# Digital constitutionalism: Using the rule of law to evaluate the legitimacy of governance by platforms

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*Platforms govern users, and the way that platforms govern matters. In this paper, I propose that the legitimacy of governance of users by platforms should be evaluated against the values of the rule of law. In particular, I suggest that we should care deeply about the extent to which private governance is consensual; transparent; equally applied and relatively stable; fairly enforced; and respects substantive human rights. These are the core values of good governance, but are alien to the systems of contract law that currently underpin relationships between platforms and their users. Through an analysis of the contractual terms of service of 15 major social media platforms, I show how these values can be applied to evaluate governance, and how poorly platforms perform on these criteria.*

*The values of the rule of law provide a language to name and work through contested concerns about the relationship between platforms and their users. This is a necessary precondition to an increasingly urgent task. The law of contract does not address these governance concerns, and the concept of constitutional rights does not extend to governance by private actors. Finding a way to apply these values to articulate a set of desirable restraints on the exercise of power in the digital age is the key challenge and opportunity of the project of digital constitutionalism.*

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## PART I INTRODUCTION

In 2009, Facebook suffered a backlash for proposing to change its terms of service without adequately consulting its community. Mark Zuckerberg (2009) pledged that from then on, Facebook users would have direct input on the site's terms of service:

> Our terms aren't just a document that protect our rights; it's the governing document for how

> the service is used by everyone across the world. Given its importance, we need to make sure the terms reflect the principles and values of the people using the service.
>
> Since this will be the governing document that we'll all live by, Facebook users will have a lot of input in crafting these terms.

Facebook never really lived up to its promise of direct democratic participation. In May 2009, Facebook renamed its 'Terms of Use' to a 'Statement of Rights and Responsibilities' that included a mechanism for Facebook's users to vote on proposed changes to the terms of service. The vote would be binding on Facebook if more than 30% of its active userbase participated.[i] This turned out to be an unrealistically high threshold. By the end of 2012, Facebook had rolled back its commitment to binding votes, as well as introducing controversial changes to its privacy policy, in a process opposed by 88% of the 668,872 people who voted – a group that represented less than 1% of the more than one billion registered users at the time (Schrage 2012), much fewer than the 30% required. Some time after October 2014, an edit was made to Facebook's blog, and Zuckerberg's comments were disavowed, attributed instead to a former Facebook employee who left the firm in 2010.[ii]

This year marks twenty years since John Perry Barlow's famous *Declaration of the Independence of Cyberspace* (1996). The rousing text expresses an ambition that the internet provides the opportunities for diverse communities to set rules that reflect the shared values of their participants, and together develop new social contracts that protect the liberties of all participants. Barlow's hope is that the governance that will emerge from diverse online social spaces will be "more humane and fair" than that of territorial governments. The core theoretical claim here is that the infinite possibilities of a world where association is not limited by geography or physical resources should enable communities to enact rules that more closely align with their values than any system of representative democracy could achieve (Johnson & Post 1995).

Twenty years on, a great deal of work remains to be done to ensure that online governance is legitimate and fair. The liberating democratic potential of social media has not yet come (Sandvig 2015). Facebook's limited experiment with voting reflects a growing unease over the governance of our shared social spaces. In the time since then, concerns over governance have multiplied and intensified. Some of the most visible controversies revolve around privacy and the extent that users consent to the sharing of detailed data about their lives and activities with both advertisers and nation states. Others focus on the visibility of content, as platforms seek to rank and order information on the basis of individual relevance, on criteria that are generally not well explained, and that sometimes appear to be deeply biased. And in recent times, calls have markedly increased for platforms to be more accountable for the way that they moderate speech – both from groups seeking enhanced responsibility from platforms to tackle abuse, and groups seeking strong restrictions on the extent to which platforms censor speech. As software continues to 'eat the world' (Andreessen 2011), these issues extend beyond communications platforms to massive e-commerce marketplaces and the rapidly emerging peer economy platforms that use digital networks to coordinate the provision of goods and services across a broad range of social life. The role of digital platforms as 'architects of public spaces' (Gillespie 2017, p.25) raises concerns that they ought to be more accountable to the public for the ways in which they create and enforce the rules that govern our interactions.

In this Article, I argue that the governance of platforms raises fundamental constitutional concerns – in the sense of very real concerns over how these social spaces are constituted and how the exercise of power ought to be constrained. In Part II, I show how these are concerns are emerging in a disparate set of controversies across a range of different platforms involving diverse groups of stakeholders, including users, business, governments, and civil society. As these concerns continue to intensify, I argue that they are not able to be adequately conceptualized or articulated using the existing and familiar tools of contract law. In Part III, I propose a framework for evaluating the legitimacy of governance of platforms based on

the values of the rule of law. There are good claims that at least some of these values – transparency, predictability, procedural fairness, and consent – are universal values of good governance. While rule of law values have historically been limited to the public sphere, this liberal assumption systematically undervalues the important role that decentralized, private actors play in governing social life. In a networked environment that is almost fully owned by private actors, these tensions are visible now more than ever. By examining the contractual Terms of Service of 15 major platforms, I show how a rule of law framework provides the analytical tools and the language to conceptualize what is at stake in the governance of platforms. I argue that these constitutional values help to make explicit the core concern of online governance: that control over behavior is exercised in a way that is not accountable to the people who are affected.

The rule of law framework I propose is not prescriptive – there are legitimate reasons why we would not want decisions to be either accountable or predictable. It does, however, help us to understand the importance of real consent when these fundamental protections are given up. This reframing ultimately provides a useful lens through which to consider what limits should be imposed on the autonomy of platforms in order to increase the legitimacy of online governance. I conclude by arguing that the linked concepts of rights of users and responsibilities of platforms provide a useful way of making explicit concerns over the constitution of our shared online social spaces. The values of the rule of law provide the language that is needed to express these concerns and progress the project of 'digital constitutionalism' that seeks to articulate and realize appropriate standards of legitimacy for governance in the digital age.

## PART II THE GOVERNANCE OF PLATFORMS

The ways in which platforms are governed *matters*. Platforms mediate the way people communicate, and the decisions they make have a real impact on public culture and the social and political lives of their users (Gillespie 2015; DeNardis & Hackl 2015). Facebook's experiment with democratic ideals neatly illustrates the disconnect between the social values at stake and the hard legal realities. At law, Terms of Service are contractual documents that set up a simple consumer transaction: in exchange for access to the platform, users agree to be bound by the terms and conditions set out. In legal terms, it makes no sense to talk in terms of governance in these consumer transactions in any more than the broadest of senses. Zuckerberg's proclamation recognizes a truth the law does not: contractual terms of service do play an important role in governance. They are constitutional documents in that they form an integral component of the ways in which our shared social spaces are constituted and governed.

Generally speaking, the Terms of Service documents that structure the online social spaces we inhabit allocate a great deal of power to the operators. Particularly for large, corporate platforms, these terms of service are generally written in a way that is designed to safeguard the commercial interests of platform providers. In legal terms, the discretion of the platform owner is practically absolute. The legal relationship of providers to users is one of firm to consumer, not sovereign to citizen (Grimmelmann 2009). Platforms strenuously resist any suggestion that their networks are in any sense public spaces. This is important because no concept of legitimacy in governance or constitutional limits on the exercise of governance powers exists within the core of commercial contract law. The language of constitutional rights has almost no application in the 'private' sphere; constitutional law applies only to 'public' actions (Berman 2000). This means that the notion of any constitutional rights – freedom of speech and association, requirements of due process and natural justice, rights to participate in the democratic process – have almost no legal weight. These rights, where they exist, all apply only against the state, not private actors.

The result is that users have very little legal redress for complaints about how platforms are governed. Users are thought of as consumers who have voluntarily accepted the terms of participation in private networks. Having accepted and adopted these terms, users are legally bound by them. The legal answer to concerns users have about the governance of platforms is, largely: if you don't like it, leave.

Platforms also work hard to avoid any perception that they are in any sense responsible to third parties for what their users do on their networks. They do this primarily by limiting the extent to which they are seen to be governing their users. By presenting themselves as neutral intermediaries, mere carriers of content and facilitators of conversations, platforms seek to avoid the implication that they may be responsible for how their users behave or how their systems are designed and deployed (Gillespie 2010). At the same time, platforms have strong incentives to shape the way their users act and interact in order to satisfy the varied and often conflicting demands from and within different user communities, civil society groups, advertisers, businesses, and governments. This is a delicate balancing act: platforms at once express their neutrality and their absolute discretion, as businesses and owners of private property, to manage their affairs and control their networks.

Platforms, of course, are not neutral. Their architecture (Lessig 2006) and algorithms (Gillespie 2014) shape how people communicate and what information is presented to participants. Their policies and terms of use are expressed in formally neutral terms but the powers they provide are carefully wielded and selectively enforced (Humphreys 2007). Their ongoing governance processes are shaped by complex socio-economic (Dijck & Poell 2013) socio-technical (Crawford & Gillespie 2014) structures, and the interplay of emergent social norms (Taylor 2006). As systems that mediate between users, platforms can never be neutral in any real sense of the word – 'platforms intervene' (Gillespie 2015).

The contractual Terms of Service documents are one of the primary legal sites of conflict as platforms resist demands to change the way they govern their networks. These contracts must accordingly do double duty. For users, the subjects of regulation, they reserve to the platform complete discretion to control how the network works and how it is used. For those who would ask that platforms exercise their power to control behavior for other ends – including users themselves, copyright owners and other third parties with grievances, and governments who seek to surveil users or censor content – the Terms are structured to disclaim any liability or responsibility for how autonomous users act. This duality can only be achieved with the assistance of the rhetorical claim that platforms are inherently private spaces. It rests on the assertion of a fundamental distinction: platforms have the technical ability and the legal right to control how their systems are used, but do not bear the moral or legal responsibility for what users do. This distinction works on the basis that users are fully autonomous, rational actors in a liberal marketplace. They consent to the platform's control as the price of entry, but they retain personal responsibility for their actions.

This positioning of platforms is becoming increasingly tenuous in the face of increasing pressure on many different fronts. Across many different areas of law and in many different countries around the world, platforms are facing mounting pressure to exercise greater control over their users. Platforms are attractive targets for regulating internet content; they are often the 'least cost avoider' (Lichtman & Landes 2002): it is much easier for a major platform to remove content or police speech than it is to find and target the individual responsible for it. Often, the only effective and scalable way to regulate the actions of people on the internet is through online intermediaries (Goldsmith & Wu 2006). Faced with a pressing need to tackle bad behavior, this efficient ability to act can quickly shade into claims of a moral responsibility (Pappalardo 2014).

Copyright law has long been one of the major battlegrounds and provides a useful example. The immunity that platforms receive under the US *Digital Millennium Copyright Act* come with 'notice & takedown' obligations that require platforms to remove infringing content that their users post. Google alone now receives over 65 million takedown notices each month for its search engine results from copyright owners (Google Inc 2016). Under continuing pressure from copyright owners, Google and other giants have moved to do much more than they are strictly required to by law (Urban et al. 2016) and rightsholders are now seeking legislative changes that would require all intermediaries to do more to combat infringement (Rosati 2016; Suzor & Fitzgerald 2011; Giblin 2014).

The relative success of copyright takedown has prompted calls for platforms to do more in other areas.

Apart from copyright law, platforms have enjoyed almost absolute protection in the US from legal responsibility for the acts of their users for many years under Section 230 of the *Communications Decency Act*. There is a growing perception that s 230 will not survive as such a broad shield much longer. The protection it provides may no longer reflect the expectations society has of the role that platforms ought to play in helping to address harm on their networks (Grimmelmann 2015). Already, faced with plaintiffs who have clearly suffered harm but have no recourse against individual wrongdoers, US courts are increasingly finding reasons to limit or circumvent its protection (Goldman 2016). By characterizing the role of platforms as enabling, encouraging, or amplifying harmful content, courts have been able to find them legally responsible as active participants in the wrongful acts. Pressure is slowly but steadily mounting to reexamine s 230; from hate speech and abuse to revenge porn to defamation to extremist speech, platforms are increasingly being asked to do more to respond to harmful content on their networks (Citron 2014; Shepherd et al. 2015; Browne-Barbour 2015).

Outside of the US, these pressures have gone further. Platforms are sometimes able to avoid demands of foreign legal systems by structuring their businesses so that they can operate globally but retain the protections of US law, but not always. The European Court of Justice's 'Right to be Forgotten' determination is a key example among several where search engines have been obliged to remove links to content on privacy grounds (CJEU 2014; Bernal 2014). Global online intermediaries now find themselves in ongoing and repeated efforts to ward off attempts from courts, legislatures, and executive governments around the world to enlist them in policing internet content (Frosio n.d.).

The influence of governments around the world on internet governance has itself given rise to new conflicts and pressures on platforms. Governments are increasingly requiring online intermediaries to disclose information about their users and to block access to content they deem objectionable or unlawful (Commissioner for Human Rights 2014). In this context, governments have been able to avoid the constraints of constitutional law on surveillance and censorship by leaning on private platforms to do the work on their behalf – a technique known as an 'invisible handshake' (Birnhack & Elkin-Koren 2003). In response, civil society groups and telecommunications industry lobbies have started to strongly contest the role of platforms in public regulatory projects. Critically, as platforms are increasingly being coopted to play substantial roles on behalf of governments, the claim that they are wholly private spaces has become more difficult to sustain.

Particularly in the wake of the Snowden revelations (Greenwald 2014), there is a growing global unease about how the rights of individuals can be protected online. Sir Tim Berners-Lee, for example, has recently called for a 'Magna Carta for the Web' (Kiss 2014) to protect the rights of individuals, and the W3C's 'Web We Want' initiative has taken up the campaign. This initiative builds on others before it, like the Internet Rights and Principles Coalition's charter (IPRC 2014) and the Global Network Initiative's principles (2012). Many other declarations and campaigns from civil society groups have echoed these calls, which are fundamentally clustered along classic liberal priorities: decentralized power, formal equality (in the form of network neutrality), freedom of expression, and privacy rights. These initiatives are explicitly positioned in opposition to interference from state actors – demands from various governments to collect and disclose information on the activities of individuals, to remove or block access to prohibited information, and to engineer networks and technologies in ways that facilitate surveillance and law enforcement. The advocacy groups working in internet governance are able to clearly articulate principles that user interests (privacy, freedom of expression) should be protected from interference from governments and the operation of state copyright and other intermediary liability laws. These principles align directly with the commercial interests of the telecommunications industry, who are able to bring money and weight to bear in global politics of resistance to state interference. One of the primary public ways in which this is done is through 'transparency reports', where intermediaries increasingly publish details about government demands for information or censorship and content removal requests by third parties under copyright or privacy laws.

By contrast, the internal, 'self-governance' practices of intermediaries is where pressure for better

governance is most dispersed and least visible. As a rule, intermediaries are not promoting transparency about their own practices in policing content and enforcing their terms of service (MacKinnon et al. 2014). Unlike well-funded copyright owners and powerful state governments, the users who care deeply about how content is regulated are not as well-organized or influential on the policies of platforms. Lacking either armies or armies of lawyers and lobbyists, user interests are not well represented in governance debates. The problem is exacerbated by a fundamental conflict and uncertainty within civil society – and often within civil society organizations. There is no consensus about the extent to which users need protection from the governance decisions of platforms themselves. The lack of a language of rights and clearly articulated concepts of the responsibility of platforms makes it difficult to even discuss the legitimate concerns that both users and platforms have (Suzor 2010).

The need for a language of users' rights is becoming increasingly pressing. In diverse and very loosely organized ways, users continuously seeking to renegotiate the social contract that sets out their relationships to platforms. Social media platforms, like any social spaces, involve power relationships and political contests over power. These political struggles sometimes manifest as high profile controversies over how power is exercised – including, for example, questions of censorship, bias in algorithmic content selection and curation, and responses to abuse and harassment perpetrated through social media (Nahon 2016). In practice, the agency of users to contest rulesets is relatively limited, although organized and sustained actions by groups of users, coordinated by groups like *Women, Action, and the Media!* have sometimes been effective enough to pressure platform owners to change the Terms of Service (Matias et al. 2015). But without any consensus over whether users even have interests that can be expressed as 'rights' that apply against platforms in a way that overrides the contractual terms of service, these struggles only ever proceed slowly and in isolation.

This is the project of digital constitutionalism: to rethink how the exercise of power ought to be limited (made legitimate) in the digital age (Fitzgerald 2000). The task of identifying and developing social, technical, and legal approaches that can improve the legitimacy of online governance is an increasingly pressing issue (Brown & Marsden 2013; DeNardis 2014; Mansell 2012). The rationale for extending principles of good governance and human rights to private platforms lies in an increasing recognition of the important role that platforms play in mediating communication (Gillespie 2015). The rules of online social spaces and the ways they are enforced have real impact on the human rights of users (Kaye 2016; Council of Europe 2012). Recognition of this point has led to increasing calls for a new way of thinking about governance by platforms, and a more substantive understanding of constitutional rights in online governance (Crawford & Lumby 2013; Langlois 2013).

This work is beginning. Initiatives like the Ranking Digital Rights project 'Corporate Responsibility Index' (2015) seek to hold online intermediaries accountable for their commitments to protecting human rights. The United Nations Internet Governance Forum's Dynamic Coalition on Platform Responsibility (DCPR) draft *Recommendations on Terms of Service and Human Rights* (2015) is one example that seeks to articulate a set of minimum and optimal standards for Terms of Service. In the draft recommendations, the DCPR attempts to create an expectation that private platforms will not only resist illegitimate pressure imposed by different state and non-state actors to censor information or hand over information about users, but also to conduct themselves in a way that does not infringe human rights standards.

These initiatives represent a marked shift from traditional conceptions of human and constitutional rights, which typically apply only against nation states. They reflect an evolving global understanding of the role of businesses in protecting human rights, and an emerging recognition that businesses should do more to embed protections for human rights in their day-to-day operations (CSR Europe 2016). Under the UN's tri-partite 'responsibility' framework (Ruggie 2008), while States still have the primary duty for protecting human rights, businesses have a responsibility to respect rights and help to provide effective remedies against their violation. The DCPR's recommendations are rooted in the UN Guiding Principles on Business and Human Rights, which explicitly cast businesses as owing a responsibility to "avoid infringing on the human rights of others and should address adverse human rights impacts with which

they are involved" (United Nations 2011). Importantly, states also have an ongoing responsibility to ensure that domestic laws – like contract law – are designed to ensure that businesses respect human rights, but this principle has not yet been embedded in the way that domestic legal systems treat Terms of Service.

# PART III THE PRINCIPLES OF THE RULE OF LAW

Evaluating the legitimacy of private online governance requires a useful set of conceptual measures of good governance in private platforms. I propose that the constitutional values of the rule of law can provide a useful way to evaluate the legitimacy of online governance. This is not a straightforward exercise; law generally does not recognize that private actors owe any form of constitutional duties. This strong division between public and private becomes problematic once it is clear that regulation is not only, or even not primarily, done by the state (Black 2001; Burris et al. 2005; Grabosky 1994). The strong liberal distinction between public and private spheres has been heavily critiqued over the last two decades by regulatory scholars. But there is still a clear need to further explore how constitutional values and rights can be protected once the idea of governance is decentralized (Black 2008; Grabosky 2013; Morgan 2007).

Taking a definition of regulation that includes all 'organized efforts to manage the course of events in a social system' (Burris et al. 2008, p.3), it is clear that private actors often play a very significant role in regulating social behavior. A growing body of literature now seeks to reconceptualize the role of the state in a 'decentralized', (Black 2001) 'pluralized' (Parker 2008), or networked (Crawford 2006; Shearing & Wood 2003; Burris et al. 2005) regulatory environment. In the context of digital media platforms, widening the governance lens beyond governments requires "[accounting] for a diverse, contested environment of agents with differing levels of power and visibility: users, algorithms, platforms, industries and governments." (Crawford & Lumby 2013, p.9).

The rule of law provides one way to evaluate the legitimacy of governance in a normative sense (Huggins 2017). The core of the idea of the rule of law is that governments ought to wield their power in a way that is authorized and subject to the law (Raz 1977). The values of the rule of law are principles of good governance. The way that these principles have historically been applied has been state-centric. This paper seeks to apply these principles to the governance of digital media, paying particular attention to the role of platforms as writers of the rules of participation, designers of technology that enables communication and constrains action, developers of algorithms that sort, organize, highlight and suppress content, and employers of human moderators who enforce rules on acceptable content and behavior.

It is important to note at the outset that the obligation on platforms to respect human rights implicates both procedural and substantive concerns. The substantive issues are extremely complex. They involve difficult jurisdictional questions and serious issues of conflicts of rights and liberties (Svantesson 2014). These are crucially important issues about which we do not have consensus. A set of constitutional values for the good governance of platforms will not look like the substantive bills of rights that are familiar to territorial governance. There are no universal substantive rights that will hold for all platforms at all times. But neither is it the case that the legitimacy of governance is unknowably subjective. This is the liberal fallacy that must be avoided; the 'neutral' mechanisms of property or contract are illusory, and cannot be relied upon to reliably lead us to optimal governance regimes through the invisible hand of the market. There will be no easy answers here – no approach in this contested arena will be universally acceptable. This is a largely political project; it requires difficult negotiations about the types of communities and platforms we want to create and the legal and social norms that are appropriate to achieving those goals.

In this paper, I focus on the procedural issues – the baseline set of protections for due process that are almost universally accepted as a fundamental requirement of the rule of law. Within this contested arena, the legitimacy of governance can be thought of in terms of two distinct but interrelated groupings of

concerns. The first is the basic principle that the exercise of power is limited. This is a requirement that those enforcing the law are themselves bound by valid laws. Primarily, this is a fetter on the arbitrary exercise of power; as we will see, this is a sense in which contractual Terms of Service fail almost completely. The second set of concerns revolve around 'procedural' values (in the sense of 'due process' or 'natural justice'): that rules must be transparent, equally applied, relatively stable, and fairly enforced (Trebilcock & Daniels 2008). On this set of measures, too, the Terms of Service of platforms generally fare extremely poorly – the terms rarely reflect how governance operates in practice.

In order to contextualize and illustrate the analysis of the legitimacy of contractual governance documents, I examine the legal terms and conditions of fifteen of the largest English-language social media platforms. I selected the fifteen largest platforms by traffic,[iii] on the basis that the largest platforms are those that are likely to have the most significant impact on the civil and political rights of their users. Note that this sample is highly western- and US-centric; it omits most major non-English language social media platforms. For this initial stage, it was useful to constrain analysis to contracts generally governed by common law systems in general and US law in particular, but future work should extend this further. Each contractual document was analyzed to identify the extent to which they provided protections for due process interests of users. This analysis focused on five key issues: limitations on power; procedures for suspending and terminating accounts; transparency, including both clarity of the rules themselves and transparency in processes for enforcing the rules; mechanisms for changing the rules; and dispute resolution processes.

## A Governance limited by law

The primary requirement of legitimacy for legal systems is that power is not exercised arbitrarily (Dicey 1959, p.188). This is ultimately the basic value of the rule of law – that power is wielded in a way that is accountable, that those in positions of power abide by the rules, and that those rules should only be changed by appropriate procedures within appropriate limits. In this limited, procedural sense, there is good reason to believe that the rule of law is a universal human good – that all societies benefit from restraints on the arbitrary or malicious exercise of power (Tamanaha 2004, p.137; Thompson 1990, p.266).

This prohibition on the arbitrary exercise of power provides a very useful criterion through which to measure the legitimacy of the governance of platforms. One of the most concerning characteristics of private governance is that it is very seldom transparent, clear, or predictable, and providers often purport to have absolute discretion on the exercise of their power to eject under both contract and property law. Essentially, providers have control over the code that creates the platform, allowing them to exercise absolute power within the community itself. The exercise of this power is limited by the market and by emergent social norms, but it is barely limited by law. Take, for example, the Facebook Terms of Service, as they were before they were updated due to user protest in May 2009, which provided that Facebook

> may terminate your membership, delete your profile and any content or information that you have posted on the Site [...] and/or prohibit you from using or accessing the Service or the Site [...] for any reason, or no reason, at any time in its sole discretion, with or without notice[.]

Most of the Terms of Service in our sample use similar language that very clearly reserves to the platform the right to terminate user accounts at any time. Most also included an explicit extension that termination could be for any or no reason, at the service provider's sole discretion.

The only outlier was Facebook (Instagram, which was acquired by Facebook, uses almost identical Terms). Following Facebook's decision to replace its contractual terms with a more accessible 'Statement of Rights and Responsibilities', this language was significantly watered down to read:

> If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you.

Even though this clause was the most generous to users from our sample, it is still broad enough to provide the platform with almost complete control over the relationship. Facebook's Terms became more readable, but this change was primarily cosmetic.

The core value of the rule of law, as a prohibition on the arbitrary exercise of power, provides a simple and powerful framework through which to articulate why this clause is so concerning. These termination clauses are particularly concerning because they set the ultimate baseline for any disputes over governance. By explicitly allocating broad discretion to platforms to terminate access on any grounds, these terms seek to firmly keep the political processes of governance outside of any legal standards of review. These terms represent a clear claim by platforms that the rule of law does not apply to disputes over access to the platform. Where platforms can exercise control over access, by extension, they are able to make access conditional upon accepting any other written or unwritten rule. These clauses are the legal lynchpin of a governance strategy that participants must submit to the authority of the platform in order to gain access ('take it or leave it').

These legal clauses are not designed to be routinely used in any practical legal sense; rather, they are a line of ultimate defense, to which platforms turn specifically to exclude legal review of their governance. In this way, these clauses harness contract law to enforce a strict division of the public and private sphere. The software code and physical network infrastructure upon which platforms are built are, legally speaking, the private property of platform owners. Conceptually, this is predicated on both a conception of social media as a 'place', capable of being privately owned (Cohen 2007), and the exalted place that private property holds in our legal system. The protection of private property forms the basis of much of classical natural law and liberal theory; Blackstone's characterization of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Blackstone 1770, p.2) has had a lasting effect on the way that the law approaches questions of private governance. When this metaphor is transposed to networked space, it becomes even stronger – rights to exclude people from accessing digital servers can become absolute in ways that private property never could, and traditional public rights of access are largely forgotten (Carrier & Lastowka 2007). It is important to note that despite the rhetoric, nothing here is really 'private'; these property rights are granted by the state, and the contracts that deal with them are enforced with the full coercive power of the state (Mason & Gageler 1987).

The conventional legal view of private governance, then, is that the terms of the contract govern access to the platform, and it is only through these terms that users have any legal rights. The contract, in turn, generally assigns absolute or near-absolute discretion to the platform owner to unilaterally terminate any rights of access. The ultimate effect is that any dispute over the ways in which platforms are governed are, by definition, non-legal. In general terms, participants have no recourse to the procedures of the legal system and the coercive power of the state. Even the rhetoric of public rights is largely delegitimized by the rhetoric of private property and contractual terms. The structural features of the legal system firmly position ongoing debates about platform governance as an issue to be negotiated with the platform operators, rather than as a public political question.

This structural framing of relationships between users and platforms is deeply problematic. Individuals and groups of users face systemic inequalities in negotiating for the recognition of rights against large commercial providers: there is good evidence that individuals are unable to adequately value inchoate future rights, there is little competition between different rulesets, and users are constrained in their power to exit established networks (Centre for International Governance Innovation 2016). On utilitarian grounds, these contracts are simply unlikely to ever reflect an optimal bargain. Since these contracts are not effectively bargained for, it can hardly be said that the interests of users are well represented. The fine print of standard form contracts cannot be said to be assented to in any real sense (Llewellyn 1960; Radin 2005).

In all cases examined, the Terms of Service provided broad, unfettered discretion to platform owners.

This is a serious failing from the perspective of the rule of law. Like constitutional documents, Terms of Service grant powers; but unlike constitutions, they rarely limit those powers or regulate the ways they are exercised. Throughout recorded history, this basic conception of the rule of law has been seen as important to help ward off tyrannical governance (Tamanaha 2004, pp.138–9). This concern does not dissipate simply because the loci of governance tensions move online to private platforms. The ways in which platforms are governed has a fundamental impact on the social lives of users in ways that is not just private in nature – on any moderately thick view of rights, private governance necessarily implicates basic values of communication, education, access to knowledge, sociability and play (see e.g. Sen 1999; Nussbaum 2011).

This analysis suggests that at least for some platforms, we ought to be concerned about the arbitrary or malicious exercise of power by the providers and their delegates. All of the other interests that users might have in participating in online social spaces hinge, ultimately, on access. Clearly too platforms have a legitimate interest in being able to determine membership – much of the character of shared social spaces has to do with the participants who make up the community or who have access to the platform. Without making any claims about the substantive rules at stake, about who may join and continue to participate, we can at least suggest that a fundamental requirement of legitimate governance is that if a participant is denied access, that should be done according to the rules. The extensive powers that platforms reserve to themselves to unilaterally determine continued access are deeply problematic because they directly reject the fundamental proposition that governance power ought to be limited and not arbitrary.

## B Formal legality

Beyond the general prohibition on arbitrary punishment, the most commonly agreed principles of the rule of law are procedural protections. These are thought of as 'thin' conceptions of the rule of law, on the basis that they do not include the substantive rights of citizens. These procedural safeguards are assumed to be more universalizable than the messier task of agreeing on fundamental substantive rights. While these conceptions of the rule of law are not uncontroversial, they do provide a useful starting point – they are the lowest common denominator of almost all rule of law theory. “Above all else”, this conception of the rule of law “is about predictability.” (Tamanaha 2004, p.114) Broadly speaking, it can be categorized into a set of procedural safeguards: that rules are clear; there are rules governing change; they apply equally and predictably; and there are fair processes to appeal. While there are other values that may make up ‘thicker’ conceptions of the rule of law, these of ‘due process’ or ‘natural justice’ are generally accepted as “a necessary, albeit not sufficient condition for the realization of almost any defensible conception of the rule of law.” (Trebilcock & Daniels 2008, p.30)

Immediately, Terms of Service present a clear problem on clarity. Many of the documents I examined were written in a style that was not designed to be read or understood by users. A recent experimental study confirms what is generally assumed – users of social networking sites overwhelmingly do not read the Terms of Service (Obar & Oeldorf-Hirsch 2016). In recent times, some platforms have worked to simplify their Terms of Service. More than half of the documents examined used more accessible, ‘plain-English’ drafting – which is a major change in ToS documents over the last decade. Many of the documents, though, are still too long and too complex to be easily understood by a lay audience. A handful of platforms (Twitter, Pinterest, Tumblr, Tagged) use simple annotations in their terms. This too is a recent change – most of these annotations began to appear over the last two to three years.[iv] This is a very important move that should be applauded; the annotated versions are substantially easier to read than other contractual documents. Other platforms create more accessible versions of the important rules that users are expected to follow as ‘community guidelines’ or similar documents that are simpler to understand. While these set out the rules that users are expected to follow, they often have little legal weight. The Terms of Service documents themselves may refer to these guidelines, but they are never expressed to be exclusive. That is, platforms reserve the discretion to enforce different, as yet-unwritten

rules, should the need arise. For many platforms, the Terms of Service are made significantly more complicated by referring and incorporating other documents like these, including guidelines, privacy policies, advertising policies, and more.

Not only are Terms of Service often unclear, but they are all able to be changed by the unilateral decision of the platform. Approximately half of the platforms committed to some responsibility to inform users that their terms had changed, either through email or a notice posted on the site itself. Only Facebook commits to providing users with an opportunity to review and comment on changes before they come into force, but its commitment to a democratic voting mechanism has been removed. Remarkably, several of the platforms examined do not commit themselves to drawing changes to the attention of users, instead requiring users to bear responsibility for continuously checking the legal terms to see whether they may have changed.

Apart from changes in policy, the arbitrariness, or perceived arbitrariness, of the way that platforms make decisions is a key source of the anxiety around governance. Many of the ongoing disputes over Facebook's policies of acceptable conduct, for example, reflect a deep concern with the way the policies are interpreted. Mothers whose breastfeeding photos are removed wonder how exactly Facebook's complaints team enforce their rule against 'pornography' in a way that distinguishes, in Facebook's explanation, between mothers genuinely sharing their experiences and "pictures of naked women who happen to be holding a baby" (Facebook spokesman Barry Schnitt, quoted in Ingram 2011). Over years of complaints by mothers and advocacy groups, Facebook has clarified their position somewhat, noting that it will respond to complaints and remove "Photos that show a fully exposed breast where the child is not actively engaged in nursing" (Facebook n.d.). What exactly 'actively engaged' means remains contested (Ibrahim 2010).

Policies and rules are always imprecisely interpreted and applied. The very fact that they are expressed in language, which can only imperfectly describe practice, means that there will always be some degree of uncertainty (Hart 1961). The way that legal systems deal with this uncertainty is to develop procedural safeguards that ensure, as far as practicable, that decision makers are impartial, that the reasons upon which they make decisions are transparent, that the discretion they exercise is curtailed within defined bounds, and, if something goes wrong, that there are procedures to appeal the decision to an independent body. This is one of the basic tenets of procedural fairness or due process, a fundamental component of the rule of law (Fuller 1969).

Challenging the decisions platforms make is generally extremely difficult. Terms of Service rarely constrain the power of platforms to make decisions as they see fit. In addition to allowing platforms to terminate entire user accounts, all of the terms of service studied reserve power to the platform to remove any content that users post to the sites. Most Terms of Service express this in quite broad terms – that platforms can remove content at their 'sole discretion' or 'belief' that it violates their policies. Some platforms go even further, expressly reserving the right to remove 'any' content at any time; LinkedIn's terms, for example, state that "We are not obligated to publish any information or content on our Service and can remove it in our sole discretion, with or without notice."

For the subset of platforms that promise only to remove content that violates their Terms of Service, users have only a slim possibility of appealing decisions they disagree with. None of the Terms establish any formal internal dispute resolution mechanism, but users can seek to challenge enforcement of the Terms in court or through arbitration. Six of the Terms studied required users to submit to binding arbitration, although for three of those, the platform agreed to pay the costs. Arbitration can reduce the costs of hearing disputes, but arbitration proceedings tend to favor the large repeat players over individual consumers if they are not carefully designed to promote consumer rights (Wilson 2016). Almost all Terms required users to resolve disputes in the platform's home jurisdiction. This is particularly problematic, since it imposes a heavy cost on users to travel in order to bring a claim. A small number of Terms seek to prohibit users from bringing class actions to reduce the individual costs of bringing many similar claims.

Even if a claim is successfully brought, all platforms limit their potential liability for any wrongdoing. Because rules about limitations of liability differ in different jurisdictions, this is usually expressed as a complete limitation or, alternatively, limited to a monetary maximum of $100 or similar. The cumulative effect of all this drafting is that generally, users have no realistic chance of challenging decisions made by platforms in any formal legal process.

In purely formal terms, we can see how the Terms of Service of major platforms are almost universally designed to maximize their discretionary power and minimize their accountability. Through the lens of the rule of law, we can see how this is immediately problematic. At a general level, Terms of Service documents of platforms fall well short of accepted standards of good governance because they, almost universally, do nothing to restrain the platform's exercise of power. As constitutional documents, Terms of Service fail to provide meaningful safeguards against arbitrary or capricious decisions. In procedural terms, they generally do not provide the clarity that is required to guide behavior, they provide no protection from unilateral changes in rules, do nothing to ensure that decisions are made according to the rules, and present no meaningful avenues for appeal.

This formal critique is a useful starting point. The legal Terms of Service of platforms matter not because they are often enforced through legal mechanisms (they are not), but because they set a baseline for disputes over governance. They are a discursive reference point for the politics of negotiation as norms are continuously constructed and contested between groups of users and owners of platforms. Contractual Terms of Service also set the ultimate outer legal bounds of platform power; they set the limits of discretion in governance that can ultimately be enforced by territorial courts (Suzor 2010).

The preliminary implications of this analysis are that consumer contracts are poor ways to articulate the rights of users and the responsibilities of platforms. But the next step in evaluating the legitimacy of governance must be to examine how it plays out in practice. This work is hindered by the difficulty in obtaining good data about the decisions that platforms make. Content moderation and other governance processes are opaque (Pasquale 2015), and often seem to be largely ad hoc (Buni & Chemal 2016). While all platforms have 'guidelines' about acceptable content and behavior, these are not necessarily enforced in any consistent way – and there is no easy way for users to see whether rules are being consistently enforced. This lack of transparency feeds distrust of the content moderation process (Anderson et al. 2016). Users often are only able to glean some insight about how decisions are made by piecing together the anecdotal experiences of other users, or from the assumedly sanitized information provided by platforms themselves.

Sometimes, more details have emerged from other sources. In 2012, for example, *Gawker* were able to obtain two leaked versions of the manual of procedures that Facebook provided to its outsourced moderators at the time (Chen 2012). The manuals are an instructional grab bag of content Facebook deems to be acceptable and not acceptable. Some of the distinctions themselves reflect Facebook's particular stance on contested topics: photos of illegal drugs are prohibited, but marijuana is expressly permitted; female nipples are prohibited, but male nipples are not; obvious 'camel toes' are prohibited but crushed heads "are ok as long as no insides are showing" (oDesk 2012). The problem is more generalizable: there is a deep anxiety that the rules about what is permissible in digital social spaces represent the cumulative value judgments of an elite group of Silicon Valley insiders (Rosen 2013). The very real threat is that both the content of the rules and the procedures through which they are enforced support and perpetuate the oppression of marginalized groups (Barbrook & Cameron 1996).

A fuller analysis of the legitimacy of governance requires an examination of the bias, error, and prejudice in the enforcement of decisions in practice. In conventional articulations of the rule of law, this is usually articulated as a distrust of errors that inevitably flow from fallible human decisionmaking. In a digital context, however, we must also add a distrust of automated decisionmaking. Responsibility for enforcing rules, for constraining action, for selecting, hiding, and amplifying content in online networks is delegated, in whole or in part, to algorithmic systems that are often inscrutable to users. These systems

necessarily incorporate assumptions and biases about the social world and their inputs that will inevitably lead to problematic results. The task of evaluating the legitimacy of decisionmaking, then, will require new methods of holding platforms to account – both in terms of human processes, and in terms of the design and operation of the algorithms that are employed to govern users. The next stage of this process will likely require innovations in independent external auditing and experimentation (Sandvig et al. 2014; Perel & Elkin-Koren 2016) and enhanced transparency and accountability from platforms themselves in order to identify systemic errors and inequalities (Pasquale 2015).

# PART IV RULE OF LAW, NOT OF INDIVIDUALS

The values of the rule of law provide a useful reference point in analyzing how platforms govern. Most importantly, however, the values of the rule of law provide a way to talk and think about the growing but amorphous set of concerns about the appropriate normative limits of the power of platforms. The rule of law, as an ideal that is never reachable but is still worth pursuing, is a vision that "to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals – whether monarchs, judges, government officials, or fellow citizens. It is to be shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity, or whim" (Tamanaha 2004, p.122).

From this ideal, it becomes possible to articulate with some greater precision what is at stake when platforms govern our shared online social spaces. Constitutionalism is fundamentally about the limitation of governance power; 'digital constitutionalism' requires a very messy contestation of the appropriate ways in which the power of platforms ought to be limited. This is an inherently political task, and there can be no common agreement on the exact shape of either substantive or procedural limitations on the power of platforms. This is, in part, why the concept of rights is so difficult to apply to the governance of platforms. Unlike territorial states, that must fairly accommodate the interests of all their citizens, digital platforms can cater to the specific needs of smaller communities. The universalizing language of rights that apply in all situations threatens a vision of a diverse, flourishing online environment of almost infinite possibility (Johnson & Post 1995; Balkin 2004). While it is important to recognize the limits of this liberal utopian vision, there is a clearly valid concern that a thick universal conception of legitimacy in governance could come at too high a cost for autonomy.

Constitutionalism does not, however, depend upon a full overarching political framework (Huggins 2017). So-called 'thin constitutionalism' provides a way to focus on legitimacy in discrete contexts. It is possible, for example, to talk about how decisions are made and reviewed without having all of the structures of constitutional government (Klabbers 2004). The core principles of the rule of law provide the language that is needed to engage in the ongoing and deeply contested political discussion about how we imagine the future of our shared online social spaces. In this sense, the values of the rule of law are not prescriptive – we would not want to envisage a future where all platforms are held to the same standards of legitimacy as territorial states (Suzor 2012).

'Digital constitutionalism' means paying attention to a set of core governance concerns, without assuming the necessity of any of them. As an initial starting point, we can categorize the values of the rule of law into five sets of concerns:

- *Meaningful consent*: legitimacy, at its core, depends upon some consensus that the regulator has a right to govern in the way that it does (Black 2008). This is a claim that social rules represent some defensible vision of the common good (Allan 2001). With respect to territorial governments, consent is often manifested through democracy, but for digital platforms, full democracy is not required (or even desirable) in all cases (Doctorow 2007). What is required is consent, in a real, meaningful sense, not in the illusory sense that users sign up without reading the Terms of Service and are therefore assumed to have consented to their contents (Radin 2005; Lemley 2006). Consent, in a meaningful sense, requires the important rules to be clear, well-known, and not surprising. It requires some genuine consultation on changes, and real opportunities for users to

exit a platform without losing the labor they invested or the capacity to communicate with their social contacts.

- *Transparency*: legitimacy requires some degree of accountability for the exercise of power. Legitimacy can be thought of as partly constructed through the discursive process of accountability; a regulator gains legitimacy by rendering account to stakeholders who are able to hold it to some standard (Black 2008). Transparency at an aggregate level is a pre-requisite for the political conversation about the responsibilities that platforms have to govern their networks in particular ways (Gillespie 2017). As a starting point, we should seriously consider what responsibilities platforms ought to have to provide useful summaries and particular details about actions they take to enforce their rules (Kaye 2016).
- *Equality and predictability*: the basic procedural requirement of the rule of law is that rules are applied uniformly and not arbitrarily (Dicey 1959). At a minimum, this means that users should be aware of the reasons upon which decisions that affect them are made (Kingsbury et al. 2005). It also implies that rules should be fairly and equally enforced, and should be stable enough to guide behavior. This is often the aspect of legitimacy that is most at play in contests over how platforms govern their networks. As platforms grow to a massive size, there are frequent conflicts over the conception and practice of neutrality. Many of the major controversies over governance of recent years are rooted in disagreements over perceptions that a platform is biased or discriminating against some group of users or promoting some opinions over others, particularly but not exclusively on the basis of race, gender, sexuality, and political speech.
- *Due process*: the final procedural component of the rule of law is that there is some mechanism to resolve disputes. In part this requires that before a regulatory decision is made, it is made according to valid criteria and processes. Once a decision has been made, due process then requires that users who are adversely affected have some avenue of appeal and independent review.
- *Substantive human rights*: The final, and perhaps most contested category, is a broad category that encompasses what are thought of as basic human rights. There is an increasing recognition that private digital platforms, have some role to play in promoting and protecting the human rights of the people who use and are impacted by them. There is not yet, however, much consensus about how much responsibility platforms have, or what shape that responsibility should take. In other 'thin' conceptions of the rule of law, substantive rights are left out because of the inherent difficulty in agreeing on their content. But like the other values above, it suffices to say that basic human rights are definitely implicated in governance by platforms, and it will continue to be important to be able to articulate how the actions of private regulators can have a very significant impact on the ability of individual users to exercise their rights and be free from interference.

These values are not the only values upon which to judge the governance of platforms, nor do they all necessarily apply to all cases. But they do provide a language to name and work through the loose set of often inchoate concerns about the relationship between platforms and their users. This is a necessary precondition to an increasingly urgent task. Platforms play a vital role in governing important parts of the daily lives of billions of individuals. The legal mechanisms that we have for protecting civil and political rights do not translate well to governance by platforms. The law of contract, which currently regulates these relationships, does not address these governance concerns. In this gap, we have an opportunity to develop a normative understanding of the responsibilities of platforms. This is an opportunity to set out the constitutional principles that we collectively believe ought to underpin our shared social spaces in the digital age. This work is necessarily contested, inherently political, and complicated by different contextual and cultural considerations. But it can only be progressed with a clearer understanding of the values that are at stake. The values of the rule of law – values of good governance – provide a way to conceptualize governance by platforms in constitutional terms. This is the key challenge and opportunity

of digital constitutionalism.

i http://web.archive.org/web/20090624001153/http://www.facebook.com/terms.php
ii See http://web.archive.org/web/20150313235245/https://www.facebook.com/notes/facebook/update-on-terms/54746167130; http://en.wikipedia.org/wiki/Kathy_Chan.
iii As measured by http://www.ebizmba.com/articles/social-networking-websites. This ranking averages Alexa Global Traffic Rank, and U.S. Traffic Rank from both Compete and Quantcast. The sites selected were: Facebook, Twitter, Linkedin, Pinterest, Google+, Instagram, Tumblr, VK, Flickr, Vine, Meetup, Tagged, MeetMe, ClassMates, and Ask.fm.
iv Note that LinkedIn's terms were changed to use much simpler language, including annotations, after the date that terms were collected for this study.

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