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### *SPECIAL ISSUE: GOVERNING THE DIGITAL SPACE*

#### **VIRTUAL GOVERNMENTS**

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#### ABSTRACT

This Article is the first to elaborate the theory of virtual governments as a concept to understand Internet platforms. The theory postulates that large Internet platforms are virtual governments in two senses: (1) they rule the virtual world online, and (2) they operate as governments even though not formally recognized as such. With this understanding, we are in a better position to identify how to improve online governance with respect to content moderation: Internet platforms should compare their policies, procedures, and safeguards—or lack thereof—to the standards of due process, transparency, and accountability applied to national governments in democracies. These reforms will compensate for the democratic deficit that undermines the legitimacy of virtual governments' online governance of people. By the same token, recognizing Internet platforms as virtual governments also militates in favor of national governments affording them comity and mutual respect. Efforts by national governments to break up virtual governments should be viewed with great scrutiny, as would be applied if one national government tried to break up the government of a state or another country. Like federalism, a principle of virtual comity helps protect individual liberties by dispersing powers among different actors—

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which in turn operates as an important check on national governments. Even (or especially) when there is a backlash against Internet platforms, adhering to a principle of virtual comity helps to disperse power over the Internet so it is not concentrated within a national government.

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## INTRODUCTION

How people encounter the online world is increasingly determined by a few, large Internet companies, often derided as “Big Tech.”<sup>1</sup> For social media, the main players in the United States are Facebook, Instagram, Pinterest, Snap, TikTok, Twitter, and YouTube.<sup>2</sup> For search, Google dominates with a staggering 91.9 percent worldwide market share.<sup>3</sup> Far from the “Declaration of the Independence of Cyberspace” John Perry Barlow scribed in 1996, the governance of the Internet has not emerged from “enlightened self-interest and the commonweal.”<sup>4</sup> Instead, its evolution has been guided by the commercially-driven decisions of faceless corporate employees in areas ranging from content moderation, to personal data, to tracking of user interactions online. As Internet scholars have long recognized, these online platforms are quasi-sovereignties, establishing “Facebookistan,” “Googledom,” “Twitterverse,” “YouTubia,” and now the bustling “TikTokland,”<sup>5</sup> which became popular during the pandemic.<sup>6</sup>

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1. See, e.g., Brody Mullins & Ryan Tracy, *Big Tech and Foes Spar Over Bill to Curb Market Power of Dominant Internet Platforms*, WALL ST. J. (Jan. 19, 2022, 5:00 AM), <https://www.wsj.com/articles/big-tech-and-foes-spar-over-bill-to-curb-market-power-of-dominant-internet-platforms-11642586401>.

2. See *Most Popular Social Networks Worldwide as of January 2022, Ranked by Number of Monthly Active Users*, STATISTA (Jan. 2022), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users>; Twitter does not rank highly in the world comparison, but it did so in a United States comparison in 2021. See Jay Baer, *Social Media Usage Statistics for 2021 Reveal Surprising Shifts*, CONVINC & CONVERT, <https://www.convinceandconvert.com/social-media-research/social-media-usage-statistics> (last visited Mar. 15, 2022).

3. See *Search Engine Market Share Worldwide: Jan 2021 - Jan 2022*, STATCOUNTER: GLOBALSTATS, <https://gs.statcounter.com/search-engine-market-share#monthly-202101-202201> (last visited Mar. 15, 2022).

4. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>.

5. See, e.g., REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 149 (2012); Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 929 (2021).

6. See Rachel Bunyan, *TikTok is More Popular than Google: Chinese-Owned Video-Sharing App Clocked Up More Visits After Surge in Popularity During Pandemic*, DAILY MAIL (Dec. 22, 2021, 8:49 PM), <https://www.dailymail.co.uk/news/article-10338393/TikTok-popular-Google-surge-popularity-pandemic.html>.

This Article proposes to take the analogy one step further, arguing that we should envisage these Internet platforms as establishing virtual governments. As such, Internet platforms are quasi-governments that make policies and decisions that constitute de facto regulations or laws for people on the Internet. These virtual governments wield at least as much power over the ways in which people encounter the Internet as do national governments.<sup>7</sup> Indeed, Internet platforms may exercise even greater power over content moderation and suspensions of user accounts (known as “deplatforming” people<sup>8</sup>) than the U.S. government, which is severely limited by the First Amendment.<sup>9</sup> The ongoing controversy over Internet platforms’ content moderation—such as the removal of misinformation related to elections, COVID, and vaccines—has thrown into sharp relief the enormous power, if not responsibility, these platforms exercise daily.<sup>10</sup>

Once we recognize these large Internet platforms as virtual governments, we gain not only a better, more accurate understanding of the actual power the platforms wield in the online world, but also a critical lens by which to evaluate their policymaking and decisions. For example, because these virtual governments are not constituted by elections or public participation, they operate in the shadow of a democratic deficit—namely, the vast majority of people online have no say whatsoever in how Internet platforms govern them.<sup>11</sup> This democratic deficit is contrary to the notion of a free and open Internet. It is one of the main reasons startups and developers are now feverishly trying to build a decentralized Web3, to

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7. See Lee, *supra* note 5, at 928–29.

8. See Aja Romano, *Kicking People Off Social Media Isn’t About Free Speech*, VOX (Jan. 21, 2021, 3:30 PM), <https://www.vox.com/culture/22230847/deplatforming-free-speech-controversy-trump>.

9. See Lee, *supra* note 5, at 930.

10. See *id.* at 915–25 (summarizing controversy and polarization over content moderation).

11. Cf. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149, 153 (2012) (finding “democratic deficit in state policymaking” based on study showing “[r]oughly half the time, opinion majorities lose—even large supermajorities prevail less than 60% of the time.”).

eliminate the centralized control of Internet platforms.<sup>12</sup> As Chris Dixon, a general partner at a16z venture capital firm and a leading proponent of Web3, explained: Web3 “fixes the core problem of centralized networks, where the value is accumulated by one company, and the company ends up fighting its own users and partners.”<sup>13</sup> Critics of the Web2 Internet platforms disagree with the platforms’ ability to censor people’s speech and even control people’s ability to participate on the platform.<sup>14</sup> Web3 is being built on blockchain technology, a peer-to-peer, decentralized technology used for cryptocurrencies and NFTs.<sup>15</sup> Scholars have identified how blockchain technology operates to create or facilitate a new kind of decentralized governance.<sup>16</sup>

Whether or not a decentralized Web3 succeeds in displacing the power of Internet platforms in the future, we must confront what to do, if anything, about Internet platforms today. One roadmap of reform—the one proposed by this Article—is to first conceptualize Internet platforms as virtual governments, and then figure out how to improve them by drawing upon our existing theories of good governance. Internet platforms can take immediate steps to address the democratic deficit that they have created. This is not to say that large Internet platforms should necessarily hold elections for the selection of members who participate in key policymaking roles, such as content moderation. But the lack of public participation creates a democratic deficit that large Internet platforms must attempt to compensate for in some way—for example, by adopting policies and

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12. See Michael Gariffo, *What is Web3? Everything You Need to Know About the Decentralized Future of the Internet*, ZDNET (Jan. 18, 2022), <https://www.zdnet.com/article/what-is-web3-everything-you-need-to-know-about-the-decentralised-future-of-the-internet/>.

13. Chris Dixon, *Why Web3 Matters*, FUTURE (Oct. 7, 2021), <https://future.a16z.com/why-web3-matters/>.

14. See Joshua Douglas *et al.* (@minimalism), *Web2 vs Web3*, ETHEREUM (Mar. 23, 2022), <https://ethereum.org/en/developers/docs/web2-vs-web3/> (discussing Web3’s benefits compared to Web2).

15. *Id.*

16. See, e.g., Andrej Zwitter & Jilles Hazenberg, *Decentralized Network Governance: Blockchain Technology and the Future of Regulation*, FRONTS. IN BLOCKCHAIN (Mar. 25, 2020), <https://doi.org/10.3389/fbloc.2020.00012>.

safeguards that are designed to serve humankind and the public interest. Otherwise, a virtual government can too easily devolve into an autocracy, ruled by one person, namely, the CEO. That's why it was not off base for one commentator to describe Facebook as "the largest autocracy on earth" and CEO Mark Zuckerberg as its ruler.<sup>17</sup>

The concept of virtual governments also provides a better framework by which to scrutinize national governments and their potential regulations of Big Tech platforms. National governments may overstep their bounds if they attempt to commandeer Internet platforms to serve illegitimate goals, such as censoring political dissent or conducting mass surveillance of citizens.<sup>18</sup> Likewise, although the current desire (if not hysteria)<sup>19</sup> to break up Big Tech no doubt sounds very attractive to many people and politicians,<sup>20</sup> it's important to reserve that nuclear option as a tool of last resort. Indeed, it is ironic that the last Big Tech company that the government almost broke up—Microsoft—is no longer the target of such attacks.<sup>21</sup> Many U.S. investors probably welcomed Microsoft's recent earnings report, which beat expectations and stemmed a downturn in the stock market at the time.<sup>22</sup>

Under my theory of virtual governments, national governments should recognize virtual governments as important developers of Internet policies and accord them a degree of comity and mutual respect. Attempts

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17. Adrienne LaFrance, *The Largest Autocracy on Earth*, THE ATL. (Sept. 27, 2021), <https://www.theatlantic.com/magazine/archive/2021/11/facebook-authoritarian-hostile-foreign-power/620168/>.

18. See, e.g., Raphael Satter, *U.S. Court: Mass Surveillance Program Exposed by Snowden Was Illegal*, REUTERS (Sept. 2, 2020, 5:20 PM), <https://www.reuters.com/article/us-usa-nsa-spying/u-s-court-mass-surveillance-program-exposed-by-snowden-was-illegal-idUSKBN25T3CK>.

19. See Andy Kessler, *Don't Buy into Big-Tech Hysteria*, WALL ST. J.: OP. (Feb. 23, 2020, 1:56 PM), <https://www.wsj.com/articles/dont-buy-into-big-tech-hysteria-11582484198>.

20. See, e.g., Zephyr Teachout, *Look Out, Big Tech, We're Coming for You*, NEW REPUBLIC (Dec. 10, 2021), <https://newrepublic.com/article/164679/antitrust-break-up-big-tech>.

21. See Alec Stapp, *Why Don't People Talk About Breaking Up Microsoft?*, TRUTH ON THE MKT. (Aug. 8, 2019), <https://truthonthemarket.com/2019/08/08/why-dont-people-talk-about-breaking-up-microsoft/>.

22. Chuck Mikolajczak, *Wall Street Recovers from Early Lows on Microsoft Boost*, REUTERS (Oct. 29, 2021, 1:01 PM), <https://www.reuters.com/business/wall-street-recovers-early-lows-microsoft-boost-2021-10-29/>.

to commandeer, and especially, to break up, these virtual governments should be viewed with great scrutiny. Only if Internet platforms fail to adopt adequate policies, safeguards, and other meaningful reforms to their governance operations affecting the online lives of millions of people, should national governments consider enacting laws to regulate virtual governments to develop better Internet policies.

Part I introduces and defines the concept of virtual governments and situates Internet platforms within the development of the Web known as Web2, which gave rise to social media and large Internet platforms. Part I also explains how developers are building the decentralized Web3 based on peer-to-peer blockchain technology, in part to counter the power of virtual governments. Part II explains how the concept of virtual governments can give us a better understanding of their power in the online world, as well a framework to evaluate both online governance by these companies and attempts by national governments to regulate or even break up these Internet companies. Finally, Part III addresses objections to the theory of virtual governments.

#### I. INTERNET PLATFORMS AS VIRTUAL GOVERNMENTS

Part I introduces the concept of virtual governments to describe Internet platforms. It situates virtual governments within the historical development of the Internet in the period commonly described as Web2, when social media first became popular and consolidated in a few large Internet platforms, such as Facebook, Twitter, and YouTube. The emerging Web3 is, in part, a response to the rise of these Internet platforms—and their perceived autocratic control over their users.

##### A. *Web1*

In the mid-1990s, when the Web was becoming more accessible to the public, many saw the vast potential for democratic participation, empowerment, and decentralization the Internet could bring. In 1996, Bill Gates predicted that the Internet “will strengthen democracy” by giving citizens immediate access to a wealth of information and “empower citizens to participate in the democratic process and civic affairs with an ease and immediacy almost unheard of today.”<sup>23</sup> In Gates’ view, citizens would be

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23. Bill Gates, *Internet Will Improve Democracy*, DESERET NEWS (July 21, 1996, 12:00 AM), <https://www.deseret.com/1996/7/21/19255319/internet-will-improve-democracy>.



“in a fundamentally more powerful position than ever before.”<sup>24</sup> Before social media existed, Gates even alluded to the possibility that the Internet would enable people to share their views online: “It will enable people to delve more deeply into public records and topics of interest, listen to an important political debate and, *perhaps most importantly, exchange opinions with others about those issues.*”<sup>25</sup>

Beyond the benefits to public debate and access to information, some theorists viewed the Internet itself as a new frontier that offered people the prospect of a better, more democratic world. In 1996, John Perry Barlow’s “A Declaration of the Independence of Cyberspace” became a bold manifesto that helped galvanize ideals of a free and open Internet.<sup>26</sup> Barlow’s Declaration was addressed to the “Governments of the Industrial World.”<sup>27</sup> The Declaration can be read as a warning to the governments of “China, Germany, France, Russia, Singapore, Italy and the United States,” which were “trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace.”<sup>28</sup> Attempts to govern or regulate the Internet were viewed with suspicion, if not outright disdain.

During this early period of the Internet—called Web1—the Internet was hailed as both an empowering tool for communication as well as a place for freedom. In Barlow’s Declaration, the perceived threat to the promise of the Internet were national governments that attempted to restrict it. Corporations were not even mentioned as a concern.

## *B. Web2 and the Rise of Internet Platforms and Virtual Governments*

### 1. History

Web2 ushered in a new kind of participation online with the birth of blogs, social media, and user-generated content.<sup>29</sup> (This period was commonly called “Web 2.0,” but, for whatever reason, the latter part “.0” is

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24. *Id.*

25. *Id.* (emphasis added).

26. See Barlow, *supra* note 4.

27. *Id.*

28. *Id.*

29. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1499–1501.

commonly omitted today.)<sup>30</sup> Social networks, including Facebook, YouTube, Instagram, and Twitter, became popular Internet platforms for users to share their views and content.<sup>31</sup> Not only were these Internet platforms hailed as facilitators of creativity, the free exchange of ideas, and user-generated content, they also were used to organize political protests, most famously in the context of the Arab Spring.<sup>32</sup> Internet platforms gave rise to a new kind of “platform economy” about which business scholars and analysts have written extensively.<sup>33</sup>

But Web2 was not all rosy. There was a growing recognition that Internet platforms, like national governments, governed people’s online speech, privacy, and life. As Rebecca Mackinnon incisively observed back in 2012:

“Governance” functions, once carried out almost entirely by nation-states, are now shared increasingly by private networks and platforms. The lives of people around the world are increasingly shaped by programmers, engineers, and corporate executives for whom nobody ever voted and who are not accountable to the public interest. When we sign up for Web services, social networking platforms, broadband service, or mobile wireless networks, and we click “agree” to the terms of service, we give them false and uninformed consent to operate as they like.

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30. *See id.* at 1500.

31. *See id.* at 1500–1502.

32. *See* Gadi Wolfsfeld, Elad Segev & Tamir Sheafer, *Social Media and the Arab Spring: Politics Comes First*, 18 INT’L J. PRESS/POL’Y 115 (2013), <https://journals.sagepub.com/doi/pdf/10.1177/1940161212471716>; Catherine O’Donnell, *New Study Quantifies Use of Social Media in Arab Spring*, UNIV. OF WASH.: NEWS (Sept. 12, 2011), <https://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/>. *But see* Robin Wright, *How the Arab Spring Became the Arab Cataclysm*, NEW YORKER (Dec. 15, 2015), <https://www.newyorker.com/news/news-desk/arab-spring-became-arab-cataclysm>.

33. *See, e.g.*, Chen Xue, Wuxu Tian & Xiaotao Zhao, *The Literature Review of Platform Economy*, SCI. PROGRAMMING, Sept. 1, 2020, at 1, <https://doi.org/10.1155/2020/8877128>.

Today the power of Internet platforms and services to shape people's lives is greater than ever and will only grow.<sup>34</sup>

Mackinnon likened Internet platforms to sovereigns or nations, aptly coining the terms "Facebookistan" and "Googledom."<sup>35</sup>

Building on that idea, Anupam Chander argued that Facebook satisfied some of the characteristics of a nation-state, including taking on a role as a centralized government.<sup>36</sup>

Facebook has leaders who make rules. Facebook interprets these rules and enforces them. Enforcement consists in removing and/or banning individuals or groups for violating Facebook's terms (as determined by Facebook), deleting certain information, or sharing certain information with government authorities.<sup>37</sup>

Later, in 2018, Kate Klonick argued that social media companies are "New Governors" of their platforms: Internet platforms operate as a kind of private governance.<sup>38</sup>

The early recognition of Internet platforms as powerful sovereigns led to no reforms. Ironically, the anti-regulatory principle of Barlow's Declaration that won the day in Web1 carried over to Web2, at least in the United States where a significant number of Internet platforms were headquartered. During this period, the U.S. Congress made no changes to its two major pieces of legislation—enacted during Web1—that shifted regulatory power to Internet platforms.

First, Section 230 of the Communications Decency Act of 1996 (Section 230) provides immunity from civil liability to Internet Service Providers (ISPs) based on the content posted by their users. At the same time, Section 230 encourages ISPs to engage in content moderation by providing

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34. Rebecca MacKinnon, *Consent of the Networked*, SLATE (Jan. 30, 2012, 9:07 AM), <https://slate.com/technology/2012/01/consent-of-the-networked-rebecca-mackinnon-explains-why-we-must-assert-our-rights-as-citizens-of-the-internet.html>.

35. MacKinnon, *supra* note 5.

36. Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1818 (2012).

37. *Id.*

38. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662–63 (2018).

immunity for good-faith moderation.<sup>39</sup> Second, the Digital Millennium Copyright Act (DMCA) safe harbors provide immunity from copyright liability to ISPs for certain functions, including passive hosting of third-party content.<sup>40</sup> Congress enacted these laws to *encourage* private industry to address the challenges of moderating online content to make the Internet safer for children and families (under Section 230) and for copyright owners (under the DMCA).<sup>41</sup> For content moderation, Congress had a confined set of choices because the First Amendment limits what the government can proscribe. For copyright infringement, Congress didn't want to make every online infringement a federal lawsuit, given the sheer magnitude of infringement online. The combination of Section 230 and the DMCA's safe harbors<sup>42</sup> established a deregulatory approach by the U.S. government, largely shifting responsibility for content moderation and combatting copyright infringement to private actors, especially Internet platforms.

Indeed, many lauded Congress's *laissez faire* approach embodied in both Section 230 and the DMCA safe harbors as a key reason for the explosion of innovative applications on the Web.<sup>43</sup> Tim Wu, now a vocal critic of Big Tech,<sup>44</sup> even called the DMCA the "Magna Carta for Web 2.0."<sup>45</sup> Jeff Kosseff described Section 230's immunity as the law—or 26 words—

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39. See 47 U.S.C. § 230(c); Lee, *supra* note 5, at 949–50 (explaining the two subsections of § 230(c)).

40. See 17 U.S.C. § 512.

41. See 47 U.S.C. § 230(b); H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.) (DMCA safe harbors to provide "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."); accord H.R. REP. NO. 105-551, pt. 2, at 49 (1998); S. REP. NO. 105-190, at 20, 40 (1998).

42. The media sometimes confuses one for the other. See Lee, *supra* note 5, at 941–43 (discussing mistakes made by the *New York Times*, among others).

43. See, e.g., Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 259–60 (2009).

44. See Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html>.

45. Tim Wu, *Does YouTube Really Have Legal Problems*, SLATE (Oct. 26, 2006, 4:28 PM), <http://www.slate.com/id/2152264/>.

that created the Internet.<sup>46</sup> During Web2, Facebook, Instagram, Google, YouTube, and Twitter became household names and Internet platforms that many millions, if not billions, of users frequented every day. Other platforms, such as Pinterest, Reddit, and Snapchat, became popular as well. Although the deregulatory approach to Internet companies occurred in the 1990s when William Clinton, a Democrat, was president with a Republican-controlled Congress, the philosophy was consistent with the conservative economic policies of President Ronald Reagan.<sup>47</sup> Today, the climate in Washington has dramatically changed: Both Democrats and Republicans now seek sweeping regulations of Big Tech and Internet platforms.<sup>48</sup>

## 2. Internet Platforms as Virtual Governments

This Article proposes that we recognize Internet platforms as virtual governments. This Subpart lays out the concept. Later, Part II explains how the concept of virtual governments improves our understanding of the current debate in Congress over whether to regulate and potentially break up Internet platforms.

“Virtual” has two meanings, both of which apply here. First, the term indicates something that exists or occurs online.<sup>49</sup> A virtual government is one that regulates online activities. It is, in other words, a body or institution that governs how the platform operates, including what rules and procedures govern the activities of its users. Second, and just as importantly, the term indicates something “being such in essence or effect though not formally recognized or admitted.”<sup>50</sup> A virtual government is not formally recognized as such—but is so in effect. For example, in 1940, when

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46. JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2* (2019).

47. *See generally* Jefferson Decker, *Deregulation, Reagan-Style*, REGUL. REV. (Mar. 13, 2019), <https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/> (recounting history behind Pres. Reagan’s deregulatory policy).

48. *See* Lauren Feiner, *Democrats and Republicans Show Rare Unity in Desire to Crack Down on Big Tech Companies*, CNBC (June 16, 2021, 12:59 PM), <https://www.cnbc.com/2021/06/16/democrats-republicans-show-unity-in-desire-for-big-tech-crackdown.html>.

49. *Virtual*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/virtual> (last visited Feb. 28, 2022).

50. *Id.*

William O. Douglas was SEC chair, he described the actors who wielded “tremendous power” in the financial markets as “virtual governments in the power at their disposal.”<sup>51</sup> Although not formal governments, those powerful actors were considered virtual governments.

Because it conveys these dual meanings, “virtual government” is a more apt description than others used in the past: Describing an Internet platform simply as a “government” lacks the tie to online regulation and implies the ruling institutions of a nation, state, or locality. Likewise, “sovereign” lacks the Internet connection and does not focus on the governance side of Internet platforms.

“Virtual government” has rarely been used to describe an Internet entity or platform in legal scholarship. In 1991, Laurence Tribe rejected the argument that the First Amendment should apply to private networks and bulletin boards on the supposed theory that they were “virtual governments” and therefore should be treated like the shopping mall in *Pruneyard Shopping Center v. Robins*, which was required, under the California Constitution, to permit individuals to pass out pamphlets on the private property of a shopping mall.<sup>52</sup> Tribe characterized the argument as a fallacy.<sup>53</sup> But Tribe suggested that “certain technologies may become socially indispensable—so that equal or at least minimal access to basic computer power, for example, might be [a] significant . . . constitutional goal.”<sup>54</sup> After Tribe’s provocative use of the term in 1991, legal scholars used it only sparingly to describe various aspects of Internet governance.<sup>55</sup>

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51. Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 40 (1991) (quoting WILLIAM O. DOUGLAS, *DEMOCRACY AND FINANCE* 15 (1940)).

52. Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, HUMANIST, Sept.–Oct. 1991, at 18; see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 78 (1980) (“The California Supreme Court reversed, holding that the California Constitution protects ‘speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.’” (quoting *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979))).

53. Tribe, *supra* note 52.

54. *Id.*; see also Don Oldenburg, *The Law: Lost in Cyberspace*, WASH. POST, Oct 1, 1991, at E5 (some private networks “may be outgrowing their private status and ripening for regulation.”).

55. See, e.g., William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 218 (1995) (section titled “Virtual

Outside the legal academy, the term “virtual government” can be traced to at least 1998-99.<sup>56</sup> A provocative project by computer science students at Stanford University classified the types of governments that were sprouting to regulate online communities.<sup>57</sup> In lines that are incredibly prescient, the students stated:

The online world is filled with virtual communities, each experimenting with its own unique style of government. Many of the classic forms of government in the real world can be found somewhere online—monarchy, oligarchy, anarchy, democracy, even feudalism. Most *virtual governments* combine the characteristics of several models, and no two communities are governed in exactly the same way.<sup>58</sup>

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Violence and Virtual Government” describes how a “multi-user dungeon” (MUD) called LambdaMOO established “a system of petitions and ballots as a mechanism for popular vote on social issues and use of administrative powers, with the results as a binding mandate on the conduct of the administrators themselves” in response to virtual rape of some of its members); Michael Johns, *The First Amendment and Cyberspace: Trying to Teach Old Doctrines New Tricks*, 64 U. CIN. L. REV. 1383, 1437 (1996) (“Second, in formulating new legal doctrine, lawmakers should recognize, empower, and learn from the multitude of self-regulating structures that have already been developed by the users and administrators of cyberspace. These structures include customary law or “netiquette,” contracts, and even small virtual governments.”); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1266 (1998) (“While the world they envision is not in fact one entirely free from law—they acknowledge the need for a variety of legal rules in cyberspace—it is one that would take the law ‘in-house,’ creating virtual courts and virtual governments within cyberspace. This approach is self-consciously based on the ‘law merchant’ enforced in private merchant courts during the Middle Ages.”). On April 2, 2022, my search of “virtual government” in the Law Reviews and Journals database on Westlaw resulted in only 36 sources. Between 2004 to February 2022, Google searches for “virtual government” have been relatively low, although they started to increase in April 2020. GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=all&q=virtual%20government> (search for “virtual government” on April 2, 2022). The increase occurred in the same year that the Internet platforms intensified their content moderation. See Lee, *supra* note 5, at 915–18.

56. See Jed Burgess et al., *Controlling the Virtual World: Governance of On-Line Communities*, STAN.: CS201 PROJECTS, <https://cs.stanford.edu/people/eroberts/cs201/projects/1998-99/controlling-the-virtual-world/index.html> (last visited Mar. 17, 2022).

57. *Id.*

58. *Id.* (emphasis added).

Although the students were speaking at the beginning of Web1, their analysis holds true for Web2: the virtual governments of Internet platforms are all different, but they share some general features, such as community standards and a notice-and-takedown process for copyright-infringing material (so that they can take advantage of the DMCA's safe harbor). The Stanford students described three types of online governments at the time: (1) democracy in which the people govern, (2) autocracy in which a privileged individual or few govern, and (3) anarchy.<sup>59</sup> Noticeably absent from the list, however, is a republic—what the United States aspires to be under the Constitution.<sup>60</sup> It's unclear why the Stanford students omitted a republic; perhaps, at the time, no online community resembled one.

### C. Web3 and the Rise of DAOs and Decentralization

We are just entering Web3, in which individuals, organizations, and businesses are building a decentralized Web.<sup>61</sup> A major development in Web3 is the emergence of decentralized autonomous organizations (DAOs). DAOs, which run on the same blockchain technology that gave rise to Bitcoin and other cryptocurrencies, are a way to convene people on the Internet to create an organization, agree on its mission, and set up its governing rules.<sup>62</sup> It's like a Web3 nonprofit, company, or group, depending on the objective of the organization. But the people in the group run it. They

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59. Jed Burgess et al., *Governments*, STAN.: CS201 PROJECTS, <https://cs.stanford.edu/people/eroberts/cs201/projects/1998-99/controlling-the-virtual-world/government/index.html> (last visited Apr. 2, 2022).

60. *See, e.g.*, *Duncan v. McCall*, 139 U.S. 449, 461 (1891) (“By the Constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.”).

61. *See* Gilad Edelman, *The Father of Web3 Wants You to Trust Less*, WIRED (Nov. 29, 2021, 8:00 AM), <https://www.wired.com/story/web3-gavin-wood-interview/>.

62. *See* Taylor Locke, *What Are DAOs? Here's What to Know About the 'Next Big Trend' in Crypto*, CNBC: MAKE IT (Oct. 25, 2021, 12:26 PM), <https://www.cnbc.com/2021/10/25/what-are-daos-what-to-know-about-the-next-big-trend-in-crypto.html>.



donate to the group, receive nonfungible tokens (NFTs) in exchange, which entitle them to vote on how to govern the DAO and run it.<sup>63</sup> The rules that govern the DAO are recorded on blockchain for transparency, and they help to make the DAO decentralized, without the need for a central organizer or administrator.<sup>64</sup> Compound governance is one open-source protocol that DAOs can adopt; the COMP token even allows the owner to delegate voting power to a third party.<sup>65</sup> In short, as one commentator observed: “The DAO is a paradigm shift in the very idea of economic organization. It offers complete transparency, total shareholder control, unprecedented flexibility and autonomous governance.”<sup>66</sup>

DAOs offer a decentralized, democratic approach. They are direct challenges to the model of Internet platforms that operate more as autocracies. “The rules and governance of each DAO is coded in smart contracts on the blockchain and cannot be changed unless voted upon by the DAO’s members.”<sup>67</sup> DAOs can be used in virtually any context in which organizing people is necessary. For example, ConstitutionDAO organized people to contribute funds to make a bid on a copy of the U.S. Constitution up for auction at Sotheby’s.<sup>68</sup> People purchased NFTs that raised \$47 million.<sup>69</sup> ConstitutionDAO, however, lost the auction to billionaire hedge

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63. See Seth Bannon, *The Tao of “The DAO” or: How the Autonomous Corporation Is Already Here*, TECHCRUNCH (May 16, 2016, 7:30 AM), <https://techcrunch.com/2016/05/16/the-tao-of-the-dao-or-how-the-autonomous-corporation-is-already-here/>.

64. See Cathy Hackl, *What Are DAOs and Why You Should Pay Attention*, FORBES (June 1, 2021, 8:00 AM), <https://www.forbes.com/sites/cathyhackl/2021/06/01/what-are-daos-and-why-you-should-pay-attention/?sh=7a3ae3257305>.

65. See Robert Leshner, *Compound Governance: Steps Towards Complete Decentralization*, MEDIUM: COMPOUND (Feb. 26, 2020), <https://medium.com/compound-finance/compound-governance-5531f524cf68>.

66. See Bannon, *supra* note 63.

67. See Locke, *supra* note 62.

68. See CONSTITUTIONDAO, <https://www.constitutiondao.com/> (last visited Apr. 2, 2022).

69. See Nilay Patel, *From a Meme to \$47 Million: ConstitutionDAO, Crypto, and the Future of Crowdfunding*, VERGE (Dec. 7, 2021, 10:15 AM), <https://www.theverge.com/22820563/constitution-meme-47-million-crypto-crowdfunding-blockchain-ethereum-constitution>.

fund CEO Ken Griffin, returned the money to its members, and disbanded.<sup>70</sup> But that won't be the end of DAOs. DAOs are just beginning.

DAOs offer a more democratic alternative to today's Internet platforms, in which people have practically no decisionmaking power on matters of governance. As one researcher observed, "[t]here's a small group of companies that own all this stuff, and then there's us who use it, and despite the fact that we contribute to the success of these platforms, we don't have anything to show for it."<sup>71</sup> Perhaps the most intriguing possibility is that a DAO, governed by its members, can replace a Web2 Internet platform—as Cooper Turley, an investor in and developer of DAOs, remarked: "I believe that the next Facebook-like company will be formed as a DAO rather than an LLC."<sup>72</sup> Mark Cuban, who is an investor in Web3 projects, concurred: "The future of corporations could be very different as DAOs take on legacy businesses.... Entrepreneurs that enable DAOs can make money. If the community excels at governance, everyone shares in the upside."<sup>73</sup> DAOs are disruptive because they are democratically run in a decentralized manner with all members having a vote in how the funds of the DAO are used.<sup>74</sup>

Whether DAOs succeed in displacing large Internet platforms is not crucial for us to resolve in this Article. Instead, it is important to recognize that DAOs prioritize governance structures and people's participation in ways that today's dominant Internet platforms do not. DAOs do not have a democratic deficit. Internet platforms do.

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70. See Jacob Kastrenakes, *ConstitutionDAO Will Shut Down After Losing Bid for Constitution*, VERGE (Nov. 23, 2021, 3:30 PM), <https://www.theverge.com/2021/11/23/22799192/constitutiondao-shutting-down-lost-auction-refunds>.

71. Bobby Allyn, *People Are Talking About Web3. Is It the Internet of the Future or Just a Buzzword?*, NPR (Nov. 21, 2021, 6:00 AM), <https://www.npr.org/2021/11/21/1056988346/web3-internet-jargon-or-future-vision>.

72. Locke, *supra* note 62.

73. *Id.*

74. See, e.g., Horacio Ruiz, *A Look at Nouns DAO*, ALTS CO (Sept. 12, 2021), <https://alts.co/a-look-at-nouns-dao/>; see also Tracy Wang, *FlamingoDAO's NFT Portfolio Is Now Worth \$1B*, COINDESK (Feb. 10, 2022, 3:52 PM), <https://www.coindesk.com/markets/2022/02/10/flamingodaos-nft-portfolio-is-now-worth-1b/>.

## II. HOW VIRTUAL GOVERNMENTS SHOULD GOVERN AND BE GOVERNED

Once we recognize Internet platforms as virtual governments, it helps to clarify two related issues: first, how virtual governments should govern their users; second, how national governments should govern virtual governments. This Part addresses each issue in turn.

### A. *How Virtual Governments Should Govern*

#### 1. Internet Platforms Must Recognize Themselves as Virtual Governments

The first step for Internet platforms to respond to the backlash—or “techlash”—they face is to recognize that they are virtual governments, not just for-profit corporations. Such recognition will provide greater clarity to the important roles they serve and responsibilities they must assume.

No longer should it be acceptable for Internet platforms to disclaim their profound role as virtual governments. Back in 2012, Mackinnon succinctly described this corporate view: “Executives of these companies often argue that human rights are neither their concern nor their responsibility: the main obligation of any business, they point out, is to maximize profit and investor returns.”<sup>75</sup> This corporate view has probably eroded, evidenced by the emergence of community guidelines—or rules governing content and conduct on the platforms—for users. Every major Internet platform has adopted its own community guidelines and procedures to enforce them.<sup>76</sup> As Mark Zuckerberg famously admitted in 2018: “In a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and more than other technology companies we’re really setting policies.”<sup>77</sup> But some companies may still be reluctant to view themselves as virtual governments rather than profit-making businesses.<sup>78</sup>

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75. Mackinnon, *supra* note 34.

76. See Lee, *supra* note 5, at 994–95.

77. Franklin Foer, *Facebook’s War on Free Will*, *GUARDIAN* (Sept. 19, 2017, 1:00 AM), <https://www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will>.

78. See, e.g., Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1037 (2016) (stating that then Google Chairman Eric Schmidt and Google European Communications Director Peter Barron both agreed that Google never wanted to have to make decisions that courts could make regarding the right to be forgotten).

The recognition of Internet platforms as virtual governments helps to bring clarity to the controversy. First, it changes the mission of the company: it can no longer view governance as a perfunctory task foisted upon it by the U.S. Congress or the Court of Justice of the European Union. Instead, the company should view governance as a profound responsibility that is fundamental to its mission or identity. Second, recognition of an Internet platform as a virtual government can lead to better policymaking and procedures for the platform and its users. Once a company realizes it is a virtual government, it should make more conscientious decisions to adopt good governance features including due process, separation of powers, and democratic participation.

In this regard, Mark Zuckerberg deserves some credit. In 2018, he announced that Facebook would create an independent oversight body—colloquially called a Supreme Court—to hear discretionary appeals of Facebook’s specific decisions whether to moderate content on its platform.<sup>79</sup> Twenty paid experts from diverse specialties, including academia, politics, journalism, and human rights comprise the Oversight Board,<sup>80</sup> which is funded by a trust established by Facebook.<sup>81</sup> In December 2021, members hailed from 16 countries, with 4 members from the United States.<sup>82</sup> The Oversight Board has its own website, charter, bylaws, and an appeals process that results in published appellate decisions.<sup>83</sup>

Many have lambasted the Oversight Board as Facebook’s lackey, established to paper over the endemic problems of Facebook’s platform that

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79. See Casey Newton, *Facebook Will Create an Independent Oversight Group to Review Content Moderation Appeals*, VERGE (Nov. 15, 2018, 2:29 PM), <https://www.theverge.com/2018/11/15/18097219/facebook-independent-oversight-supreme-court-content-moderation>.

80. See *Our Commitment*, OVERSIGHT BD., <https://oversightboard.com/meet-the-board/> (last visited Dec. 28, 2021).

81. See Cecilia Kang, *What Is the Facebook Oversight Board?*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/05/05/technology/What-Is-the-Facebook-Oversight-Board.html>.

82. See *Oversight Board (Facebook)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Oversight\\_Board\\_\(Facebook\)#Members](https://en.wikipedia.org/wiki/Oversight_Board_(Facebook)#Members) (last visited Dec. 28, 2021).

83. See OVERSIGHT BD., <https://oversightboard.com/> (last visited Apr. 2, 2022).

favors virality through polarization, misinformation, and extremism.<sup>84</sup> Those serious charges deserve a full examination, which goes beyond the scope of this Article. But I believe the Oversight Board is a significant development for online governance and virtual governments. It is an example of what I've called a private administrative agency.<sup>85</sup> Indeed, the Oversight Board has incorporated features from administrative agencies and courts, including the solicitation of public comments or briefs, as well as the issuance of published decisions for each appeal.<sup>86</sup> The Board allows public comments before deciding each appeal.<sup>87</sup>

For the first time in the history of Web2 Internet platforms, a tribunal is publishing the decisions on whether certain content violated the platform's community standards. Although the Oversight Board hears only a tiny fraction of appeals, the publication of content moderation decisions is a huge step in the right direction. The industry standard—among Facebook/Instagram, Google/YouTube, Twitter, and TikTok—is to avoid explaining the reasons for the removal of content except, perhaps, in rare cases.<sup>88</sup> In other words, the public has no way of knowing how most content

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84. See, e.g., Roger McNamee & Maria Ressa, *Facebook's "Oversight Board" Is a Sham. The Answer to the Capitol Riot Is Regulating Social Media*, TIME (Jan. 28, 2021, 10:30 AM), <https://time.com/5933989/facebook-oversight-regulating-social-media/>; Jeremy Lewin, *Facebook's Long-Awaited Content 'Supreme Court' Has Arrived. It's a Clever Sham*, GUARDIAN (Mar. 17, 2021, 6:23 AM), <https://www.theguardian.com/commentisfree/2021/mar/17/facebook-content-supreme-court-network>.

85. Lee, *supra* note 78, at 1055 (“[A] private administrative agency is defined as a non-governmental entity that (i) derives its authority or responsibility for administration of certain tasks through a formal or informal delegation of power by the government and (ii) performs public functions that are meant to serve the public or society at large.”).

86. Curiously, the Oversight Board's bylaws do not contain a specific provision for requesting public comment, but instead, authorize an appeals panel to request information and briefs from experts, advocacy, or public interest organizations. See OVERSIGHT BD., OVERSIGHT BOARD BYLAWS 16 (2022), <https://www.oversightboard.com/sr/governance/bylaws>.

87. See *Announcing the Board's Next Cases and Changes to Our Bylaws*, OVERSIGHT BD. (Nov. 2021), <https://oversightboard.com/news/3138595203129126-announcing-the-board-s-next-cases-and-changes-to-our-bylaws/>.

88. See generally Jillian C. York & Corynne McSherry, *Content Moderation Is Broken. Let Us Count the Ways.*, ELEC. FRONTIER FOUND. (Apr. 29, 2019),

moderation decisions were made. The decisions are secret. The Oversight Board's publication of its decisions provides the public with an invaluable explanation of its decision in affirming or reversing Facebook's content moderation. I have argued for a similar agency to review Google's decisions on requests under the EU right to be forgotten and to render published decisions for greater accountability.<sup>89</sup>

The Oversight Board's other significant contribution to online governance is the adoption of a process for the public to comment on pending appeals.<sup>90</sup> It marks a rare instance in which a decision affecting users on an Internet platform is informed by public input. Much more needs to be done. For example, Internet platforms should include a period of notice and comment inviting public input before making significant changes to their content moderation policies. (Ideally, such notice and comment would have preceded the original adoption of the policies.)

## 2. Internet Platforms Should Adopt Reforms Consistent with Democratic Accountability

Once Internet platforms understand themselves as virtual governments, that recognition provides greater clarity as to how they can improve their governance of the platforms. From top to bottom, they should reevaluate their existing policies and procedures against the measure of good governance practices from nation-states. It goes beyond the scope of this Article to elaborate a comprehensive set of principles. But three priorities for Internet platforms should be recognized: (1) enhancing democratic or public participation; (2) providing greater transparency and reason-giving and; (3) recognizing a principle of separation of powers.

### *a. Priority 1: Enhancing Democratic or Public Participation*

Internet platforms should address the general lack of democratic or public participation—the democratic deficit—in both their policymaking and their enforcement of those policies. It is a complete contradiction, if not Orwellian, for an Internet platform's so-called community standards to be

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<https://www.eff.org/deeplinks/2019/04/content-moderation-broken-let-us-count-ways> (explaining how Facebook's content moderation can occur without explanation); John Bergmayer, *Due Process for Content Moderation Doesn't Mean "Only Do Things I Agree With"*, PUB. KNOWLEDGE (June 29, 2020), <https://publicknowledge.org/due-process-for-content-moderation-doesnt-mean-only-do-things-i-agree-with/>.

89. See Lee, *supra* note 5, at 1091-92.

90. OVERSIGHT BD., *supra* note 87.

imposed without a way for the public—the community—to provide input into their creation or modification. A standard devised by employees and executives at corporations and imposed upon the public is not a community standard.

The democratic deficit also undermines the enforcement of the community standards. Except for Facebook’s Oversight Board, Internet platforms enforce their community standards behind closed doors—in a modern-day Star Chamber—without any published decisions, much less a way for the public to comment on a controversial enforcement decision that might have consequences beyond the particular dispute. Elsewhere, I have proposed that Internet platforms can incorporate a civil rights advocate and a public advocate to represent important interests in appeals of content moderation decisions.<sup>91</sup> Internet platforms’ current approach to content moderation resembles an autocracy or dictatorship, not a republic or democracy.

*b. Priority 2: Providing Greater Transparency and Reason-Giving*

Internet platforms should strive for greater transparency and reason-giving. They already provide transparency reports regarding content moderation and enforcement of their policies.<sup>92</sup> But these reports are not enough. They typically provide only general, aggregate numbers for the enforcement of their policies against users.<sup>93</sup> Some companies provide selective examples of moderated content, such as Google’s publication of examples of its decisions on user requests under the EU right to be forgotten.<sup>94</sup> For 2020, Google provided a selection of examples out of the thousands of decisions it made that year.<sup>95</sup> This approach should be

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91. See Lee, *supra* note 5, at 1045–48.

92. *Id.* at 998–1022.

93. See, e.g., *Hate Speech*, FACEBOOK, <https://transparency.fb.com/data/community-standards-enforcement/hate-speech/facebook/> (last visited Apr. 2, 2022).

94. *Requests to Delist Content Under European Privacy Law*, GOOGLE, <https://transparencyreport.google.com/eu-privacy/overview?hl=en> (last visited Apr. 2, 2022).

95. *Id.* (examples for all countries in 2020). Twitter also included examples of content moderation in its transparency report. See *Removal Requests*, TWITTER,

expanded beyond the right to be forgotten to copyright decisions under the DMCA safe harbors, YouTube's ContentID,<sup>96</sup> enforcement of community standards, and other decisions affecting users' online access and activities. Providing the public with an explanation of the reasons for an enforcement decision is a hallmark of due process<sup>97</sup>—“reason giving is meant to ensure that the hearing itself is not a charade.”<sup>98</sup>

Relatedly, Internet platforms should provide greater transparency regarding the procedures they use for enforcement of their policies. For example, in a prior article, I reviewed the content moderation procedures used by the major Internet platforms. Most provided only a sketchy outline

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<https://transparency.twitter.com/en/reports/removal-requests.html#2021-jan-jun> (report for Jan. to June 2021).

96. YouTube established an automated system to identify copyrighted content that copyright holders have submitted to YouTube for inclusion in its matching database. See Hassan Ali, *YouTube Content ID: What Is It and How Does it Work?*, WYZOWL, <https://www.wyzowl.com/youtube-content-id/> (last visited Apr. 2, 2022). If a user posts a video that contains content that matches the copyrighted materials in YouTube's database, the copyright holder will be notified by YouTube and given three options: (1) block the user's video, (2) monetized the user's video with ads, or (3) track the popularity of the user's video. See *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en#zippy=%2Cwhat-options-are-available-to-copyright-owners> (last visited Apr. 2, 2022). YouTube revealed that 98% of the copyright infringement claims is handled through Content ID and only 2% under notice-and-takedown of the DMCA. Copyright holders choose to monetize the users' videos in 90% of the disputes. See Ernesto Van der Sar, *YouTube's Takedown Numbers Are a Mystery, But Content-ID Is a 'Cash Cow'*, TORRENTFREAK (May 16, 2021), <https://torrentfreak.com/youtubes-takedown-numbers-are-a-mystery-but-content-id-is-a-cash-cow-210516/>.

97. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.” (internal citations omitted)).

98. Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 106 (2007).



of the procedures used.<sup>99</sup> Even worse is the lack of disclosure by Internet platforms in their use of algorithms and artificial intelligence in what content the platforms feed to users, as well as in the enforcement of their policies, such as for potential copyright infringement. For example, whistleblower Frances Haugen, a former Facebook employee, revealed many disturbing aspects of Facebook's policies. For example, she claimed that Facebook knowingly used an algorithm for its news feed that favored the most divisive posts because they were most likely to go viral and spark user engagement.<sup>100</sup> Facebook stuck with its algorithm even after its data scientists warned that "[o]ur approach has had unhealthy side effects on important slices of public content, such as politics and news."<sup>101</sup> Internet platforms should provide disclosure statements to the public explaining how they use algorithms/AI on their users' interactions with the platform and in enforcement of their policies. Internet platforms should also allow outside researchers access to the platforms' data (anonymized so as not to disclose personal information) to study the potential harmful effects the platforms have on, for example, adolescents. Congress is considering a bill that would give the Federal Trade Commission authority to require Internet platforms to "disclose, in real time, what information is spreading on them" and to allow outside researchers access to the company's data to conduct studies on the platforms' operation and effect on society.<sup>102</sup>

I have proposed a Nonpartisan Content Moderation (NCM) procedure that explains, step by step, how Internet platforms can provide both greater

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99. See Lee, *supra* note 5, at 995 ("More generally, the community standards typically do not provide much specific detail about the precise procedures, mechanics, guiding principles, or timetable that content moderators must follow.").

100. See Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, WALL ST. J. (Sept. 15, 2021, 9:26 AM), [https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215?mod=article\\_inline](https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215?mod=article_inline).

101. *Id.*

102. See Ben Smith, *A Former Facebook Executive Pushes to Open Social Media's 'Black Boxes'*, N.Y. TIMES (Jan. 2, 2022), <https://www.nytimes.com/2022/01/02/business/media/crowdtangle-facebook-brandon-silverman.html>.

due process and greater transparency in content moderation.<sup>103</sup> Alternative proposals can be considered. The main point is that Internet platforms' current approaches can be significantly improved to address the democratic deficit that undermines the legitimacy of their current content moderation.

*c. Priority 3: Recognizing a Principle of Separation of Powers*

Internet platforms should recognize a principle of separation of powers.<sup>104</sup> CEOs of Internet platforms, such as Facebook's CEO Mark Zuckerberg, should not be allowed to overrule the content moderation decisions of those employees trained in and entrusted with content moderation. "Otherwise, one person could undermine the checks and balances built into the multimember and multi-level review for content moderation. In a court or administrative tribunal, it would be highly irregular for one person to be able to veto or override a decision from the proceedings below."<sup>105</sup>

The three priorities outlined above provide a few examples of how recognizing Internet platforms as virtual governments can sharpen our understanding of how they should govern themselves and their users' online lives—and can lead to real reforms.

*B. How Virtual Governments Should Be Governed by National Governments*

Recognizing Internet platforms as virtual governments also exposes the risks involved in attempts by national governments to regulate—if not break up—Internet platforms. When one government attempts to dictate the decisions of another government, it raises immediate concerns. When national governments are involved, the principle of comity of nations counsels for the recognition of mutual respect and courtesy for each nation's laws.<sup>106</sup> When a national and a state government in the United States is involved, the Tenth Amendment recognizes certain limits on the

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103. Lee, *supra* note 5, at 1039–52.

104. *Id.* at 1053–54.

105. *Id.* at 1053.

106. *See generally* Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation ... shall be allowed to operate within the dominion of another nation, depends upon ... 'the comity of nations.'").

extent to which the national government, even with the Supremacy Clause, can interfere with the province of state governments or commandeer state officials to perform duties required by a federal statute.<sup>107</sup> As Chief Justice Roberts explained:

[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . The independent power of the States also serves as a check on the power of the Federal Government: By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.<sup>108</sup>

Of course, the Framers did not have Internet platforms in mind when they devised a system of governance based on federalism. But their purpose in diffusing power to protect individual liberty applies equally to protecting freedoms online. There is a real danger that the backlash against Internet platforms results in greater concentration of power over the Internet in the federal government—which would be a cure worse than the disease.<sup>109</sup>

If we take the concept of virtual governments seriously, then we should recognize an analogous approach to federalism that accords comity, mutual respect, and a certain level of deference to Internet platforms that operate as virtual governments. Indeed, in the past the U.S. government has often, though not always, take a deferential, free-market approach to the

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107. See generally *Printz v. United States*, 521 U.S. 898, 919 (1997) (“The Framers’ experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”); *New York v. United States*, 505 U.S. 144, 157 (1992) (“The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.”).

108. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (internal citations omitted) (internal quotations omitted).

109. Cf. Yaqiu Wang, *In China, the ‘Great Firewall’ Is Changing a Generation*, HUM. RTS. WATCH (Sept. 1, 2020, 11:57 AM), <https://www.hrw.org/news/2020/09/01/china-great-firewall-changing-generation>.

Internet.<sup>110</sup> In 2022, that sentiment appears to be lost. Congress seems poised to enact greater regulations on Internet platforms involving antitrust reforms and enhanced privacy protection, and greater restrictions on Internet platforms' content moderation imposed by amendments to, if not repeal of, Section 230 immunity.<sup>111</sup> Once seen as the darlings of Silicon Valley and American ingenuity, Facebook, Google, and other Internet platforms are reviled as Big Tech that must be regulated or even broken up.<sup>112</sup> The Biden Administration has already taken steps to rein in Big Tech.<sup>113</sup>

Some of these legal reforms may be warranted to address pervasive problems on Internet platforms, such as the lack of privacy protections in the U.S. It goes beyond the scope of this Article to evaluate the various bills and proposals to rein in Big Tech. Yet there is a danger that the fervor to regulate Big Tech obscures the consequences of U.S. government regulation of the Internet. If U.S. government regulation of the Internet becomes commonplace and not exceptional, then what is to distinguish U.S. regulations of the Internet from ones imposed by China, Russia, and other countries?

### III. RESPONDING TO OBJECTIONS

This Part responds to criticisms. No doubt many are likely to oppose the idea of Internet platforms being recognized as virtual governments.

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110. See, e.g., 47 U.S.C. § 230(b)(2) (recognizing policy "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation").

111. See Lauren Feiner, *2022 Will Be the 'Do or Die' Moment for Congress to Take Action Against Big Tech*, CNBC (Dec. 31, 2021, 9:59 AM), <https://www.cnbc.com/2021/12/31/2022-will-be-the-do-or-die-moment-for-congress-to-take-action-against-big-tech.html>.

112. See, e.g., Sheelah Kolhatkar, *What's Next for the Campaign to Break Up Big Tech*, NEW YORKER (July 6, 2021), <https://www.newyorker.com/business/currency/whats-next-for-the-campaign-to-break-up-big-tech>.

113. See Kevin Breuninger & Lauren Feiner, *Biden Signs Order to Crack Down on Big Tech, Boost Competition 'Across the Board,'* CNBC (July 9, 2021, 2:22 PM), <https://www.cnbc.com/2021/07/09/biden-to-sign-executive-order-aimed-at-cracking-down-on-big-tech-business-practices.html>; see also Sheelah Kolhatkar, *Lina Khan's Battle to Rein in Big Tech*, NEW YORKER (Nov. 29, 2021), <https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech>.

*A. Corporations Maximize Share Holder Profits*

A foundational belief of corporate law is the notion that corporations have a duty to maximize the profits, value, or wealth of shareholders.<sup>114</sup> Yet, as legal scholars recognize, the legal authority for this belief is “strangely scant.”<sup>115</sup> Although it is often described as widely accepted, the normative theory to justify this belief is contested.<sup>116</sup> For example, legal scholars who advance the theory of corporate social responsibility (CSR) have posed a major challenge to the traditional view of corporate shareholder maximization, especially today when concerns about climate change and the destruction of the planet are much greater.<sup>117</sup> But assuming this belief in shareholder primacy is correct, expending resources to improve virtual governance might appear contrary to that corporate objective: Why would Internet platforms spend more money and resources to shore up their content moderation procedures, safeguards, and staff—to make them operate better and more fairly—when the platforms could just do what they are doing now?

Perhaps not. I have the sense that we may be reaching a tipping point beyond which business as usual will no longer work. Either Congress will enact one of the bills to impose greater requirements on Internet platforms’ content moderation, or startups and other enterprises will succeed in building the decentralized Web3 that turns Internet platforms, such as Facebook, into the next MySpace.

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114. See Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951–55 (2018).

115. *Id.* at 1956.

116. *Id.* at 1963–67.

117. See Robert Sprague, *Beyond Shareholder Value: Normative Standards for Sustainable Corporate Governance*, 1 WM. & MARY BUS. L. REV. 47, 77 (2010); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 3 (1979) (“[T]he basic question of corporate social responsibility is not whether we wish to compel or forbid certain kinds of corporate conduct by legislative command, for example, but rather whether it is socially desirable for corporations organized for profit voluntarily to identify and pursue social ends where this pursuit conflicts with the presumptive shareholder desire to maximize profit. I will, simply as a convention, refer to any such corporate activity as a form of voluntarism or altruism.”).

There are already ominous signs. Twitter CEO Jack Dorsey abruptly quit so he could focus, not on the controversies of Twitter's content moderation, but on Bitcoin and decentralized finance, both facets of Web3.<sup>118</sup> Mark Zuckerberg changed Facebook's name to Meta, to shift the business to the emerging metaverse, a major part of Web3.<sup>119</sup> And, in a clever passing of the buck, he has openly lobbied Congress to enact laws to fix or resolve the controversies over content moderation.<sup>120</sup> In some respects, Dorsey's and Zuckerberg's moves are not surprising. The easiest way out of fixing the intractable problems with content moderation is quitting or moving on. An analogous situation is now occurring in the automobile industry, which long ignored climate change and sustainability issues, but now has shifted dramatically to electric vehicles (EVs).<sup>121</sup> Thus, even if maximizing shareholder wealth is the primary duty of corporations, reforming their content moderation policies and procedures is likely to serve that goal. Business as usual won't last.

### B. *Commandeering Corporations*

A related criticism is that my theory has commandeered corporations to take on new civic or societal responsibilities as so-called virtual governments. For-profit corporations should not be expected to do so. That's the responsibility of federal, state, and local governments. There's a big difference between the state and private actors. The concept of virtual governments crosses the line and should be categorically rejected.

This criticism is similar to the one above, but without the emphasis on maximizing shareholder profit. Instead, it relies on the distinction between

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118. See Benjamin Pimental, *Don't Think of It as Leaving Twitter. Jack Dorsey's Going All In on Crypto.*, PROTOCOL (Nov. 29, 2021), <https://www.protocol.com/fintech/jack-dorsey-bitcoin-crypto-twitter>.

119. See Salvador Rodriguez, *Facebook Changes Company Name to Meta*, CNBC (Oct. 29, 2021, 8:56 AM), <https://www.cnbc.com/2021/10/28/facebook-changes-company-name-to-meta.html>.

120. See Peter Kafka, *Facebook Wants Washington's Help Running Facebook*, VOX (Mar. 24, 2021, 6:25 PM), <https://www.vox.com/recode/2021/3/24/22349186/facebook-zuckerberg-testimony-section-230-reform-proposal>.

121. See Mike Colias et al., *Auto Makers Supercharge Move into Electric Vehicles*, WALL ST. J. (Jan. 5, 2022, 5:06 PM), <https://www.wsj.com/articles/auto-makers-supercharge-move-into-electric-vehicles-11641420382>.

the state and private actors. While that distinction does matter, the line is blurred in some contexts. Private entities are sometimes tasked with responsibilities for the public good. Essentially, the state outsources public responsibilities to private actors. Take, for example, healthcare and the treatment of people who are sick or dying. The United States has both non-for-profit and for-profit health care institutions, but we expect that all healthcare institutions have a responsibility for the care and welfare of their patients.<sup>122</sup> During the pandemic that responsibility was profound.<sup>123</sup> I believe Internet platforms who decide the online fate of millions of people every day occupy a similar position. Indeed, content moderation has developed into a profession for “trust and safety” online.<sup>124</sup> Whether professionals are engaged in trust and safety or in healthcare, the institutions at which they work must consider their larger, societal responsibility.

#### CONCLUSION

This Article is the first to elaborate the concept and theory of virtual governments. The Article makes the case for why Internet platforms should be understood as virtual governments. With that understanding, we are in a better position to identify how to improve content moderation: Internet platforms should compare their policies, procedures, and safeguards—or lack thereof—to the standards of due process, transparency, and accountability applied to national governments. These reforms will compensate for the democratic deficit that undermines the legitimacy of Internet platforms’ governance of their users. By the same token, recognizing Internet platforms as virtual governments militates in favor of

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122. See generally Dan W. Brock & Allen Buchanan, *Ethical Issues in For-Profit Health Care*, in FOR-PROFIT ENTERPRISE IN HEALTH CARE (Bradford H. Gray ed., 1986), <https://www.ncbi.nlm.nih.gov/books/NBK217902/>; Terry L. Corbett, *The Case for a Health Care Benefit Corporation*, 47 CAP. U. L. REV. 183, 240–41 (2019) (explaining how corporations in health care are different in services and role than ordinary businesses).

123. See generally Johan C. Bester, *Justice, Well-Being, and Civic Duty in the Age of a Pandemic: Why We All Need to Do Our Bit*, 17 J. BIOETHICAL INQUIRY 737 (2020), <https://link.springer.com/article/10.1007/s11673-020-10053-4>.

124. See Adelin Cai & Clara Tsao, *The Trust & Safety Professional Association: Advancing the Trust and Safety Profession Through a Shared Community of Practice*, TECHDIRT: TECH POL’Y GREENHOUSE (Aug. 28, 2020, 12:00 PM), <https://www.techdirt.com/articles/20200820/09120545153/trust-safety-professional-association-advancing-trust-safety-profession-through-shared-community-practice.shtml>.

national governments affording them comity and mutual respect. Efforts by national governments to break up virtual governments should be viewed with great scrutiny, just as would be applied if one national government tried to break up a government of a state or another country. Like federalism, a principle of virtual comity helps to protect individual liberties by dispersing powers among different actors—which operates as an important check on the federal government itself.