⁸⁰ Mattel sued them for harming their brand: “This is a business issue, not a freedom of speech issue.”¹⁸¹ When expanding, Mattel allowed itself to be an actor in the public sphere, shaping culture and fashion trends and, ostensibly, empowering women. When defending itself, however, Mattel retreated into being just another company protecting its brand.¹⁸²

Social media platforms follow the same dualistic logic. In their thriving moments, Facebook broadcast their mission of “making the world more open and connected.”¹⁸³ Zuckerberg defined the start of Facebook as a “project,” rather than a “company.”¹⁸⁴ He even ducked questions about the profitability of Facebook: “what we’re doing is . . . a really valuable and useful thing”; how to make money out of it was “secondary.”¹⁸⁵ Twitter founder Jack Dorsey used similar rhetoric. For him, Twitter was “the closest thing we have to a global consciousness.”¹⁸⁶ Moreover, the fact that Twitter was a company was a “problem”: “In principle, I don’t believe anyone should own or run Twitter. It wants to be a public good.”¹⁸⁷

Increasingly, this insistence started sounding hollow. Social media platforms were increasingly perceived as exercising inherently public powers—and to be doing so in an arbitrary and irresponsible way.¹⁸⁸ Correspondingly, they started to be called out for their responsibility for the

¹⁷⁹ *See id.*

¹⁸⁰ AQUA, *Barbie Girl*, on AQUARIUM (Universal Music Grp. 1997).

¹⁸¹ KLEIN, *supra* note 173, at 180 (quoting a Mattel spokesperson).

¹⁸² *Id.* (citing the same Mattel spokesperson saying, “This is a \$2 billion company, and we don’t want it messed around with, and situations like this gradually lead to brand erosion”).

¹⁸³ *See* Anna Lauren Hoffmann, Nicholas Proferes & Michael Zimmer, “Making the World More Open and Connected”: Mark Zuckerberg and the Discursive Construction of Facebook and Its Users, 20 *NEW MEDIA & Soc’y* 199, 205 (2018) (quoting and analyzing Facebook’s social mission); *see also* Saul Hansell, *Yahoo Woos a Social Networking Site*, *N.Y. TIMES* (Sept. 22, 2006), <https://perma.cc/CV7T-J7K5>.

¹⁸⁴ Taylor Coleen, *Zuckerberg: Facebook Started Out as a ‘Hobby’ and a ‘Project,’ Not a Company*, *TECHCRUNCH* (Oct. 20, 2012, 3:51 PM EDT), <https://perma.cc/4J6X-UN7Z>.

¹⁸⁵ Kevin Allison & Richard Waters, *Interview: Mark Zuckerberg, Facebook Founder*, *FIN. TIMES* (Sept. 11, 2007), <https://perma.cc/G4WE-49NB>.

¹⁸⁶ @jack, *TWITTER* (Apr. 26, 2022, 10:03 PM), <https://perma.cc/F6MT-TBQ2>.

¹⁸⁷ @jack, *TWITTER* (Apr. 26, 2022, 10:03 PM), <https://perma.cc/2M4C-CY8Z>.

¹⁸⁸ *See, e.g.*, Brooke Auxier, *64% of Americans Say Social Media Have a Mostly Negative Effect on the Way Things Are Going in the U.S. Today*, *PEW RSCH. CTR.* (Oct. 15, 2020), <https://perma.cc/4U36-7277>.

social ills they at least partially caused.¹⁸⁹ However, in such situations they consistently resist “being characterized as media companies and instead have insisted that they be thought of purely as technology companies.”¹⁹⁰ When addressing lawmakers, Zuckerberg stated that “we’re a tech company, we’re not a media company,”¹⁹¹ since “the primary thing that we do is have engineers who write code and build product and services for other people.”¹⁹² In similar situations, Twitter and Google officers made strikingly similar remarks.¹⁹³ An analogous thing happened when Facebook was accused of not preventing Russia from interfering with the 2016 U.S. elections. Within the company, many argued that “Facebook was a private company . . . not an intelligence agency; the platform was not duty-bound to report its findings . . . It might be irresponsible for Facebook to say anything.”¹⁹⁴

The most recent, and most explicit, attempt to regain the status of a technology company in the eyes of the public, and therefore simplify its

¹⁸⁹ See Michelle Castillo, *Zuckerberg Tells Congress Facebook Is Not a Media Company: ‘I Consider Us to Be a Technology Company’*, CNBC (Apr. 11, 2018), <https://perma.cc/96QH-3TGY>.

¹⁹⁰ Philip Napoli & Robyn Caplan, *Why Media Companies Insist They’re Not Media Companies, Why They’re Wrong, and Why It Matters*, FIRST MONDAY (May 2, 2017), <https://perma.cc/RP2Z-P5GW> (citations omitted).

¹⁹¹ Kelly Fiveash, “We’re a Tech Company, We’re Not a Media Company,” Says Facebook Founder, ARS TECHNICA (Aug. 30, 2016), <https://perma.cc/6ET2-FV9W>; see also Brad Stone, *Short Answers from Facebook’s Mark Zuckerberg*, N.Y. TIMES BITS (Oct. 17, 2007), <https://perma.cc/9JD9-U99N> (“We’re not really a media company.”).

¹⁹² Castillo, *supra* note 189; see also SHEERA FRENKEL & CECILIA KANG, AN UGLY TRUTH: INSIDE FACEBOOK’S BATTLE FOR DOMINATION (2021) (telling the story of Facebook’s communication team’s reaction to the accusations: “It was a technology company that simply hosted the ideas that were posted by its users. That refrain, which all social media companies fell back upon, protected it from defamation suits and other legal liabilities and kept the company out of the fray of partisan politics.”).

¹⁹³ A former CEO of Twitter stated, “I think of us as a technology company because I think the future of the company is in building on an extensible platform that allows third-party developers and companies to add value to Twitter in a way that is accretive to Twitter and is accretive to our users . . . I don’t need to be or want to be in the content business.” Nick Bilton, *Is Twitter a Media or Technology Company?*, N.Y. TIMES BITS (July 25, 2012), <https://perma.cc/XC66-6EXW>. A Google executive similarly stressed that Google is a “technology platform . . . for sharing of information that can include news from sources such as newspapers” and denied it being a “media company.” Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. AT COLUM. U. (Feb. 27, 2018), <https://perma.cc/L8GT-U6HS> (quoting Richard Salgado, Google’s law enforcement and information security director, in his remarks to the Senate Judiciary Subcommittee on Crime and Terrorism).

¹⁹⁴ FRENKEL & KANG, *supra* note 192.

legitimation hurdles,¹⁹⁵ is the rebranding of Facebook as Meta. Zuckerberg declared that the rebranding is meant to reflect a shift in focus away from the social media business and into the creation of hardware and software that will enable the “Metaverse” revolution.¹⁹⁶ This shift was explicit, as the official announcement was titled “Introducing Meta: A Social Technology Company.”¹⁹⁷

By trying to distance its brand identity from its core business (social media, ads, and content moderation), Meta is trying to emphasize its similarities to other familiar Big Tech firms.¹⁹⁸ If successful, such a shift has the potential to greatly simplify the legitimation and trust hurdles facing Meta.¹⁹⁹ In fact, this detachment is a “common corporate tactic,”²⁰⁰ even in the social media business. Few people would think of Microsoft as a social media company, although it owns LinkedIn. And most people do not remember Google owns YouTube,²⁰¹ partly because they are both owned by Google’s parent company Alphabet.

By emphasizing that they are merely a “tech company” and not the “media” or an intelligence agency, social media platforms attempt to shrug off any sense that they have a significant responsibility for the public consequences of their services and policies. This might work for other corporations, but not for social media platforms, with their fantasies of

¹⁹⁵ Obviously, Zuckerberg denies this much. See Kevin Roose, *The Metaverse Is Mark Zuckerberg’s Escape Hatch*, N.Y. TIMES (Nov. 10, 2021), <https://perma.cc/RK4Z-5LHD> (“Mr. Zuckerberg, whose new public persona is something like ‘above-it-all futurist,’ professes not to have been motivated to rename Facebook by a desire to escape the company’s baggage.”).

¹⁹⁶ See Alex Heath, *Mark Zuckerberg on Why Facebook is Rebranding to Meta*, VERGE (Oct. 28, 2021, 2:20 PM EDT), <https://perma.cc/B9A9-8XQL>.

¹⁹⁷ *Introducing Meta: A Social Technology Company*, META (Oct. 28, 2021), <https://perma.cc/LDC7-NDH7> (“Today at Connect 2021, CEO Mark Zuckerberg introduced Meta, which brings together our apps and technologies under one new company brand. Meta’s focus will be to bring the metaverse to life and help people connect, find communities and grow businesses.”).

¹⁹⁸ See Megan Graham & Talal Ansari, *Facebook’s Name Change to Meta Reflects Common Corporate Tactic*, WALL ST. J. (Oct. 28, 2021, 4:22 PM ET), <https://perma.cc/9XZ6-RY9X>.

¹⁹⁹ See Roose, *supra* note 195 (“For years, anything Facebook does—even projects that have nothing to do with social networking, like introducing a cryptocurrency wallet—has been tainted by association.”).

²⁰⁰ Graham et al., *supra* note 198.

²⁰¹ Zia Muhammad, *New Survey Reveals People Don’t Know About Tech Monopolies*, DIGIT. INFO. WORLD, <https://perma.cc/QUA8-HQPK> (“For example, only about 47% of respondents to the survey knew that Google owned YouTube, even though it was one of the biggest acquisitions that have ever occurred in the world of technology.”).

changing the world and connecting all human beings.²⁰² In addition, the legitimacy crisis that social media platforms are facing means that users and governments no longer accept that they are merely technological companies. The incredible public power exerted by these companies is now impossible to conceal. Despite the libertarian drive to keep them fully private,²⁰³ that ship has sailed.²⁰⁴

A leaked internal memo from a Facebook Vice President explained to employees that “We connect people. Period,”²⁰⁵ by which he meant that Facebook is not responsible for any harm that results from that connection.²⁰⁶ The immediate repudiation of the memo that followed²⁰⁷ showed that social media platforms cannot define their precise terms of engagement with society anymore. They are now irredeemably public. They must explore new legitimization strategies.

B. Civil Society Legitimacy

Although digital media platforms continue to insist that they are not media companies, circumstances sometimes force them to reluctantly acknowledge their public responsibilities and to emulate the legitimization strategies of civil society organizations.

²⁰² See Nathaniel Persily & Joshua A. Tucker, *How to Fix Social Media? Start with Independent Research*, BROOKINGS (Dec. 1, 2021), <https://perma.cc/J6SV-YJHL> (“When social media platforms first launched nearly two decades ago, they promised to bring people together and give the average person a megaphone to speak to the world.”).

²⁰³ John Samples, *Alex Jones and the Bigger Questions of Internet Governance*, CATO INST. (Aug. 13, 2018), <https://perma.cc/SRX2-32JQ> (“The question [of how should platforms govern their users’ speech] has a simple, plausible answer. Tech companies are businesses. They should maximize value for their shareholders. The managers of the platform are agents of the shareholders; they have the power to act on their behalf in this and other matters. . . . For many libertarians, this story will be convincing.”). It is noteworthy that the author is a member of the Oversight Board. *John Samples*, OVERSIGHT BD., META, <https://perma.cc/QJ23-YR5F>.

²⁰⁴ See Ian Bogost, *Facebook Is Not a Technology Company*, ATLANTIC (Aug. 3, 2016), <https://perma.cc/E46Q-2EGZ>.

²⁰⁵ The memo was revealed in Ryan Mac, Charlie Warzel & Alex Kantrowicz, *Growth at Any Cost: Top Facebook Executive Defended Data Collection in 2016 Memo—and Warned That Facebook Could Get People Killed*, BUZZFEED NEWS (Mar. 29, 2018), <https://perma.cc/FZ64-23S5>.

²⁰⁶ See *id.* (“So we connect more people . . . That can be bad if they make it negative. Maybe it costs someone a life by exposing someone to bullies. . . . Maybe someone dies in a terrorist attack coordinated on our tools.”).

²⁰⁷ See Nick Visser, *Explosive Facebook Memo Defended Company’s Strategy, Even If It Got People Killed*, HUFFPOST (Mar. 30, 2018, 12:19 AM EDT), <https://perma.cc/5NV6-K696> (reporting that Zuckerberg immediately said the content of the memo was something he “disagreed with strongly”).

Civil society organizations stand between the state and the market and hold quasi-public powers. These include non-governmental organizations (NGO), religious and ideological organizations, universities, associations, and, most importantly, the media. These are “autonomous associations, independent of the state” that are the location in which “society as a whole can structure itself and co-ordinate its actions through such associations which are free of state tutelage.”²⁰⁸ Civil society is the site in which the democratic community is formed.²⁰⁹ What distinguishes civil society organizations from private corporations is that their express mission is to have an impact on the public sphere. For example, a university may have an endowment that dwarfs many hedge funds, but it will still see its main goal as research and education. At the same time, a hedge fund may have a flowery earth-saving mission statement, but will always place increasing stakeholder value at the top.

The legitimacy of the public power wielded by civil society is dependent on them successfully cultivating a relationship of trust with the public.²¹⁰ This, to a large extent, depends on convincing the public that a particular civil society organization is operating mainly for the public interest and not for their self-interest. For example, we give universities the power and prestige both to produce our knowledge and train our elites when we believe they have the public’s best interest at heart; when they are seen as greedy and power hungry, however, their overall prestige (and influence) may be greatly diminished.²¹¹ Mass media—which, unlike most civil society organizations,

²⁰⁸ Charles Taylor, *Civil Society in the Western Tradition*, in *THE NOTION OF TOLERANCE AND HUMAN RIGHTS: ESSAYS IN HONOUR OF RAYMOND KLIBANSKY* 117, 118, 120 (Ethel Groffier & Michel Paradis eds., 1991).

²⁰⁹ This is what the sociologist Jeffery Alexander meant when he stated that “civil society should be conceived as a solidary sphere, in which a certain kind of universalizing community comes to be culturally defined and to some degree institutionally enforced.” See JEFFREY C. ALEXANDER, *THE CIVIL SPHERE* 31 (2006).

²¹⁰ See William Mishler & Richard Rose, *Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies*, 59 *J. POL.* 418, 419 (1997) (“Trust also is essential to the establishment of civil society, the institutions of which create within citizens a sense of community and connect them to government. . . . Trust is necessary so that individuals may participate voluntarily in collective institutions, whether in political institutions, such as political parties, or in economic and social institutions, such as labor unions, business associations, and churches.” (citations omitted)).

²¹¹ See Thomas Gilbert & Christopher Hrdlicka, *A Hedge Fund That Has a University*, *WALL ST. J. OP.* (Nov. 13, 2017), <https://perma.cc/R2JQ-GB49> (expressing the sentiment that as the main business of private universities is to preserve their endowment, rather than to promote the public good, they should be taxed like any other hedge fund).

are for-profit corporations whose core business is to have impact over public and political issues—gains trust and legitimacy when it is seen by the public as acting in the public interest, and doing so by strictly meeting the ethical requirements of the journalistic profession.²¹²

Many major scholars of media digitalization call for social media platforms to abandon the pretense that they are merely tech companies or technical intermediaries²¹³ and embrace their role as the “custodians of the internet.”²¹⁴ Tarleton Gillespie describes the situation facing social media platforms well:

Social media platforms now inhabit a new position of responsibility, not only to individual users but also to the public they powerfully affect. When an intermediary grows so large and so entwined with the institutions of public discourse, it has an implicit contract with the public that, whether platform management likes it or not, may be quite different from the contract it required users to click through. The impact these platforms have on essential aspects of public life now lies at their doorstep.²¹⁵

For Jack Balkin, the point of regulating social media is precisely “to create incentives for social media companies,” so that they become “trustworthy intermediate institutions that are guided by professional and public-regarding norms.”²¹⁶

While they are quite reluctant to assume any civil responsibilities outright, social media platforms came under intense pressure to do something about the maelstrom of digital misinformation. Much of this pressure came from governments: In 2018, for example, the European Union asked big tech companies to sign onto a “Code of Practice on

²¹² See generally STEPHEN JOHN ANTHONY WARD, *THE INVENTION OF JOURNALISM ETHICS: THE PATH TO OBJECTIVITY AND BEYOND* (2d ed. 2015) (laying out the historical development of journalistic ethics).

²¹³ See, e.g., Balkin, *supra* note 26, at 83 (“Social media companies have viewed themselves primarily as technology companies that make money through digital surveillance that enables advertising. Their goal is to get bigger and bigger, and to expand their user base so they can serve more ads and make more money.”).

²¹⁴ This is the title of a Tarleton Gillespie book. TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* (2018); see also *id.* at 211 (“Platforms can no longer duck the responsibility of being custodians to the massive, heterogeneous, and contested public realm they have brought into being.”).

²¹⁵ Gillespie, *supra* note 15, at 203.

²¹⁶ Balkin, *supra* note 26, at 71-72.

Disinformation,”²¹⁷ and recently made the document even more assertive.²¹⁸ Several countries, including France and Singapore, passed laws meant to battle online misinformation.²¹⁹ Misinformation is clearly a part of the legitimization crisis facing social media platforms, as shown, for example, by a Pew study found that three out of ten people who think social media platforms have a negative social effect cited misinformation as the reason.²²⁰

While the pressure “to do something about [social media]” is always present,²²¹ it increases dramatically during globally salient crisis points. Three cases stand out as extraordinary examples of social media fact-checking campaigns: the 2020 U.S. elections, the COVID-19 pandemic, and the Russian invasion of Ukraine.

Originally, digital platforms insisted on not being “arbiters of truth.”²²² After the controversial role digital platforms were seen to play in the 2016 U.S. election, Zuckerberg assured Facebook users that they “[took] misinformation seriously,” but “[they] do not want to be arbiters of truth [them]selves, but instead rely on [their] community and trusted third parties.”²²³ In all three cases, “pressure from lawmakers and the public to *do something* about the ‘age of disinformation’ made a completely hands-off approach politically and commercially untenable,”²²⁴ and forced digital media platforms to engage in what one may call arbitration of truth on a massive, and unprecedented, scale.

²¹⁷ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Online Disinformation: A European Approach*, COM (2018) 236 final (Mar. 26, 2018).

²¹⁸ See European Commission Press Release IP/21/2585, *Commission Presents Guidance to Strengthen the Code of Practice on Disinformation* (May 26, 2021); European Commission Press Release IP/22/3664, *Disinformation: Commission Welcomes the New Stronger and More Comprehensive Code of Practice on Disinformation* (June 16, 2022); *2022 Strengthened Code of Practice on Disinformation* (June 16, 2022), <https://perma.cc/KX8P-QMFF>.

²¹⁹ For a global overview of anti-misinformation actions, see Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions Around the World*, POYNTER (Aug. 13, 2019), <https://perma.cc/7YSL-ETVZ>.

²²⁰ See Auxier, *supra* note 188.

²²¹ See Persily & Tucker, *supra* note 202 (“We appear to have reached an inflection point when it comes to concern about the harms of social media and the willingness of governments to do something about them.”).

²²² See, e.g., Callum Borchers, *Twitter Executive on Fake News: ‘We Are Not the Arbiters of Truth’*, WASH. POST (Feb. 8, 2018, 3:20 PM EST), <https://perma.cc/4QXR-BZBQ>.

²²³ Mark Zuckerberg, FACEBOOK (Nov. 19, 2016), <https://perma.cc/F9C7-T6Q5>.

²²⁴ Douek, *supra* note 37, at 544; see also Emily Bazelon, *The Problem of Free Speech in an Age of Disinformation*, N.Y. TIMES MAG. (Oct. 13, 2020), <https://perma.cc/9W4L-454V>.

The 2016 U.S. elections brought the issue of the spread of fake news on social media to public awareness.²²⁵ At the time, research shows that 62% of U.S. adults got their news on social media.²²⁶ Studies also show that fake news was more widely shared than the most popular mainstream media news during that time.²²⁷ Since most fake news stories favored Donald Trump, some “commentators have suggested that Donald Trump would not have been elected president were it not for the influence of fake news.”²²⁸ During the Trump presidency and as the 2020 U.S. election drew near, public pressure on digital media platforms to do something about disinformation intensified.

In the run-up to the 2020 U.S. election, the major digital platforms promised to clamp down on election-related misinformation.²²⁹ The companies, to a large extent, followed through on their promise, which mainly involved “labeling false or misleading election posts in order to point users to reliable information.”²³⁰ YouTube declared that it would “remove any content that claims widespread voter fraud or errors altered the outcome of the U.S. presidential race,” and removed thousands of channels due to election misinformation, while linking to reliable, authoritative sources.²³¹ Twitter went as far as adopting an election integrity policy, which prohibits using “Twitter’s services for the purpose of manipulating or interfering in elections or other civic processes.”²³²

²²⁵ See, e.g., Alexandre Bovet & Hernán A. Makse, *Influence of Fake News in Twitter During the 2016 US Presidential Election*, NATURE COMM’NS, Jan. 2, 2019, at 1.

²²⁶ Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RSCH. CTR. (May 26, 2016), <https://perma.cc/7T6D-FJC2>.

²²⁷ Craig Silverman, *This Analysis Shows How Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016), perma.cc/FZ56-CNXS; Bovet & Makse, *supra* note 225.

²²⁸ Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, J. ECON. PERSPS., Spring 2017, at 211, 212.

²²⁹ See Matt O’Brien & Mae Anderson, *Did Social Media Actually Counter Election Misinformation?*, AP NEWS (Nov. 4, 2020), <https://perma.cc/3LQV-DQ8B> (“Ahead of the election, Facebook, Twitter and YouTube promised to clamp down on election misinformation, including unsubstantiated charges of fraud and premature declarations of victory by candidates.”).

²³⁰ *Id.*

²³¹ Taylor Telford, *YouTube Removes 8,000 Channels in Crackdown on Election Misinformation*, WASH. POST (Dec. 9, 2020, 2:20 PM EST), <https://perma.cc/PU93-TT5J>.

²³² *Civic Integrity Policy*, HELP CTR., TWITTER (Oct. 2021), <https://perma.cc/C36L-J8DM>.

The COVID-19 pandemic further increased the pressure on social media platforms.²³³ In fact, as studies have found that social media users are much more likely to believe antivaccination claims,²³⁴ public opinion turned against social media platforms to fight misinformation.²³⁵ The number of fact-checks on social media increased by 900% in the three months after coronavirus outbreak.²³⁶ Facebook, Twitter, and TikTok launched COVID-19 information centers, which provide information about the virus and the platform's response to the pandemic,²³⁷ including articles written by independent fact-checkers.²³⁸ Mark Zuckerberg declared that over two billion users on Instagram and Facebook have been shown "authoritative health resources."²³⁹ YouTube announced it will not allow content that contained misinformation about approved vaccines²⁴⁰ nor any content about COVID-19 that "poses a serious risk of egregious harm."²⁴¹

Most recently, the Russian invasion of Ukraine, which has been named the world's first TikTok war,²⁴² and the wave of mis- and mal-information

²³³ See e.g., Rebecca Klar, *Feds Step Up Pressure on Social Media over False COVID-19 Claims*, HILL (July 18, 2021, 11:00 AM EDT), <https://perma.cc/TW5N-VCQS>.

²³⁴ See Matt Motta, Dominik Stecula & Christina Farhart, *How Right-Leaning Media Coverage of COVID-19 Facilitated the Spread of Misinformation in the Early Stages of the Pandemic in the U.S.*, 53 CAN. J. POL. SCI. 335, 335 (2020) ("However, we do know that delays, denials and misinformation about COVID-19 have exacerbated its spread and slowed pandemic response, particularly in the U.S." (citation omitted)).

²³⁵ For a review of social media platforms' role in the "infodemic" happening along the COVID-19 pandemic and a call for action, see Israel Júnior Borges do Nascimento et al., *Infodemics and Health Misinformation: A Systematic Review of Reviews*, 100 BULL. WORLD HEALTH ORG. 544 (2022).

²³⁶ Austin Horng-En Wang, *PM Me the Truth? The Conditional Effectiveness of Fact-Checks Across Social Media Sites*, 8 SOC. MEDIA + SOC'Y 1, 1 (2022) ("Numerous social media sites, including Facebook, Twitter, YouTube, and Pinterest, also implement their fact-check (FC) policies, and the number of FCs increased by 900% within 3 months after the coronavirus disease 2019 outbreak.").

²³⁷ See *COVID-19*, TIKTOK, <https://perma.cc/H84T-D6UC>; *COVID-19 Misinformation*, TRANSPARENCY CTR., TWITTER (July 28, 2022), <https://perma.cc/8YLG-5GB2>; Kang-Xing Jin *Keeping People Safe and Informed About the Coronavirus*, META (Dec. 18, 2020), <https://perma.cc/XKP6-U98L>.

²³⁸ Mark Zuckerberg, FACEBOOK (Apr. 16, 2020), <https://perma.cc/L3JU-MKXT> ("We're also launching a new feature called Get The Facts, a section of our Covid-19 Information Center featuring articles written by independent fact-checking partners debunking misinformation about the coronavirus.").

²³⁹ *Id.*

²⁴⁰ *Managing Harmful Vaccine Content on YouTube*, YOUTUBE OFF. BLOG (Sept. 29, 2021) <https://perma.cc/NK4H-ZQX6>.

²⁴¹ *COVID-19 Medical Misinformation Policy*, YOUTUBE HELP, <https://perma.cc/PE2T-VBXH>.

²⁴² Kyle Chayka, *Watching the World's "First TikTok War"*, NEW YORKER (Mar. 3, 2022), <https://perma.cc/75L8-RDEG>.

that followed, forced digital media platforms to again become arbitrators of truth. Following the start of the conflict, Facebook barred Russian state-media from running ads and algorithmically demoted their content for both Facebook and Instagram feeds.²⁴³ Facebook also bolstered its ability to fact-check the conflict by creating new partnerships with regional fact-checking organizations.²⁴⁴ In addition, Facebook put into place a plethora of other anti-misinformation policies, including labeling state-controlled media and limiting the ability to forward messages on Messenger, Instagram and WhatsApp.²⁴⁵ In response to the proliferation of war-related misinformation, Twitter adopted a crisis misinformation policy, under which posts that include misleading claims about ongoing humanitarian crises would not be “amplif[ied] or recommend[ed]” by the Twitter algorithm.²⁴⁶ Twitter would also “prioritize adding warning notices to highly visible Tweets and Tweets from high profile accounts, such as state-affiliated media accounts, verified, official government accounts.”²⁴⁷ YouTube removed 9,000 channels and 70,000 videos under its major violent events policy.²⁴⁸ TikTok started clearly labeling Russian media outlets and even removed some of them inside the E.U.²⁴⁹

Motivated by the controversies surrounding election and health misinformation, both Facebook and Twitter developed programs that involve users and reliable third-party fact-checkers. Birdwatch, the Pilot Twitter program, allows users known as “Birdwatchers” to submit notes, including links to authoritative sources, to correct false information in a

²⁴³ *Meta’s Ongoing Efforts Regarding Russia’s Invasion of Ukraine*, META (Feb. 26, 2022), <https://perma.cc/332F-QKK8>.

²⁴⁴ See Naomi Nix, *In Ukraine, Facebook Fact-Checkers Fight a War on Two Fronts*, WASH. POST (Apr. 12, 2022, 3:00 AM EDT), <https://perma.cc/A93B-5YXX>.

²⁴⁵ See *Meta’s Ongoing Efforts Regarding Russia’s Invasion of Ukraine*, META (Mar. 17, 2022), <https://perma.cc/BVL9-QHLR>.

²⁴⁶ Yoel Roth, *Introducing Our Crisis Misinformation Policy*, TWITTER BLOG (Mar. 19, 2022), <https://perma.cc/P2LW-XARS>.

²⁴⁷ *Id.*

²⁴⁸ Dan Milmo, *YouTube Removes More Than 9,000 Channels Relating to Ukraine War*, GUARDIAN (May 22, 2022, 6:07 AM EDT), <https://perma.cc/N5KA-9R5U>.

²⁴⁹ See Sheera Frenkel, *TikTok Is Gripped by the Violence and Misinformation of Ukraine War*, N.Y. TIMES (Mar. 6, 2022), <https://perma.cc/7YZH-3X68> (“TikTok has also banned Sputnik and Russia Today in the E.U., and on Friday said it would start labeling the outlets as state-sponsored in the countries where they are still available. The app also said on Thursday that it had dedicated more resources to monitoring for misleading content about the war.”).

tweet.²⁵⁰ Facebook runs a Third-Party Fact-Checking Program wherein members of the International Fact-Checking Network are asked by Facebook to attach fact-checks to content that is flagged by AI, moderators and users.²⁵¹ TikTok is also partnering with fact-checkers in its fight against election misinformation and COVID-19 falsehoods.²⁵²

Civil society legitimization is different because platforms engage in it only under duress and haphazardly. What will happen if social media platforms actively and assertively accept their role as custodians of the internet? We may never know.

IV. TWO WAYS TO FAIL

In the previous Sections, we discussed four strategies that social media companies have deployed in their attempt to gain legitimacy among the public. Each of them fails and each of them does so in a different way. However, there is a major distinction between the failure of “legal” legitimization strategies—such as mimicking the functioning of state bureaucracies and high courts—and the non-legal ones—such as emphasizing similarities with other Big Tech companies and adopting a civil society stance. The first type of strategy fails because it only addresses the question of *how* platform power is exercised—without giving an appropriate answer to the question of *why* these corporations should possess this type of power. By contrast, the second type of strategy fails because, although they provide *an* answer as to *why* they should exert this power, the answer they provide fails to gain social plausibility. In what follows, we evaluate both failures.

Section II discussed two ways in which social media platforms rest on legal analogies to legitimate their content moderation activities. We believe both are bound to fail. Even though some procedural safeguards may marginally increase perceptions of legitimacy among individual users,²⁵³ it is highly doubtful that they can legitimate content moderation in the aggregate.

²⁵⁰ See Harrison Mantas, *Twitter Finally Turns to the Experts on Fact-Checking*, POYNTER (Aug. 5, 2021), <https://perma.cc/LN4S-4F42>.

²⁵¹ *About Fact-Checking on Facebook*, META BUS. HELP CTR., <https://perma.cc/E66G-ZM4U>.

²⁵² See Vanessa Pappas, *Combating Misinformation and Election Interference on TikTok*, TIKTOK (Aug. 5, 2020), <https://perma.cc/L8K9-NP9M>.

²⁵³ See generally BRADFORD ET AL., *supra* note 18.

Social media platforms seem to be relying on the self-legitimizing potential of legal devices. As if the very fact that they mimic legal institutions will make their power more legitimate. However, “law in all societies derives its authority from something outside itself.”²⁵⁴ More than a type of legitimation, law is an element of it—necessary but not sufficient.²⁵⁵ A legal order derives its legitimate authority from “a set of beliefs or accepted principles about the rightful source of authority, which underpins them.”²⁵⁶ Different political regimes and societies have different conceptions of the source of legitimate authority: the people, the divine, or the wise. What remains constant, however, is that rules do not create their own ultimate authority, but are logically and socially reliant on a widespread understanding of *why* people should follow these rules. Law is a manner of employing authority, a *how*, but it cannot be the source of its own authority.

If law cannot self-legitimize, then the choice by social media platforms to invest time, energy and capital in parroting legal institutions is based on a misunderstanding. Social media platforms place a disproportionate faith in the procedural aspect of law’s legitimacy—the *how* of law’s application. However, law is legitimate not only because of the way it is applied, but also because it is regarded as a product of the political community.²⁵⁷ Social media companies still lack an answer as to *why* they should be the ones to exercise this phenomenal power over the public sphere.

As we described above, adopting a bureaucratic form of norm enforcement allows us, ideally, to understand how the decision is derived from a generally applicable norm. What it does not explain is *why* that generally applicable norm is legitimate. No matter how perfect a bureaucracy is, its precise application of the laws is only as legitimate as the laws themselves. In the case of the bureaucratic apparatus of social media

²⁵⁴ Harold Berman, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 16 (1983).

²⁵⁵ See generally BEETHAM, *supra* note 54, at 15-16 (elaborating on how legality is one of the three “elements” that compose legitimacy).

²⁵⁶ David Beetham, *Max Weber and the Legitimacy of the Modern State*, 13 *ANALYSE & KRITIK* 34, 39 (1991).

²⁵⁷ As many authors point out, in modern democracies, the law owes its legitimacy to the fact that it is perceived to be a creation of the people themselves. See, e.g., BEETHAM, *supra* note 54, at 75 (“The most common source of legitimacy in contemporary societies is the ‘people.’”); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991) (distinguishing between decisions made by the government and decisions made by the American people, the latter being “constitutional” decisions); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law* 117 *HARV. L. REV.* 4, 36 (2003) (“The Constitution is . . . an expression of the deepest beliefs and convictions of the American nation . . .”).

content moderation, while it might be made more neutral, more predictable and more transparent, it does not make the rule-makers authoritative and legitimate. The underlying question remains: Why should these companies, these individuals, have the authority to control so much of our public sphere, and as a result, our political future? An answer to that cannot be found in following mere forms.

There is ample evidence that procedural justice helps in legitimating the exercise of power, both for state action and for corporate decisions—like for instance customer attention.²⁵⁸ However, no amount of procedure can substitute the fact that authorities need a valid reason to exercise their power. It is true that the Justice Collaboratory authors recognize that “[e]stablishing a platform’s legitimacy might be harder than it is for other authorities that have been approved by their community members and are appointed through a democratic process.”²⁵⁹ But this timid acknowledgement, in the midst of a general celebration of the powers of procedure to legitimate platform governance, does not capture the extent to which the source of authority of the government and platforms differ. The government, or the courts, are not just indistinct “other authorities” in relation to Facebook, Twitter, and YouTube. It is obvious that government agencies, courts, and the police are part and parcel of the state, which is the embodiment of the political community. Social media platforms do not have any remotely close analogue to this powerful symbolism.

The reliance on external sources of authority is even more apparent in the case of constitutional courts. Constitutional courts, and scholars studying them, usually rely on the fact that these organs rely on “professional reason” to make decisions: they analyze their cases in light of valid norms, they apply legal methods, and they provide in writing the reasons for their decisions. Normally, they do not stress the fact that constitutional courts are embedded in a political community and speak on its behalf—because it is not necessary. People within a country came to respect and obey a court for a series of reasons that have to do with their professional dexterity and principled decision making, but also with the fact that they represent the

²⁵⁸ See Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 560 (2016) (“As companies increasingly understand the relationship between profit and complaint handling, they are moving their internal processes toward some measures of procedural justice.”). See generally TYLER, *supra* note 115.

²⁵⁹ Farzaneh Badiei, Tracey Meares & Tom Tyler, *Community Vitality as a Theory of Governance for Online Interaction*, 23 YALE J.L. & TECH. 15, 39 (2021).

nation's values and commitments.²⁶⁰ As some constitutions explicitly state it, courts speak "in the name of the people."²⁶¹ A constitutional court legitimates itself by portraying itself as a country's "better self."²⁶²

Here is where the analogy between the Board and constitutional courts falters. The Board lacks such connection with a people's collective identity. Board members are not judges. They are not appointed by state institutions, and they are not embedded in the national culture in which their decisions are to be applied.²⁶³ National judges claim to apply a national constitution, generally adopted or at least validated by a democratic process.²⁶⁴ The Board, instead, applies Facebook's Community Standards, which reflect no one's values but those of Mark Zuckerberg.²⁶⁵ Indeed, Facebook's "community" is an ill-defined term that does not seem to mean anything else than a disaggregated set of some billion users.²⁶⁶ National courts speak "in the name of the people."²⁶⁷ The Board does not expect to be speaking on behalf of anyone else.

Both the bureaucracy and the Board, then, attempt to acquire legitimacy by adopting the regalia of law. They fail, because they detach law from the source of its authority. We follow law, also, because we see it as *our* creation. In a democracy, the people "expect their own constitutional beliefs to matter," and the Constitution sustains its legitimacy thanks to the

²⁶⁰ See *supra* note 257.

²⁶¹ Bundesverfassungsgerichtsgesetz [BVerfGG], art. 25(4) 12-03-51 (Ger.), translated in Iyamide Mahdi & Ute Reusch, *Act on the Federal Constitutional Court*, <https://perma.cc/Z38A-Y4Y2>; COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION], art. 101.

²⁶² Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 22 (1989) ("The Court . . . represents the community's better self . . ."). Here, Kahn is reconstructing Bruce Ackerman's theory of constitutional review as articulated in Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

²⁶³ See Klonick, *supra* note 103, at 1621-22 (describing the complications of Twitter, Facebook, and YouTube in trying to implement their policies, drafted by American-trained lawyers, in a global company).

²⁶⁴ See *supra* note 257; see also Nico Krisch, *Pouvoir Constituant and Pouvoir Irritant in the Postnational Order*, 14 INT'L J. CONST. L. 657, 662 (2016) ("If one wants to invoke constituent power for legitimacy purposes, one has to be able to make at least a plausible—i.e., socially acceptable—claim for a connection with the people one pretends to represent.").

²⁶⁵ See Douek, *supra* note 7, at 52 ("A list of human rights buzzwords released by Facebook or chosen by Zuckerberg will not have the same resonance as national constitutions that are typically adopted through democratic processes.").

²⁶⁶ On the ambiguous use of the term "community" by social media platforms, see generally Emiliano Vitaliani, Morena Schatzky & Matías González, *"Community" in the Digital Realm*, YALE ISP KNIGHT SERIES (forthcoming) (on file with authors).

²⁶⁷ See *supra* note 261.

“quintessentially democratic attitude in which citizens know themselves as authorities, as authors of their own law.”²⁶⁸ The user base of social media platforms lacks such creative potential. Law, then, fails as an answer to *why* platforms should exercise the authority that they do.

Unlike legal legitimation, which focuses on how platforms exercise their power, the strategies described in Section III do convey an answer as to why they claim such authority. The problem is that such answer turns out to be dubious at best when applied to contemporary social media platforms.

When they try to regain or bolster their legitimacy as corporations, platforms emphasize that they are private businesses whose main function is to produce value through technological innovation.²⁶⁹ The answer to why they deserve authority is that they are a privileged part of the private market, which has intuitive autonomy in capitalist societies, and thus deserve the same leeway as other technology companies.

People have not bought this idea. As we discussed above, the societal perception of social media platforms is that by dominating the digital public sphere, they wield inherently political and public powers.²⁷⁰ They are also seen as mishandling these powers by both engaging in pernicious forms of data collection and surveillance capitalism, and causing or contributing to the modern plagues of digital misinformation and hate speech.²⁷¹ The rising societal awareness of the power of social media platforms, and its misuse, is exactly the cause of the legitimation crisis that inspired this Article. Either way, it seems unlikely that social media platforms will regain their golden days as unchecked Silicon Valley trailblazers.

In contrast, adopting civil society legitimation strategies makes a lot of sense for social media platforms. It is more plausible than corporate legitimacy because it acknowledges the public power of social media and

²⁶⁸ Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and the Medical Leave Act*, 112 YALE L.J. 1943, 1982-83 (2003).

²⁶⁹ See Bogost, *supra* note 204.

²⁷⁰ This fact has been acknowledged even by the Supreme Court of the United States. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (“By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”).

²⁷¹ See *supra* notes 15-17 and accompanying text.

accepts the responsibility for making the digital public sphere work for the public.

We are, however, skeptical of the potential of such strategies to succeed at present for two reasons.

First, social media platforms are reluctant to embrace such a new self-understanding. Willingly accepting public responsibility is likely to require an abandonment of their incredibly profitable ad-based business model. Many traditional mass media organizations, seeking to establish civil society legitimacy and trust, fashioned a separation between their news side and their advertisement side to avoid the appearance of corruption.²⁷² Such a separation will be a very bitter pill for social media platforms to swallow, as their tremendous economic success is “based on data collection, behavioral advertising, and other aspects of surveillance capitalism.”²⁷³ It is hard to be considered “public-regarding” if you are also seen as fleecing the public. Furthermore, it is clear that an embrace of a responsible custodian role undermines the attempt to regain and sustain their corporate legitimacy. Both strategies lead in opposite vectors. While one strategy pushes you to not care about extra-economic ends, the other indicates that the public-interest is your core concern.

The second reason has to do with the nature of civil society. The trust that legitimates civil society organizations and the media “is exhibited and sustained by public opinion, deep cultural codes, distinctive organizations—legal, journalistic and associational—and such historically specific interactional practices as civility, criticism, and mutual respect.”²⁷⁴ In other words, the legitimacy of civil society organizations is dependent to a large extent on deep cultural embeddedness. Civil society organizations are almost always local and ingrained in a particular political community and culture.²⁷⁵ Newspapers and broadcasters, for example, are integrated into

²⁷² See e.g., Jonathan Zittrain, *How to Fix Twitter and Facebook*, ATLANTIC (June 9, 2022), <https://perma.cc/398H-FPW4> (“The most influential papers separated their business and editorial operations. And broadcast TV stations, which have had to operate in the public interest to maintain government-issued licenses, traditionally ran independent newsrooms.”).

²⁷³ Balkin, *supra* note 26, at 88.

²⁷⁴ See ALEXANDER, *supra* note 209, at 31.

²⁷⁵ See Gilad Abiri, *Moderating from Nowhere*, 47 BYU L. REV. 757, 797 (2022) (“Prior to the rise of the digital public sphere, newspapers, and broadcasters were most often embedded in particular polities and cultures. . . . This means that local media elites are almost always fully socialized members of the domestic political community . . .”).

domestic politics and cultures. Their editors and writing staff are virtually always thoroughly assimilated into the domestic political community, and are therefore keenly sensitive to the domestic political and cultural context. They are also almost always members of the same political community as their readership. Trust in media (when it exists) is built upon embeddedness into particular political communities.

In contrast to the connected nature of civil society organizations, social media platforms operate as fully global and stateless media spheres that flow freely past the majority of national borders and even language barriers. This is in contrast to the embedded and local nature of traditional media: Facebook is not the Times of India, Asahi Shimbun, Der Spiegel, or your local radio station. Programmers and moderators who decide what is seen on digital platforms are seldom socialized members of any one political culture. Although it is imaginable that one day in the future people will learn to trust the cyborg content moderation and recommendation apparatus of social media, it still lacks many of the mechanisms that enable us to (sometimes) trust our civil society organizations and see their power as legitimate.

Social media platforms might still be able to gain legitimacy in the way of civil society organizations. In fact, most activists and academics advocate for different versions of this exact transformation. This, however, may require a major metamorphosis in the way platforms operate, conduct their business, and ultimately, conceive of themselves.

CONCLUSION

Social networks are in a dilemma. The reason their legitimation crisis seems irresolvable is, simply, that they do not fit any existing cultural role. They are too public to be a corporation and too private to be a government. They could serve public interests in the way civil society organizations like the media do—but doing that in a plausible way would demand they radically transform themselves. Failing to achieve legitimacy soon might mean doomsday, either through crippling regulation or through a final, massive abandonment by users.

Some indicia suggest that platforms' legitimation crisis is already threatening to reduce social media usage. As a commentator observes, "[w]ith every social-media controversy, people talk about shutting down

their accounts forever.”²⁷⁶ Although few actually do, that does not mean that this is an idle threat. Facebook has seen its user base reduced for the first time in history.²⁷⁷ Every week, one major newspaper features a story about the benefits people have found in quitting Instagram or Twitter, or how they try to learn to reap the benefits without succumbing to their ills.²⁷⁸ Simultaneously, antitrust authorities and regulators worldwide are closing in, and platforms regard them with existential dread.²⁷⁹

It is not clear that we should mourn these particular social platforms if they disappear. However, it is unlikely that our public sphere will do without them. The alternative to a future with platforms that are not legitimated is not a future without platforms, but a future with delegitimated, atomized ones. Governments, platforms, and broader society will have to think deeply of what role platforms will play in our communication. Platforms have made efforts to gain legitimacy, but have done so following old playbooks. They have not worked. A good first step would be for them to offer a compelling answer as to why they deserve our trust and cooperation. Without such an answer, they are like ships without a destination: no wind will be favorable to them.²⁸⁰

²⁷⁶ Dalvin Brown, *Quitting Twitter? What People Say About Life After Social Media*, WALL ST. J. (May 1, 2022, 11:00 AM ET), <https://perma.cc/22MP-2CBS>.

²⁷⁷ Shirin Ghaffary, *Facebook Is Shrinking*, VOX (Feb. 2, 2022, 7:23 PM EST), <https://perma.cc/75ZN-AVPB>.

²⁷⁸ See Brown, *supra* note 276, or, more generally, try a web search of “benefits of quitting social media.”

²⁷⁹ Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (July 28, 2021), <https://perma.cc/3R24-9QHD> (“Mark Zuckerberg, Facebook’s chief executive, has described a breakup of the company as an ‘existential’ threat.”).

²⁸⁰ L. ANNAEUS SENECA, MORAL LETTERS TO LUCILIUS 206 (Michel Daw ed., Richard M. Gummere trans., 2013), <https://perma.cc/2C9L-V7JW> (“When a man does not know what harbour he is making for, no wind is the right wind.”).