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Global Digital Governance Through the Back Door of Corporate Regulation

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Global Digital Governance Through the Back Door of Corporate Regulation

Orit Fischman-Afori*

Today, societal life is increasingly conducted in the digital sphere, in which two core attributes are prominent: this sphere is entirely controlled by enormous technology companies, and these companies are increasingly deploying artificial intelligence (AI) technologies. This reality generates a severe threat to democratic principles and human rights. Therefore, regulating the conduct of the companies ruling the digital sphere is an urgent agenda item worldwide. Policymakers and legislatures around the world are taking their first steps in establishing a digital governance regime, with leading proposals in the EU. Although it is understood that it is necessary to adopt a comprehensive framework for imposing accountability standards on technology companies and on the operation of AI technologies, both traditional perceptions regarding the limits of intervention in the private sector and contemporary perceptions regarding the limits of antitrust tools hinder such legal moves.

Given the obstacles inherent in the use of existing legal means for introducing a digital governance regime, this Article proposes a new path for corporate governance regulations. The proposal, part of a "second wave" of regulatory models for the digital sphere, is based on the understanding that the current complex technological reality requires sophisticated and pragmatic legal measures for establishing an effective framework for digital governance norms. Corporate governance is a system of rules and practices by which companies are guided and controlled. Because the digital sphere is

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governed by private corporations, it seems reasonable to introduce the desired digital governance principles through a framework that regulates corporations. The bedrock of corporate governance is promoting principles of corporate accountability, which are translated into a wide array of obligations. In the last two decades, corporate accountability has evolved into a new domain of corporate social responsibility (CSR), promoting environmental, social, and governance (ESG) goals not aimed at maximizing profits in the short term. The various benefits of the complex corporate governance mechanisms may be used to promote the desired digital governance regime that would be applied by the technology companies. A key advantage of the corporate governance mechanism is its potential to serve as a vehicle to promulgate norms in the era of multinational corporations. Because the digital sphere is governed by a few giant companies from the United States, corporate governance may be leveraged to promote digital governance principles with a global reach in a uniform manner.

The proposed path for introducing global digital governance principles through the back door of U.S. corporate regulation has not been raised and discussed yet in the literature or by policymakers. This Article aims to explore this promising model for regulating the digital sphere in a globalized manner and provide a theoretical basis for it.

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INTRODUCTION

In the last few years, the global public discourse has increasingly focused on the immense size and power of technology companies, especially the "Big Five": Google (Alphabet), Apple, Facebook (Meta), Amazon, and Microsoft.[1] Increasingly, our civil life takes place in the digital sphere of the online platforms run by these giant companies. Today, the digital sphere is the "place" where people meet, converse, exchange ideas and information, experience social and cultural activities, study, work, shop, and more. The COVID-19 pandemic has intensified the central role of the digital sphere in civic life,[2] deepening the dependence of society on the giant companies

[1] *See, e.g.*, *Big Tech*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/big-tech [https://perma.cc/7569-BAXD]; Nicolas Lekkas, *GAFAM: The Big Five Tech Companies Facts (FAAMG)*, GROWTH ROCKS (May 19, 2022), https://growthrocks.com/blog/big-five-tech-companies-acquisitions [https://perma.cc/9S48-VRNY].

[2] *See OECD Policy Responses to Coronavirus (COVID-19)*, OECD [hereinafter *OECD Policy Responses*], https://www.oecd.org/coronavirus/en/policy-responses [https://perma.cc/4NWR-QZEU]; *The Role of Online Platforms in Weathering the COVID-19 Shock*, OECD (Jan. 8, 2021), https://www.oecd.org/coronavirus/policy-responses/the-role-of-online-platforms-in-weathering-the-covid-19-shock-2a3b8434 [https://perma.cc/883Z-3T5W] ("[E]vidence is emerging on how the COVID-19 crisis triggered large changes in the use of digital technologies by people, businesses and governments.").

that rule the digital sphere. These companies are not the only rulers of the digital sphere; the entire infrastructure, including the physical one, is controlled by a range of private corporations.[3] The backbone of civil society, enabling basic human activities, is entirely held by private companies. However, private corporations seek to maximize profits, and are not designed to provide guarantees for democratic values or human rights; this is traditionally seen as the role of the public sector. Therefore, giant technology companies' control over the digital sphere generates one of the most discussed contemporary threats to liberal and democratic values, including human rights.[4]

The dominance of private companies in the digital sphere, especially of those running the online platforms, has generated another phenomenon in recent years: the proliferation of algorithms that operate the various systems. The technologies used by the business sector are continually evolving, and in the last few years use of the family of technologies referred to as artificial intelligence (AI) has become pervasive.[5] The business sector uses AI for a range of tasks, from offering services replacing the human workforce, to the operation of systems aimed at monitoring online users' activities on the platforms.[6] Automated content moderation is a prominent example,

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[3] Dennis Weller & Bill Woodcock, *Internet Traffic Exchange: Market Developments and Policy Challenges* 1, 25–26 (OECD Digital Economy Papers, No. 207, 2013), http://dx.doi.org/10.1787/5k918gpt130q-en [https://perma.cc/BLV3-TZMY].

[4] *See, e.g.*, Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2044 (2018); *see also* Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 393 (2018); Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 482 (2020); Evelyn Douek, *Governing Online Speech: From "Posts-As-Trumps" To Proportionality & Probability*, 121 COLUM. L. REV. 759, 759 (2021); Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 956 (2021).

[5] *See, e.g.*, NAT'L SCI. & TECH. COUNCIL, EXEC. OFF. OF THE PRESIDENT, PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE 1, 5–6 (2016), https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai. [https://perma.cc/NRN5-EHWV]; HOUSE OF LORDS SELECT COMM. ON ARTIFICIAL INTELLIGENCE, AI IN THE UK: READY, WILLING AND ABLE?, 2017–19, HL 100, 5, 5 (UK), publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf [https://perma.cc/T7XC-JAUT].

[6] *See* Iris Chiu & Ernest Lim, *Technology vs Ideology: How Far Will Artificial Intelligence and Distributed Ledger Technology Transform Corporate Governance and Business?*, 18 BERKELEY BUS. L.J. 1, 4 (2021)*; see generally*, Frank Pasquale, *Humans Judged by Machines: The Rise of Artificial Intelligence in Finance*, *Insurance, and Real Estate*, in ROBOTICS, AI, AND HUMANITY: SCIENCE, ETHICS, AND POLICY (J. von Braun et al. eds., 2021), https://ssrn.com/abstract=3793965_[https://perma.cc/T8US-QPZL].

which includes practices aimed at taking down or blocking unwarranted content or speech.[7] Content moderation practices can address harmful content, such as incitement to violence or the spread of "fake news," or may handle content that violates personal rights, such as privacy, or economic rights, such as copyright.[8] AI systems carry out these operations, further amplifying concerns related to the control private corporations exercise over the digital sphere thought the use of their algorithms. An automated system can produce false positive outcomes, such as those cases in which the system is designed to take down any potentially harmful material. This approach is inconsistent with using freedom of speech as a default guiding norm; instead the default principle of such systems is the prohibition of speech, not its freedom.[9] For instance, evidence of over-blocking of digital speech was revealed in the first YouTube transparency report, published in December 2021. This report identified that 60% of the automated takedown notices issued in the first half of 2021

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[7] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1602 (2017); *see also* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1047 (2018); *see also* Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 26, 42 (2019); *see also* Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 528, 528–29 (2022).

[8] Authenticity and privacy protection are amongst the main values announced by Facebook as underlying its content moderation policy. *See* Monika Bickert, *Updating the Values that Inform Our Community Standards*, META: NEWSROOM (Sept. 12, 2019), https://about.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards/ [https://perma.cc/MZ4C-AELN]. Content moderation involving cases of the encouragement of violence stood at the heart of a massive public debate in May and June of 2020, when Twitter labeled former President Trump's online messages as potentially false or as glorifying violence, leading to Trump's suspension from the platform for roughly two years. *See Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [https://perma.cc/ADH3-RLL2]. For the deep fake technologies and the challenges to free speech and democracy, *see also* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1754 (2019); *see also* Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. L. & TECH. 387, 419 (2020).

[9] *See* Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51, 53 (2017).

that were disputed by users were resolved in favor of the user.[10] Had these users not filed a dispute, the content would have been wrongly silenced.[11] Automated content moderation practices therefore amplify the chilling effect on digital speech. These practices are just one example of the larger issue facing society: the threat to democratic values and basic human rights comes in part from automated, computer-controlled devices operated by the business sector.[12]

These two core attributes of the digital sphere—being controlled by private corporations and operated by means of AI technologies—together with their negative consequences for democracy and human rights are challenging civil society organizations, academics, and policymakers at both national and international levels.[13] All are seeking a framework that would facilitate technological development for the sake of economic growth and the public good, but at the same time, would regulate conduct that is inconsistent with promotion of human rights or endangers democracy.

These initiatives seek to establish a digital governance regime by imposing accountability standards on the private business sector—and more specifically, on those technology companies who operate online platforms or deploy AI technologies. Even the latest calls for a "second wave" of regulatory models, based on a thorough understanding of the way the digital sphere operates, are still based on various forms of accountability.[14] Accountability is a notion derived from public law, denoting an obligation to meet basic

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10 *See Copyright Transparency Report*, YOUTUBE 1, 6 (July 2021), https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2021-1-1_2021-6-30_en_v1.pdf [https://perma.cc/JR7X-TAGV].

11 Paul Keller, *YouTube Transparency Report: Over Blocking is Real,* KLUWER COPYRIGHT BLOG, (Dec. 9, 2021), http://copyrightblog.kluweriplaw.com/2021/12/09/youtube-copyright-transparency-report-overblocking-is-real/ [https://perma.cc/7PWR-MPQK].

12 Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1162 (2018).

13 *See infra* Part II.A.

14 *See e.g.*, Douek, *supra* note 7. Building off of Evelyn Douek's argument that a better understanding of the way online content moderation operates, genuine accountability measures should be imposed in a different way from those familiar in traditional administrative law.

procedural standards to protect human rights.[15] Such standards include transparency regarding the decision-making process, providing reasons for decisions made, and establishing a framework for objective oversight.[16] Yet, the imposition of accountability standards on private companies faces a significant obstacle stemming from the divide between private law and public law.[17] In the United States, the dividing line is particularly rigid: the private sector is not bound to public sector obligations.[18] The EU tradition incorporates more public law norms and duties into the realm of private law, but through a gradually evolving process. Two recent EU legislative initiatives, the Digital Services Act (DSA)[19] and the AI Act,[20] do not seek to impose full-fledged public-law standards on the relevant companies, and do not confer rights to individuals with vis-à-vis corporations.[21] Although these initiatives amount to a significant move toward the establishment of a new digital governance regime, they were criticized for failing to provide adequate guarantees of human rights in the digital sphere.[22]

Another strategy for addressing the emerging new reality of the digital sphere involves the resurrection of antitrust law. In the United States, there has been a shift in antitrust law and its

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15 *See generally* Mark Bovens, *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 182, 184 (M. Bovens et al. eds., 2014).

16 Administrative Procedure Act 5 U.S.C. §§ 551–559 (1946).

17 Orit Fischman-Afori, *Online Rulers as Hybrid Bodies: The Case of Infringing Content Monitoring*, 23 U. PA. J. CONST. L. 121, 143–44 (2021).

18 For the United States' "state action doctrine," *see infra* Part II.A.

19 *See The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, EUROPEAN COMMISSION [hereinafter *DSA*], https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en [https://perma.cc/KF5C-9BT6].

20 *Proposal For a Regulation of The European Parliament and of The Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts,* COM (2021) 206 final (Apr. 21, 2021) [hereinafter AI Act], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 [https://perma.cc/FN6C-FKDE].

21 *See* Nathalie Smuha et al., *How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission's Proposal for an Artificial Intelligence Act*, 1, 48–54 (Aug. 5, 2021), https://ssrn.com/abstract=3899991 [https://perma.cc/9DVA-X8X5]; *see generally* Orit Fischman-Afori, *Taking Global Administrative Law One Step Ahead: Online Giants and the Digital Democratic Sphere*, 20 INT'L J. CONST. L., 1006 (2022), https://ssrn.com/abstract=3874915 [https://perma.cc/ZA7Z-4SQU].

22 *See infra* Part II.A.

underlying policies over the years.[23] Current governing policy is described as consumer welfare-centric, focusing on prices and harm to competition in relevant markets.[24] Antitrust law is not aimed at easing harm to democracy, human rights, or free speech. Under current perceptions that focus on outright anticompetitive conduct, the mere existence of giant companies does not justify intervention by antitrust law.[25] In today's reality, where a few technology companies have grown to unprecedented size, there has been a growing call to return to past antitrust objectives aimed at breaking up large monopolies posing a threat to democracy.[26] The House Judiciary Committee has investigated the matter.[27] The Federal Trade Committee (FTC) recently took action against some of these companies, such as Facebook and Google,[28] and additional claims were filed alleging

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[23] *See* George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 1–4 (1985); *see also* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 962 (2018); *see also* Tim Wu, *Antitrust & Corruption: Overruling Noerr* (Colum. Pub. Health L., Working Paper No. 14-663), https://ssrn.com/abstract=3630610 [https://perma.cc/7FJ8-LMDR].

[24] *See infra* part II.B; *see also* Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2149 (2020); *see also* Robert H. Lande, *High Tech Monopolies: Cutting the Gordian Knot With No-Fault*, 168 U. PA. L. REV. 253, 257 (2021).

[25] ORG. FOR ECON. CO-OP. & DEV., AN INTRODUCTION TO ONLINE PLATFORMS AND THEIR ROLE IN THE DIGITAL TRANSFORMATION 37 (2019) [hereinafter OECD INTRO.], https://doi.org/10.1787/53e5f593-en [https://perma.cc/W43N-G9NM].

[26] Tim Wu makes a compelling argument that Big Tech should be broken up to prevent the negative effects on democracy that result from the sheer size of these technology companies. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 26 (2018); *see also* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 800 (2017); *see also* JOHNATHAN B. BAKER ET AL., JOINT RESPONSE TO THE HOUSE JUDICIARY COMMITTEE ON THE STATE OF ANTITRUST LAW AND IMPLICATIONS FOR PROTECTING COMPETITION IN DIGITAL MARKETS 4 (Apr. 30, 2020); *see also* OECD INTRO., *supra* note 25.

[27] *See* STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL, & ADMIN. L. OF THE JUDICIARY, 117 CONG., INVESTIGATION OF COMPETITION IN THE DIGITAL MARKETS (2d Sess. 2020) [hereinafter DIG. MARKETS INVESTIGATION], https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf [https://perma.cc/AK9G-9GF5].

[28] *See infra* Part II.B; *see, e.g.*, Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv03590-JEB, (D.D.C. Dec. 9, 2020), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf [https://perma.cc/ALE5-VCGN]; Amended Complaint, FTC v. Facebook, Inc., No. 1:20-cv03590-JEB,

anti-competitive behavior.[29] EU authorities approached competition law in a similar manner, taking action against anti-competitive conduct of large technology companies.[30] So far, authorities in both the United States and the EU have been hesitant to stray from the traditional approach to anti-competitive claims.[31]

Given the obstacles to introducing a governance regime into the digital sphere via existing legal means, this article proposes a new path of *corporate governance*, which is a complex system of rules and practices by which companies are guided and controlled.[32] It is a broad concept, accepted worldwide, aimed at ensuring that companies are appropriately managed to accomplish their objectives.[33] Because the digital sphere is controlled by private corporations, which would continue to run the digital environment regardless of their size, it seems reasonable to introduce the desired digital governance norms by means of a framework that regulates corporations. This proposal, belonging to the "second wave" of regulatory models for the digital sphere, is based on the understanding that the current complex technological reality requires sophisticated and pragmatic legal measures for establishing an effective digital governance regime. A corporate governance mechanism may yield better results in promoting adherence to higher standards of accountability, with the potential for global reach and unified application due to the multinational character of the technology companies. Therefore, this Article proposes a policy that will encourage and eventually require those corporations running the digital sphere to establish a digital

(D.D.C. Aug. 19, 2021), https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.75.1.pdf [https://perma.cc/4868-CN3D].

29 *See infra* part III.B; s*ee, e.g.*, Complaint, United States v. Google LLC, No.1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download [https://perma.cc/X 9YR-ZVLN].

30 *See infra* Part II.B; *see, e.g.*, Case T-612/17 Google LLC & Alphabet, Inc. v. Comm'n (Google Shopping), ECLI:EU:T:2021:763 (Nov. 10, 2021).

31 Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L. J. 1952, 2003 (2021).

32 *See* ORG. FOR ECON. CO-OP. & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE (2004) [hereinafter OECD PRINCIPLES], https://www.oecd.org/corporate/ca/corporategovernance principles/31557724.pdf [https://perma.cc/HZ3C-4MPC].

33 *See* 1–2 Principles of Corporate Governance: Analysis and Recommendations*, The Objective and Conduct of the Corporation*, § 2.01 (Am. L. Inst. 2023).

governance regime through the corporate governance framework. This path will promote a coherent and widespread normative agenda through local regulatory means. In other words, a global digital governance regime may be established through the back door of local United States corporate regulation.

The global digital governance proposed here will be based on some of the merits of corporate governance,[34] which has undergone significant transformations worldwide in the last two decades, especially with regard to publicly listed companies. These developments reflect changes in the understanding of companies' goals in modern societies, and how they should operate.[35] Today, the bedrock of corporate governance is promoting the principles of corporate accountability, which enhance the stakeholders' confidence, both in the specific company and in the markets generally.[36] One of the most debated questions is: who are the relevant stakeholders? One increasingly popular position is that the stakeholders are many and varied, including not only shareholders but also creditors, suppliers, employees, customers, and the community at large.[37] Corporate governance designs a managerial structure that makes it possible to weigh the multiple stakeholders' often conflicting interests, based on tools implementing "checks and balances."[38] The notion of corporate accountability is translated into a wide array of obligations, including transparency and disclosure, conferring entitlements to their beneficiaries.[39] In the last two decades, corporate

34 *See infra* Part III.A.

35 STIJN CLAESSENS & BURCIN YURTOGLU, CORPORATE GOVERNANCE AND DEVELOPMENT—AN UPDATE 30 (2012).

36 OECD PRINCIPLES, *supra* note 32, at 11.

37 *See, e.g.*, Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RSRV. L. REV. 863, 884 (2019); *see also* Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction: A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita* 1 (Eur. Corp. Gov. Inst., Law Working Paper, No. 522/2020, 2020), https://ecgi.global/sites/default/files/working_papers/documents/mayerfinal.pdf [https://perma.cc/8S9K-6MUF].

38 OECD PRINCIPLES, *supra* note 32, at 12.

39 ORG. FOR ECON. CO-OP. & DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 37 (2015) [hereinafter G20/OECD Principles], https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en [https://perma.cc/X7H7-L7BR].

accountability has evolved into a new domain of corporate social responsibility (CSR), promoting values that are not aimed at maximizing profits in the short term. Such values may include environmental, social and governance (ESG) purposes.[40] Moreover, under CSR policy, companies may also promote the protection of human rights.[41] In response to the expanding public debate on the function of corporations, the United States has heard louder calls for considering broader social interests.[42] Critics argue that corporations

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40 *See e.g.*, Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 375–79 (2017); *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 384–85 (2020); *see also* Thomas L. Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR And ESG Disclosure*, 23 U. PA. J. BUS. L. 740, 741–47 (2021).

41 *See, e.g.*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (Apr. 2011) [hereinafter UN PRINCIPLES], https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/98JW-UHQN]; ORG. FOR ECON. CO-OP. & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011) [hereinafter OECD MULTINATIONAL]; *see also* ORG. FOR ECON. CO-OP. & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES—RESPONSIBLE BUSINESS CONDUCT (2022) [hereinafter OECD RBC GUIDELINES], http://mneguidelines.oecd.org/ [https://perma.cc/89YH-98N4]; *What is CSR?*, U.N. INDUS. DEV. ORG., https://www.unido.org/our-focus/advancing-economic-competitiveness/competitive-trade-capacities-and-corporate-responsibility/corporate-social-responsibility-market-integration/what-csr [https://perma.cc/T68W-55GR] (describing the growing field of CSR and stressing its key issues: environmental management, eco-efficiency, responsible sourcing, stakeholder engagement, labor standards and working conditions, employee and community relations, social equity, gender balance, human rights, good governance, and anti-corruption measures).

42 In 2019, the leaders of leading American companies stressed the CSR and ESG agenda in the Business Roundtable. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans',* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/36RW-Z3EG]. In 2020, BlackRock, which is regarded as one of the main institutional investors in the United States, adopted an ESG agenda for its investments. *See Building More Resilient Portfolios*, BLACKROCK, https://www.blackrock.com/ch/individual/en/themes/sustainable-investing/esg-integration [https://perma.cc/HDZ6-RTZ3]. Larry Fink, founder, chairman and CEO of BlackRock, called for the enhancement of ESG goals, including transparency. S*ee* Larry Fink, *Letter to CEOs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 19, 2022), https://corpgov.law.harvard.edu/2022/01/19/letter-to-ceos-2/ [https://perma.cc/EKS7-9VXS]. Yet, some are skeptical about the merits of "stakeholderism." *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 93–94 (2020);

should be perceived as entities serving society as a whole. Because public law does not apply to private corporations, corporate governance can be used to inject some public-law notions designed to promote the public interest into the business sector.[43]

Another important attribute of corporate governance is that its norms bind corporations to their place of incorporation, irrespective of any multinational character.[44] For example, if a company was incorporated in California, California corporate law governs its managerial modes of operation to a significant extent, despite its worldwide business activities. Moreover, all companies publicly listed in the United States are subject to regulation by the Securities and Exchange Commission (SEC).[45] Given that the digital sphere is governed by some major American companies, corporate governance may be used to leverage norms with a global reach. The SEC may also be well suited to ensure compliance with new desired regulations and provide an experienced framework for their smooth and efficient implementation. These and other benefits of corporate governance may be used to promote an effective global and uniform digital governance that would be applied by the giant technology companies.[46]

Corporate governance may therefore serve as a promising and pragmatic path for regulating the digital sphere and for establishing a global and unified digital governance regime. This Article explores the proposed path and provides a theoretical basis for it, which has not yet been attempted in the literature.

This Article proceeds as follows: Part I describes the core challenges of the digital sphere, focusing on the rule of private companies, especially those running online platforms, and on the emerging

Lucian A. Bebchuk et al., *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1470–72 (2021).

43 *See* OECD RBC GUIDELINES, *supra* note 41.

44 *See* Dionysia Katelouzou & Peer Zumbansen, *The Transnationalization of Corporate Governance: Law, Institutional Arrangements, & Corporate Power*, 38 ARIZ. J. OF INT'L & COMP. L. 1, 3–4 (2021). *See generally* Peer Zumbansen, *Neither 'Public' nor 'Private,' 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. L. & SOC'Y 50 (2011).

45 *See generally* SEC. & EXCHANGE COMM'N, https://www.sec.gov/ [https://perma.cc/VJ63-RZDU].

46 *See infra* Part III.B.

role of algorithms and AI technology. We argue that the combination of these two attributes generates a profound threat to democracies and human rights. Part II presents the two main paths currently proposed for addressing the challenges of the digital sphere: direct regulation imposing accountability and antitrust measures. The shortcomings of these paths are further discussed. Part III.A delves into the principles of corporate governance, describing the key merits and complexities of corporate governance norms worldwide. This part also addresses the wide range of methods for introducing corporate governance norms, from top-down regulation to voluntary self-regulation codes of conduct. Part III.B ties up both ends: it suggests that corporate governance is well suited for introducing a digital governance regime with a global reach into the digital sphere. Finally, Part IV focuses on potential arguments against the proposed model.

I. CORE CHALLENGES OF THE DIGITAL SPHERE

Today, one of the most pressing challenges of societal life is the structure and operation of the digital sphere, which has become the place where people worldwide meet, converse, exchange ideas, shop, study, and even vote.[47] Almost every aspect of social life is conducted online, using digital technologies. These technologies have often been referred to as "disruptive" because they entail enormous social changes and challenge traditional dogma.[48]

The online digital sphere can be envisioned as a pyramid comprised of three main layers: (a) at the bottom, the physical infrastructure of the Internet (the cables under the oceans and the satellite connections); (b) in the middle, the services that allow users to connect to the Internet (Internet service providers); and (c) at the upper layer, the various platforms operating on it, offering a range of services,

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[47] *See generally* J.P Gibson et al., *A Review of E-Voting: The Past, Present and Future.*, 71 ANNALS OF TELECOMMS. 279–86 (2016) (discussing e-voting), https://doi.org/10.1007/s12243-016-0525-8 [https://perma.cc/X6FV-HZXV]. In Estonia, for example, the general elections for the government are conducted electronically,. *See e-Governance*, E-ESTONIA, https://e-estonia.com/solutions/e-governance/e-democracy/.

[48] *See* OECD INTRO., *supra* note 25, at 24.

such as search engines, social media platforms, and retailers.[49] The various activities conducted online necessitate the use of all the layers of the pyramid: users must be connected to the Internet and they need the services of the various platforms to perform activities, whether sending a message, consuming information, buying or selling goods, paying bills, participating in a course, and more. To take part in all these activities, users end up becoming dependent on the structural pyramid of the digital sphere. The COVID-19 crisis intensified the process of digitization of civil life and deepened dependence on digital infrastructure.[50] Yet, while the two lower layers of the pyramid are concerned with technological connectivity, the upper layer of the pyramid involves a wide range of activities and presents a much more complex social challenge.[51]

As the scope of the digital sphere has expanded to cover almost every part of human life, the call for its comprehensive regulation has become stronger. In the early 2000s, the beginning of the digital revolution celebrated the utopian vision of a global free zone without regulation.[52] Two decades later, it has become clear to policymakers that the rule of law should hold sway in the digital sphere as well, and that strict constraints should be imposed on all layers of the pyramid.[53] Therefore, the goals of real-world laws remain valid in the digital world; human rights and liberties, for example, should be maintained with regard to digital services, criminal offenses committed online should be enforced, and online contracts should be honored. The legal order that existed in the pre-digital life should be duplicated in the new digital arena.[54] A sweeping legal adjustment is too simplistic, however. The digital sphere is characterized by

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[49] *See* STEFAN KULK, INTERNET INTERMEDIARIES AND COPYRIGHT LAW: EU AND US PERSPECTIVES 11–12 (Kluwer Law International, 2019).

[50] *See OECD Policy Responses*, *supra* note 2 (explaining that during lockdowns, the world population was dependent on the digital sphere, and the demand for broadband connectivity rose by 60%).

[51] *See* Fischman-Afori, *supra* note 17, at 129–30.

[52] *See* Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 33–38 (2019) (reviewing the early utopian trend in scholarly writing regarding the internet).

[53] *Id*.

[54] Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 403 (2000).

many features that differentiate it from the non-digital one. Thus, the digital sphere has generated new challenges that require the development of new and adaptive legal measures.[55]

Legislatures and policymakers on both sides of the Atlantic are engaged in significant initiatives to tailor a new legal regime to the digital sphere—designing a new "digital governance."[56] All these initiatives must address two key phenomena in order to be successful: first, the online digital sphere is entirely controlled by commercial corporations that are also characterized by a wide multinational spread; and second, these corporations run the digital sphere using automated measures. Addressing these two core features is crucial for formulating efficient and long-lasting digital governance principles that will operate on a global scale and in a coherent and systematic way.

A. The Rule of Private Corporations

The online digital sphere, including its entire structural pyramid, is operated and controlled by commercial companies. Private for-profit corporations control the physical net.[57] The Internet service providers that enable users worldwide to connect to the Internet are often the big telecommunication companies that once controlled the telephone infrastructure in the pre-digital era.[58] Finally, the various

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55 *See e.g.*, Douek, *supra* note 7.

56 *See infra* Part II.

57 *See* Weller & Woodcock, *supra* note 3, at 25–26; Zachary S. Bischof et al., *Untangling the World-Wide Mesh of Undersea Cables*, *in* PROCS. OF THE 17TH ACM WORKSHOP ON HOT TOPICS IN NETWORKS, 78–79 (2018) ("Most submarine cables have been constructed and are managed by consortia, and shared by multiple network operators. TAT-8, for instance, had 35 participants including most major international carriers at the time (including AT&T, British Telecom and France Telecom). The latest construction boom, however, seems to be driven by content providers, such [sic] Google, Facebook, Microsoft, and Amazon.").

58 *See* Weller & Woodcock, *supra* note 3, at 25–26; OECD, THE OPERATORS AND THEIR FUTURE: THE STATE OF PLAY AND EMERGING BUSINESS MODELS 32 (2019), https://www.oecd-ilibrary.org/docserver/60c93aa7-en.pdf [https://perma.cc/3EJ4-ZEKK]; *See World Top 25 Broadband Internet Service Companies List by Market Cap as on Nov 7th 2019*, VALUE TODAY, https://www.value.today/company-products/broadband-internet-service [https://perma.cc/Q6C5-BVNA] (listing the top 25 global broadband internet service companies by market capital, including many of the traditional telecommunication companies, such as AT&T, Verizon, Deutsche Telekom, T-Mobile, Vodafone, Orange, British Telecom, and more).

platforms providing a range of services online are run by commercial companies.[59] In recent years, these online platforms have attracted significant public attention, as some large companies have gained crushing market power in their areas of activity. In terms of market capital, the Big Five—Alphabet (Google), Apple, Meta (Facebook), Amazon, and Microsoft—are at the heart of public discourse with regards to their power in the digital sphere.[60] This power comes from their digital dominance and is reflected not only in traditional market factors such as the price of products and services, but also in a new characteristic: control over basic societal and democratic functions. These private companies control the flow of information in society, the "places" where people meet and converse, and the content of these conversations.[61] Prominent examples are social media and search engine services that function as central platforms on which information and content flow. Facebook (owned by Meta) is the dominant social media platform, with more than two billion users worldwide.[62] Other highly popular social media platforms are Instagram (also owned by Meta) and Twitter, with more than one

[59] *See* OECD INTRO., *supra* note 25, at 20–25 (explaining who online platforms are).

[60] *See, e.g.*, Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325, 325–26 (2018).

[61] *See* OECD INTRO., *supra* note 25, at 48–49; Aswad, *supra* note 7, at 30–31 (2018); Barrie Sander, *Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation*, 43 FORDHAM INT'L L.J. 939, 952–53 (2020); Human Rights Council, Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 3 (2020); U.N. Doc. A/HRC/38/35/Add.1, at 2–3 (June 6, 2018) [hereinafter HRC], https://digitallibrary.un.org/record/1638481 [https://perma.cc/RE37-G3PJ]; U.N. Secretary-General, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/74/486, at 14 (Oct. 9, 2019) [hereinafter *Promotion and Protection*], https://digitallibrary.un.org/record/3833657 [https://perma.cc/4RUW-BVF2].

[62] *See* Max Roser et al., *Internet*, OUR WORLD IN DATA, https://ourworldindata.org/internet [https://perma.cc/S945-WBKZ] ("With 2.3 billion users, Facebook is the most popular social media platform today. YouTube, Instagram and WeChat follow, with more than a billion users. Tumblr and TikTok come next, with over half a billion users."); *see also* Amended Complaint, FTC v. Facebook, Inc., No. 1:20-cv03590-JEB,
(D.D.C. Aug. 19, 2021), https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.75.1.pdf [https://perma.cc/4868-CN3D] ("Facebook is the world's dominant online social network, with a purported three billion-plus regular users.").

billion users worldwide.[63] Google is the dominant search engine globally.[64] These gigantic online platforms control the traffic of information in the digital sphere and, for various reasons, have adopted policies concerning content monitoring and moderation.[65]

Content moderation practices have caused a fierce public debate and extensive scholarly discourse in recent years.[66] The liability of the various online platforms for content disseminated on their "premises" is regulated at the national or regional level. In the United States, the most significant legal framework is Section 230 of the Communications Decency Act, which provides online platforms with broad immunity from liability for user-generated content.[67] A similar immunity was anchored in the EU by the E-Commerce Directive.[68] These immunities were initially designed to encourage online platforms to voluntarily take an active role in

63 *See* Roser et al., *supra* note 62.

64 *See* Complaint at 3, United States v. Google LLC, No.1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download [https://perma.cc/X 9YR-ZVLN] ("Google of today is a monopoly gatekeeper for the internet, and one of the wealthiest companies on the planet, with a market value of $1 trillion and annual revenue exceeding $160 billion."); *see also* Case T-612/17 Google LLC & Alphabet, Inc. v. Comm'n, ECLI:EU:T:2021:763, ¶ 119 (Nov. 10, 2021) ("It must be emphasi[z]ed at the outset that Google does not dispute the fact that it holds a dominant position on the 13 national markets for general search services corresponding to the countries in which the Commission found that Google had abused that position.").

65 *See* OECD INTRO., *supra* note 25, at 48–49; Aswad, *supra* note 7, at 30–31; Sander, *supra* note 61, at 952–53; HRC, *supra* note 61, at 2–3; *Promotion and Protection*, supra note 61; DAVID KAYE, SPEECH POLICE THE GLOBAL STRUGGLE TO GOVERN THE INTERNET, 112 (2019).

66 *See, e.g.*, Balkin, *supra* note 4; Langvardt, *supra* note 4; Van Loo, *supra* note 4; Douek, *supra* note 4; Kadri, *supra* note 4.

67 *See* Communications Decency Act (CDA), 47 U.S.C. 230 (2012) (stating that Section 230 immunity is without prejudice to any other law).

68 Directive 2000/31/EC of the European Parliament and of the Council of 12 June 8, 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), 2000 O.J. (L 178).

removing harmful content[69] and to avoid private censorship.[70] Since this legal framework gives online platforms vast discretion, voluntary speech moderation practices vary from one platform to the next, and these practices are almost entirely left to private self-regulation governance.[71] Various social and legal developments have led to the gradual adoption of content moderation practices by online platforms.[72] Some platforms impose policies in response to business needs, such as credibility and social legitimacy,[73] or to nudges by public authorities.[74] Content moderation practices may differ with respect to the type of content moderated, the reason for the moderation, and the way of its operation.[75] These practices may relate to a

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69 *Id.* at L 178/6 § 40 ("[T]his Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States."); Communications Decency Act, *supra* note 67.

70 Klonick, *supra* note 7, at 1602; Jack Balkin, *Old School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2309 (2014); Felix Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV., 293, 347–49 (2011).

71 Klonick, *supra* note 7, at 1630–47, 1663.

72 *See* Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power Over Online Speech*, HOOVER INST. 1, 3–10 (Aegis Series Paper No. 1902), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf [https://perma.cc/FMA6-PRYJ].

73 *See* Keats Citron, *supra* note 7, at 1047; Aswad, *supra* note 7, at 42; *see also* EURO. COMM'N, CODE OF CONDUCT ON COUNTERING ILLEGAL HATE SPEECH ONLINE: FIRST RESULTS ON IMPLEMENTATION 1 (Dec. 2016), http://ec.europa.eu/information_society/newsroom/image/document/2016-50/factsheet-code-conduct-8_40573.pdf [https://perma.cc/29ZF-K7E3].

74 *See* EURO. COMM'N, CODE OF CONDUCT ON COUNTERING ILLEGAL HATE SPEECH ONLINE: FIRST RESULTS ON IMPLEMENTATION 1 (Dec. 2016), http://ec.europa.eu/information_society/newsroom/image/document/2016-50/factsheet-code-conduct-8_40573.pdf [https://perma.cc/29ZF-K7E3].

75 The content moderated varies, and may include text-based content, images, and videos that are communicated online via various services. The content moderated may comprise a wide array of undesirable speech, such as hate speech and speech encouraging violence, misleading or false information ("fake news"), or content that allegedly infringes copyright or amounts to other tortious conduct, such as defamation. Each type of content may merit different measures. Speech moderation practices comprise a range of methods that include, for instance, monitoring and detecting, speech tagging, and speech removal or blocking. Tagging is aimed at elevating users' awareness of the problematic aspects of the content, while removal is aimed at protecting users or other stakeholders from the harmful consequences of the content's dissemination. Removal may be accompanied by stay-down measures aimed at preventing the re-upload of the content that was taken down. *See*

wide range of undesirable content, such as hate speech and speech encouraging violence;[76] misleading or false information ("fake news");[77] or content that allegedly infringes copyright or amounts to other tortious conduct, such as defamation.[78] Content moderation may also pertain to criminal activities, such as child abuse.[79] Each type of content may be handled using different measures.[80] Taken together, online platforms run by giant technology companies control the digital speech environment, which functions today as the backbone of democratic civil societies.[81]

The privately managed content moderation regime raises concerns regarding its potential conflict with freedom of speech and

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Daphne Keller, *Internet Platforms: Observations on Speech, Danger, and Money*, HOOVER INST. 1, 18 (Aegis Series Paper No. 1807, 2018), www.hoover.org/sites/default/files/research/docs/keller_webreadypdf_final.pdf [https://perma.cc/6LX8-Y7G9]; Orit Fischman-Afori, *Taking Global Administrative Law One Step Ahead: Online Giants and the Digital Democratic Sphere*, INT'L J. CONST. L., 1, 6–7 (2022). See, for example, Facebook's policy concerning speech moderation. *We Are Committed to Protecting Your Voice and Helping You Connect and Share Safely*, META, https://about.fb.com/actions/promoting-safety-and-expression/ [https://perma.cc/89T6-YNNZ]; *Protecting Privacy and Security*, META, https://about.fb.com/actions/protecting-privacy-and-security/ [https://perma.cc/K825-TRM9]; *We Are Committed to Securing Our Platforms, Providing Transparency and Empowering People to Vote*, META, https://about.fb.com/actions/preventing-election-interference/ [https://perma.cc/L686-AWAE].

76 *See* Richard A. Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1045–53 (2021).

77 *See* YOCHAI BENKLER ET AL., NETWORK PROPAGANDA 3 (2018); *see generally* Nathalie Maréchal et al., *Introduction—Understanding the Challenge*, *in* TACKLING THE 'FAKE' WITHOUT HARMING THE 'NEWS': A PAPER SERIES ON REGULATORY RESPONSES TO MISINFORMATION, 1, 3 (Michael Karanicolas ed., 2021), https://ssrn.com/abstract=3804878 [https://perma.cc/PB9Q-63YB].

78 *See, e.g.*, *Rules and Policies: Copyright*, YOUTUBE https://www.youtube.com/howyoutubeworks/policies/copyright/#making-claims [https://perma.cc/7V4P-K54J].

79 *See, e.g.*, *Online Safety for Children & Families*, GOOGLE, https://safety.google/families/ [https://perma.cc/QT9G-F936].

80 *See generally* Maayan Perel, *Digital Remedies*, 35 BERKELEY TECH. L.J. 1, 23–29 (2020); Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1 (2021).

81 *See* Eyal Benvenisti, *Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?*, 29 EUR. J. INT'L L. 9, 55–56, 70 (2018).

other fundamental human rights.[82] Both the U.S. Supreme Court[83] and United Nations' officials[84] have acknowledged that access to Internet services, including social media platforms, is both a free speech right and a human right. The fear that content moderation can conflict with freedom of speech is also raised in cases where coercive regulations require moderation, which is carried out by private corporations according to their own policies.[85] A growing concern is that private corporations may be motivated to moderate content too heavily, silencing legitimate speech and amplifying the chilling effect.[86] Online platforms, being risk-averse, tend to over-

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82 *See* Balkin, *supra* note 4; Langvardt, supra note 4, at 349; *see generally* Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation*, 71 U. COLO. L. REV. 1263 (2000); *The Santa Clara Principles On Transparency And Accountability in Content Moderation,* SANTA CLARA PRINCIPLES, https://santaclaraprinciples.org/ [https://perma.cc/F77Q-MHQ7].

83 *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

84 *See* Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), 20, U.N. Doc. A/HRC/17/27, (May 16, 2011) ("[T]he Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression.").

85 For example, in 2017, Germany adopted the Hate Speech Act (NetzDG), which imposes obligations on large social networks to remove hate speech. *See* Act to Improve Enforcement of the Law in Social Networks, art. 1, § 1 (English translation) (2017). This act was criticized for allowing private censorship. *See, e.g.*, Rebecca Zipursky, *Nuts About NETZ: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT. L.J. 1325, 1328 (2019); Mathias Hong, *The German Network Enforcement Act and The Presumption in Favour of Freedom of Speech*, VERFASSUNGSBLOG (Jan. 22, 2018), https://verfassungsblog.de/the-german-network-enforcement-act-and-the-presumption-in-favour-of-freedom-of-speech/ [https://perma.cc/N622-H8YW]. Another example is the 2019 EU Digital Single Market Directive, which imposes content moderation obligations concerning copyright infringements. *See* Article 17, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130). This coercive EU regulation raised significant concerns regarding its effect on freedom of speech. *See e.g.* Cory Doctorow, *The Worst Possible Version of the EU Copyright Directive has Sparked a German Uprising*, ELEC. FRONTIER FOUND. (Feb. 18, 2019), https://www.eff.org/deeplinks/2019/02/worst-possible-version-eu-copyright-directive-has-sparked-german-uprising [https://perma.cc/7TPJ-MC9X]. Such concerns were even raised by the UN Special Rapporteur David Kaye. *See* David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression) OL OTH 41/2018 (June 13, 2018), https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-OTH-41-2018.pdf [https://perma.cc/4GAV-4CYS].

86 *See* Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/38/35 (July 6, 2018). *See also,* Barrie Sander, *Freedom of Expression in the Age of Online Platforms: The Promise and*

moderate speech by opting for a speech silencing default; the outcome is a massive removal of content.[87] There is additional fear that digital speech controlled by private corporations may be moderated on a capricious or discriminatory basis, raising concerns about other values in democratic civil societies.[88]

Giant technology companies control not only the digital speech environment, but also many aspects of the commercial realm, from access to trade arenas to the chain of value. Prominent examples are the activities of Amazon, one of the largest online retailers worldwide, which also functions as a principal trade arena for other retailers,[89] and of Apple, a dominant provider of digital devices that simultaneously functions as a central platform for various online activities.[90] Control over the online commercial realm may also raise

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Pitfalls of a Human Rights-Based Approach to Content Moderation, 43 FORDHAM INT'L L.J. 939, 952–53 (2020).

[87] An extensively discussed and documented outcome of content moderation practices, aimed at avoiding copyright infringement liability, is the significant chilling effect on freedom of speech. *See e.g.,* Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J. SCI. & TECH. 387, 390–93 (2009); Jennifer M. Urban et al., *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC'Y USA 371, 373–74 (2017).

[88] Aswad, *supra* note 7, at 31.

[89] *See* European Commission Press Release, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices (Nov. 10, 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 [https://perma.cc/5KVE-LKK8] ("Amazon has a dual role as a platform: (i) it provides a marketplace where independent sellers can sell products directly to consumers; and (ii) it sells products as a retailer on the same marketplace, in competition with those sellers . . . the Commission's preliminary view, outlined in its Statement of Objections, is that the use of non-public marketplace seller data allows Amazon to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany- the biggest markets for Amazon in the EU."). *See also* Guy A. Rub, *Amazon and the New World of Publishing: Comments on Chris Sagers, Apple, Antitrust, and Irony*, 14 ISJLP 367, 367–68 (2018).

[90] *See* European Commission Press Release, Antitrust: Commission Opens Investigation into Apple's App Store Rules (June 16, 2020) https://ec.europa.eu/commission/presscorner/detail/es/ip_20_1073 [https://perma.cc/4V7A-Z2GE] ("Mobile applications have fundamentally changed the way we access content. Apple sets the rules for the distribution of apps to users of iPhones and iPads. It appears that Apple obtained a 'gatekeeper' role when it comes to the distribution of apps and content to users of Apple's popular devices. We need to ensure that Apple's rules do not distort competition in markets

profound social concerns about individual rights, such as privacy and consumer protection.[91]

Corporations control all aspects of societal activities in the digital sphere and have become online rulers.[92] The immense size of the Big Five has concentrated unprecedented power in the hands of a few private entities. It is gradually being acknowledged that today, in the digital era, the state is not the sole source of sovereignty.[93] Assuming that the rule of law is valid in the digital sphere, the question is how the legal regime of the non-digital world is mirrored and imposed in a digital sphere where the controlling entities are motivated by profit and subject only to private law.

B. *The Rule of Algorithms*

Increasingly, corporations rule the digital sphere with the aid of automated methods, using technology to perform more and more business tasks. In the last decade, AI technology has become pervasive.[94] AI refers to a family of technologies that train algorithms to produce various outputs, including content, predictions, and recommendations.[95] One particular AI technology, known as machine

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where Apple is competing with other app developers, for example with its music streaming service Apple Music or with Apple Books.").

91 OECD INTRO., *supra* note 25, at 32. The EU has adopted, thus far, the strictest regulation concerning privacy in the digital sphere. *See* Commission Regulation 2016/679 of April 27, General Data Protection Regulation, 2016 O.J. (L119); *see also Complete Guide to GDPR compliance*, GDPR, https://gdpr.eu/ [https://perma.cc/9T8W-4ZWQ].

92 Fischman-Afori, *supra* note 17.

93 Dan Jerker B. Svantesson, *Internet & Jurisdiction Global Status Report 2019*, INTERNET & JURISDICTION POL'Y NETWORK, at 49 (2019), https://www.internetjurisdiction.net/uploads/pdfs/Internet-Jurisdiction-Global-Status-Report-2019-Key-Findings_web.pdf [https://perma.cc/8UQZ-7TXN]; Fischman-Afori, *supra* note 17, at 123.

94 *See* SELECT COMM. ON ARTIFICIAL INTELLIGENCE, AI IN THE UK: READY, WILLING AND ABLE?, 2017–19, HL 100, at 2 (U.K.), publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf (UK AI Report), at p. 25. *See also* OECD, *Artificial Intelligence*, https://www.oecd.org/digital/artificial-intelligence/ [https://perma.cc/5TVM-7QZC].

95 The US National Artificial Intelligence Initiative Act of 2020 (NAIIA) defines the term AI as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to— (A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action." Division E Sec. 5001 (2020); https://www.congress.gov/116/crpt/hrpt617/CRPT-

learning, trains algorithms to run on massive and constantly updated datasets and detect patterns used to autonomously generate outputs such as observations and decisions.[96] Machine learning is a data-driven technology that adapts its performance to the inputs it receives.[97] The end goal of these technologies is "to allow the computers learn automatically without human intervention or assistance and adjust actions accordingly."[98]

Companies are motivated by profit; therefore, they naturally adopt measures that improve business performance. AI can be used to perform business ledger tasks and other corporate administrative work, replacing part of the secretarial[99] and even executive workforce.[100] Algorithms can also be used to carry out customer service

116hrpt617.pdf#page=1210 [https://perma.cc/B68M-S6R7]. The EU AI Act defines "artificial intelligence system" similarly as "software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with." AI Act, *supra* note 20. The World Intellectual Property Organization Report on AI offers a much broader definition according to which "AI systems are viewed primarily as learning systems; that is, machines that can become better at a task typically performed by humans with limited or no human intervention. This definition encompasses a wide range of techniques and applications . . . ." WIPO, WIPO Technology Trends 2019: Artificial Intelligence (2019) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf [https://perma.cc/U2BK-8VRZ]. Regarding the various ways to define AI, see Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 62–63, (2019); Bryan Casey & Mark A. Lemley, *You Might Be a Robot*, 105 CORNELL L. REV. 287, 311 (2020).

96 Stanley Greenstein, *Preserving the Rule of Law In The Era Of Artificial Intelligence*, 30 ARTIFICIAL INTELL. L. 291, 300 (2021), https://doi.org/10.1007/s10506-021-09294-4 [https://perma.cc/PX8W-VK3V] ("Machine learning is described as, 'a subfield of artificial intelligence concerned with the computerized automatic learning from data of patterns. The aim of machine learning is to use training data to detect patterns, and then to use these learned patterns automatically to answer questions and autonomously make and execute decisions.'"); Katyal, *supra* note 86, at 62–63.

97 Greenstein, *supra* note 96, at 300 ("Machine learning is essentially the application of mathematical algorithms on data to produce a model that can be incorporated into decision-making systems, the model autonomous to the extent that it can update itself based on new data.").

98 *Id.* at 300.

99 Chiu & Lim, *supra* note 6, at 14.

100 *See generally* Chiara Picciau, *The (Un)Predictable Impact of Technology on Corporate Governance*, 17 HASTINGS BUS. L.J. 67 (2021).

tasks.[101] Automated measures for conducting various aspects of the business are becoming popular because they can handle services provided to masses of customers more efficiently than humans traditionally have.[102] AI technologies have also generated new business models, based on the ability to recognize patterns in big data and transform them into valuable and meaningful information.[103] Thus, AI became a pillar in business processes that are based on mass use of online services, such as in the sales, travel, medical, insurance, financial, and other sectors. Technology enables various online services to store vast quantities of data about activities in these commercial fields and identify patterns, creating profitable new products and services. Thus, emerging AI technologies encourage corporations to collect and store big data, including users' personal data, as part of their business model.[104]

The role of AI in business activities does not stop at these levels. Online services handle mass use that needs to be monitored and filtered for various reasons in a decision-making process. A good example is content monitoring on social media platforms.[105] AI

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[101] Chiu & Lim, *supra* note 6, at 14.

[102] *See* ORG. FOR ECON. CO-OP. & DEV., DATA-DRIVEN INNOVATION FOR GROWTH AND WELL-BEING: INTERIM SYNTHESIS REPORT 6 (2014) [hereinafter INTERIM SYNTHESIS REP.], http://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf [https://perma.cc/9S7F-4ZLN]; *see generally* J. Manyika et al., *Big Data: The Next Frontier for Innovation, Competition and Productivity,* MCKINSEY GLOBAL INSTIT. (2011); Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267 (2017).

[103] *Id.*

[104] INTERIM SYNTHESIS REP., *supra* note 102, at 30–32; OECD INTRO.*, supra* note 25, at 32–35.

[105] For example, YouTube content ID system, aimed at moderating uploaded contents to avoid copyright infringement, is based on AI technologies. *See How Content ID Works*, YouTube Help Center, https://support.google.com/youtube/answer/2797370?hl=en [https://perma.cc/BS4N-MQ7U]; *see also* Robert Gorwa et al., *Algorithmic Content Moderation: Technical and Political Challenges In The Automation Of Platform Governance*, 7 BIG DATA & SOCIETY, 1, 2 (2020) ("Amidst significant technical advances in machine learning (and the enormous amount of hoopla that has followed them), automated tools are not only being increasingly deployed to fill important moderation functions, but are actively heralded as the force that will somehow save moderation from its existential problems." The study further reports that "YouTube now reports that '98% of the videos removed for violent extremism are flagged by machine-learning algorithms,' and Twitter recently stated that it has taken down hundreds of thousands of accounts that try to spread terrorist propaganda, with some '93% consist[ing] of accounts flagged by internal, proprietary spam fighting tools.'").

technology provides an effective decision-making system that replaces human labor.[106] Human handling of the huge amount of content flowing through social media networks appears to be impracticable. This new role of AI grants algorithms discretion about the handling of vast amounts of user posts, affecting society as a whole.[107] For example, an AI decision to block a post uploaded by a politician affects not only that individual's freedom of speech but democratic discourse as a whole. Conversely, an AI decision not to block a politician's post may have a similar effect on democratic discourse.[108] Thus, AI, which makes operational decisions about a range of online activities, has become the *de facto* ruler of the digital sphere. Human judgment in the business sector has now been delegated, to a significant extent, to algorithms.[109]

The combination of the two core characteristics of the digital sphere, that it is entirely controlled by private corporations and that this control is exercised by means of algorithms, places significant portions of civic life in the hands of algorithms designed to serve the needs of commercial corporations.[110] The algorithms that control participation in various social arenas use a language and logic that

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106 INTERIM SYNTHESIS REP, *supra* note 102, at 32.

107 Balkin, *supra* note 12.

108 *See* Urban et al., *supra* note 87, at 403–04; Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, 24 LEWIS & CLARK L. REV. 857, 860–62 (2020). As previously discussed in a footnote of this Article, former President Trump found himself at the center of the debate regarding politicians' digital speech in May 2020, when Twitter declared that Trump's online messages were potentially false or glorifying violence. *See Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [https://perma.cc/ADH3-RLL2]. Former President Trump perceived this move as hindering freedom of speech. *See* Maggie Haberman & Kate Conger, *Trump Signs Executive Order on Social Media, Claiming to Protect 'Free Speech'*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-order-social-media.html [https://perma.cc/W22L-SBMT]. As a result of massive public pressure, Facebook followed Twitter's move and adopted a new proactive policy monitoring speech that encourages violence, resulting in the suspension of Trump's account for two years. *See* Mike Isaac & Sheera Frenkel, *Facebook Says Trump's Ban Will Last at Least 2 Years,* N.Y. TIMES (June 7, 2021), https://www.nytimes.com/2021/06/04/technology/facebook-trump-ban.html [https://perma.cc/HRS8-57HE].

109 Greenstein, *supra* note 96, at 298.

110 Katyal, *supra* note 95, at 107–08.

are not understood by ordinary humans.[111] This is part of the known "black box" problem of AI technologies.[112] A similar trend exists in the public sector, where decisions made by public agencies are increasingly generated by computational systems.[113] But in the public sector there have been significant developments regarding the legal framework that should govern the use of AI technologies to ensure adequate administrative procedural standards and public law principles of accountability.[114] The emerging reality in the business sector calls for legislatures, policymakers, and civil society stakeholders to address this challenge as well. The global digital sphere, which is run by the business sector, needs a comprehensive and effective

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111 *See generally* Martin Ebers, *Regulating Explainable AI in the European Union. An Overview of the Current Legal Framework(s), in* NORDIC YEARBOOK OF LAW AND INFORMATICS 2020: LAW IN THE ERA OF ARTIFICIAL INTELLIGENCE (Liane Colonna & Stanley Greenstein eds., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3901732 [https://perma.cc/C68A-T898]; Greenstein, *supra* note 96, at 18 ("The rule of law up until now has been dependent on its form being in the format of natural language—it entails governance by natural language as opposed to the governance of the algorithm. The rule of law is dependent on natural language in order to be comprehended.").

112 Greenstein, *supra* note 96, at 292 ("The threat to the rule of law lies in the fact that most of these decision-making systems are 'black boxes' because they incorporate extremely complex technology that is essentially beyond the cognitive capacities of humans and the law too inhibits transparency to a certain degree."); *see generally* Sylvia Lu, *Data Privacy, Human Rights, and Algorithmic Opacity,* 110 Cal. L.R. 2087 (2022); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015).

113 Paul Daly, *Artificial Administration: Administrative Law in the Age of Machines* 1 (Ottawa Faculty of Law Working Paper No. 2020-03, 2019), https://ssrn.com/abstract=3493381 [https://perma.cc/RD7W-Z4F8]; Monika Zalnieriute et al., *The Rule of Law and Automated Government Decision-Making*, 82 MODERN L. REV. 425, 444 (2019); Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147, 1205–13 (2017); Van Loo, *supra* note 102, at 1321.

114 Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 657–60 (2017); Cary Coglianese & David Lehr, *Transparency and Algorithmic Governance*, 71 ADMIN. L. REV. 1, 4–14 (2019). *See, e.g.,* Responsible Use of Artificial Intelligence (AI), GOV. OF CANADA (Nov. 1, 2022), https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai.html [https://perma.cc/FG9X-UX5Q]; *Digital Nations Charter,* GOV. OF CANADA (Nov. 18, 2021), https://www.canada.ca/en/government/system/digital-government/improving-digital-services/digital9charter.html [https://perma.cc/NJJ5-5WNU].

regime of digital governance to ensure the rule of algorithms is consistent with the rule of law worldwide.[115]

II. CURRENT PATHS FOR DESIGNING DIGITAL GOVERNANCE AND THEIR SHORTCOMINGS

In recent years, academic discourse, public initiatives, and legislative proposals have focused on the rule of corporations and algorithms in the digital sphere. These initiatives are the first step in an attempt to structure principles for a digital governance regime, but they are often limited efforts,[116] lacking a systematic guiding norm.[117] Although the challenges are global, there is no international or transnational overarching design. The American and EU approaches are widely different, and the operative measures taken to date, on both sides of the Atlantic, do not provide much relief.

The wide range of initiatives can be classified into two main paths: (1) those aimed at imposing (semi-)accountability norms, derived from public law, on the corporations controlling the digital

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[115] Luciano Floridi calls for building an ethical AI-based society that provides adequate safeguards to human rights. *See generally* LUCIANO FLORIDI, THE FOURTH REVOLUTION: HOW THE INFOSPHERE IS RESHAPING HUMAN REALITY (Oxford Univ. Press, 2014); Luciano Floridi et al., *AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations,* 28 MINDS & MACHINES 689, 694 (2018), https://link.springer.com/article/10.1007%2Fs11023-018-9482-5 [https://perma.cc/A796-H3FG]. The AI4People is a multi-stakeholder forum established by Luciano Floridi, aimed at promoting an evidence-based policy regarding ethical AI systems. *See About,* ATOMIUM EUROPEAN INSTITUTE, https://www.eismd.eu/about/ [https://perma.cc/44YT-H5SQ]. *See also* S. Amato, *Artificial Intelligence and Constitutional Values*, *in* ENCYCLOPEDIA OF CONTEMPORARY CONSTITUTIONALISM 10–12 (J. Cremades & C. Hermida eds., Springer 2021), https://link.springer.com/referencework/10.1007/978-3-319-31739-7 [https://perma.cc/5C5C-KX3W].

[116] For the long list of civil society organizations that have promoted "manifests" pertaining to the adequate digital environment, see Sarah Oates, *Towards an Online Bill of Rights, in* THE ONLIFE MANIFESTO – BEING HUMAN IN A HYPERCONNECTED ERA, 229, 231–32 (Luciano Floridi ed., Springer 2015) (identifying the list of manifestos and declarations relating to online speech in Table 1).

[117] Some scholars have stressed the limits of any law to address social problems stemming from emerging technologies, in particular problems in the current digital information sphere. *See, e.g.,* Ugo Pagallo, *Good Onlife Governance: On Law, Spontaneous Orders, and Design, in* THE ONLIFE MANIFESTO—BEING HUMAN IN A HYPERCONNECTED ERA, 161–62 (Luciano Floridi ed., Springer 2015).

sphere and on the corporations operating AI technologies; and (2) those concerning the use of competition law measures to restrain the power of the dominant corporations in the markets. These two paths and their main shortcomings are described below.

A. *Imposition of Accountability Norms and the Public/Private Law Divide*

The control exercised by private corporations over the digital societal sphere, including their use of AI, raises the issue of whether some restraints should be imposed on corporations' conduct. The understanding that these corporations may affect individuals' rights and liberties has reinforced the position demanding that the policies and conduct of these companies meet some minimal standards to guarantee adequate protection of individual rights. Legislatures worldwide have proposed various initiatives to this effect, some of which have already been adopted.[118] The common ground of these initiatives is an attempt to introduce some basic elements of accountability into the conduct of the private sector.[119]

Accountability is a broad notion encompassing a range of concepts, perceptions, and concrete requirements.[120] According to a general definition, accountability is "a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other."[121] A basic element of accountability is transparency, which is part of the need to explain the conduct at stake.[122] The concept of transparency may be further broken down

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118 The most prominent example is the EU Digital Services Act. *See DSA*, *supra* note 19.

119 *See, e.g.*, *Digital Services Package*, https://www.consilium.europa.eu/en/policies/digital-services-package/ (explaining the underlying rationales of the EU digital services package, including the establishment of "a set of responsibilities and a clear accountability and transparency framework for providers of intermediary services").

120 *See, e.g.,* Danielle Hanna Rached, *Doomed Aspiration of Pure Instrumentality: Global Administrative Law and Accountability*, 3 GLOB. CONST. 338, 338–42 (2014); David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, 2009 ACTA JURIDICA 3, 5–6 (2009); Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOB. GOV. 39, 44 (2008); Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, *in* REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS, 197, 199–200 (Peter Drahos ed., 2017).

121 Bovens, *supra* note 15, at 184.

122 *Id.* at 185.

into sub-notions and different requirements. For instance, transparency may denote an obligation to publish annual reports concerning company activities. Full-fledged obligations of transparency may include a duty to disclose specific data or information.

There are many examples of attempts to impose obligations regarding transparency on operations in the digital sphere. For instance, the U.S. Algorithmic Accountability Act of 2019 allows the FTC to require corporations that use "automated decision systems" concerning consumers' personal information to submit impact assessments of the accuracy, fairness, bias, discrimination, privacy, and security of their systems.[123] Another example is the recent American initiative of the Platform Accountability and Consumer Transparency (PACT) Act Bill.[124] This bill proposes certain limited duties regarding transparency, such as quarterly transparency reports concerning content moderation activities conducted by online platforms.[125] A similar initiative, even broader in scope, was presented by the EU in December 2020 in the proposed Digital Services Act (DSA), which aimed at ensuring a safe and accountable online environment.[126] The DSA requires companies to provide accessible information about policy and contractual terms relating to content moderation, including measures and tools used for such purpose, whether based on algorithmic or human decision making.[127] Yet, the transparency requirements specified in these proposed legislative initiatives have been criticized for failing to provide a full-fledged disclosure standard similar to the one in public law, which requires authorities to fully disclose all information involved in the decision-making process.[128] Mere annual reports or general data disclosures

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123 *See* Algorithmic Accountability Act 2019, H.R. 2231, 116th Cong. § 2 (2019).

124 Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. [hereinafter PACT Bill], https://www.schatz.senate.gov/imo/media/doc/OLL20612.pdf [https://perma.cc/8HTC-HPD5]. The PACT Bill was first introduced in June 2020 and reintroduced in March 2021 by Senators Brian Schatz and John Thune. *See id.*

125 PACT Bill, § 5(d).

126 *DSA*, *supra* note 19.

127 *Id.*

128 *See, e.g.,* Alexander Peukert, *Five Reasons to be Skeptical About the DSA*, VERFASSUNGSBLOG (Aug. 31, 2021), https://verfassungsblog.de/power-dsa-dma-04/ [https://perma.cc/8975-L8RJ]; Giancarlo Frosio & Christophe Geiger, *Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime*, EUR. L. J. (forthcoming), https://ssrn.com/abstract=3747756 [https://perma.cc/X64R-

do not provide adequate information to individuals about particular decisions that directly influence their activities and rights. By contrast, the standards of transparency and disclosure in public law are perceived as a much higher obligation of the public authority to provide individuals with all the relevant information used in a decision regarding their matters.[129]

In the last few years, there have been growing calls for regulation of the use of AI systems. Civil society organizations, policymakers, scholars, and grassroots initiatives are generating a number of reports and working papers that shed light on various aspects of AI technologies, why they should be regulated, and how.[130] The United States made the first move by legislating the National

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7ERB]; Fischman-Afori, *supra* note 21, at 22. *See also* Aaron Mackey, *Even with Changes, the Revised PACT Act Will Lead to More Online Censorship*, ELEC. FRONTIER FOUND. (Mar. 26, 2021), https://www.eff.org/deeplinks/2021/03/even-changes-revised-pact-act-will-lead-more-online-censorship [https://perma.cc/C3M6-73PE] (raising constitutional concerns regarding mandatory transparency reports).

[129] *See generally*, STEPHEN BREYER, ADMINISTRATIVE LAW & REGULATORY POLICY (3d ed. 1992); Administrative Procedure Act, 5 U.S.C. §§ 551–559. *See also* Freedom of Information Act, 5 U.S.C. § 552.

[130] For the various worldwide AI initiatives conducted at national levels, see *AI Initiatives*, COUNCIL OF EUR., https://www.coe.int/en/web/artificial-intelligence/national-initiatives [https://perma.cc/CX8S-AZ7Y]. For various voluntary programs for self-regulating the use of AI, see Carlos Ignacio Gutierrez, *Uncovering Incentives for Implementing AI Governance Programs: Evidence from the Field* 1 (July 31, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897486 [https://perma.cc/TSM5-FURT]. For examples of academic and public sector initiatives at the European level, see AI4People, ATOMIUM EUR. INST., https://www.eismd.eu/ai4people/ [https://perma.cc/L4TH-B25W] ("AI4People is the first European forum bringing together key stakeholders as academia, industry, civil society organi[z]ations and the European Parliament to lay the foundations for a 'Good AI Society' shaping the impact of Artificial Intelligence."); *About,* SHERPA PROJECT, https://www.project-sherpa.eu/about/ [https://perma.cc/XP22-CBKM] ("The SHERPA consortium has 11 partners from six European countries (representing academia, industry, civil society, standards bodies, ethics committees, art)."). For an example of an academic-governmental joint initiative in the UK, see Press Release, Dep't for Digit., Culture, Media & Sport, Office for A.I., and the Rt. Hon. Chris Philp MP, New UK Initiative to Shape Global Standards for Artificial Intelligence (Jan. 12, 2021), https://www.gov.uk/government/news/new-uk-initiative-to-shape-global-standards-for-artificial-intelligence [https://perma.cc/6X68-VXM3] ("The Alan Turing Institute, supported by the British Standards Institution (BSI) and the National Physical Laboratory (NPL), will pilot a new UK government initiative to lead in shaping global technical standards for Artificial Intelligence.").

Artificial Intelligence Initiative Act of 2020 (NAIIA),[131] which set the general overarching framework for future federal policies and regulations regarding AI.[132] Following the NAIIA guidelines, a National AI Advisory Committee was established in April 2022, and tasked with providing recommendations on a wide array of issues, including those related to accountability and legal rights.[133] However, no regulations have been adopted to date.[134]

Two prominent examples of international attempts to formulate principles for recommended AI regulation are the principles recommended by the OECD to policymakers in 2019[135] and the UNESCO recommendation on the ethics of AI in 2021.[136] The OECD recommendation sets out five general complementary principles that should be adopted by policymakers: "inclusive growth, sustainable development, and wellbeing; human-centered values and fairness; transparency and explainability; robustness, security, and safety; and accountability."[137] The UNESCO recommendations are more detailed, classifying these general principles into specific issues to be addressed by policymakers, such as notions of proportionality and "do no harm," safety and security, fairness and non-discrimination, sustainability, right to privacy and data protection, human oversight and determination, transparency and explainability, and last,

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[131] *See* National Artificial Intelligence Initiative Act of 2020, H.R. 6216, 116th Cong. (2020).

[132] *About Artificial Intelligence*, NAT'L A.I. INITIATIVE OFF., https://www.ai.gov/about/ [https://perma.cc/J5EJ-XW9C].

[133] *The National AI Advisory Committee (NAIAC)*, NAT'L A.I. INITIATIVE OFF., https://www.ai.gov/naiac/ [https://perma.cc/5RZZ-4P6V].

[134] Daylyn Brooke Gilbert, *Implementation of AI into Federal Agencies: Keeping an Eye on the Federal Workforce*, 1 (July 23, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891943 [https://perma.cc/32HK-TKG4] ("Recent political discourse about AI has been slow and advising reports fail to address important factors in the implementation of AI such as logistics surrounding the federal workforce.").

[135] *Recommendation of the Council on Artificial Intelligence,* ORG. FOR ECON. CO-OP. & DEV., OECD/LEGAL/0449 (May 22, 2019) [hereinafter OECD AI].

[136] *Recommendation on the Ethics of Artificial Intelligence*, U.N. EDUC., SCI. & CULTURAL ORG., Annex 1, 41C/73 (Nov. 22, 2021) [hereinafter UNESCO AI], https://unesdoc.unesco.org/ark:/48223/pf0000379920.page=14 [https://perma.cc/DY2P-MWMD].

[137] OECD AI, *supra* note 135, at 3.

responsibility and accountability.[138] Another international initiative is the one led by the Council of Europe *ad hoc* committee on AI (CAHAI), which promotes an international legal framework based on the standards of human rights and the rule of law.[139]

In contrast to the United States, the EU is much more advanced in promoting an AI regulatory regime. In 2020, the EU took its first affirmative step towards regulation by way of a white paper on AI, which emphasized the need to promote an overarching regulatory setting that would allow the development of a trustworthy AI environment.[140] The EU Commission has stressed that although AI has the potential to change human lives by promoting the public good in a range of aspects, it also entails potential risks, "such as opaque decision-making, gender-based or other kinds of discrimination, intrusion in our private lives or being used for criminal purposes."[141] Consistent with this statement, the European Parliament has adopted several resolutions related to AI, including on ethics,[142] liability,[143] and copyright.[144] In April 2021, the EU Commission presented its

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[138] UNESCO AI, *supra* note 136, at Annex 8–11.

[139] *See CAHAI-Ad Hoc Committee on Artificial Intelligence*, COUNCIL OF EUR., https://www.coe.int/en/web/artificial-intelligence/cahai [https://perma.cc/F98N-S8VZ] (explaining the task of the ad-hoc committee, that "[u]nder the authority of the Committee of Ministers, the CAHAI [is instructed to] examine[] the feasibility and potential elements on the basis of broad multi-stakeholders consultations, of a legal framework for the development, design and application of artificial intelligence, based on the Council of Europe's standards of human rights, democracy and the rule of law.").

[140] *Commission White Paper on Artificial Intelligence–A European Approach to Excellence And Trust*, 1, COM (2020) 65 final (Feb. 19, 2020), https://commission.europa.eu/document/d2ec4039-c5be-423a-81ef-b9e44e79825b_en [https://perma.cc/WDQ6-98HM].

[141] *Id.*

[142] Resolution of 20 October 2020 With Recommendations to the Commission on a Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies, EUR. PARL. DOC. 2020/2012(INL), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2012 [https://perma.cc/J3DW-P2BY].

[143] Resolution of 20 October 2020 with Recommendations to the Commission on a Civil Liability Regime for Artificial Intelligence, EUR. PARL. DOC 2020/2014(INL), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.pdf [https://perma.cc/HVJ6-LA9N].

[144] Resolution of 20 October 2020 on Intellectual Property Rights for the Development of Artificial Intelligence Technologies, EUR. PARL. DOC. 2020/2015(INI),

proposal for an Artificial Intelligence Act,[145] aimed at guaranteeing that the function of AI technologies conforms to the "Union values, fundamental rights and principles."[146] The proposed legislation covers a wide variety of topics, from the prohibition of various types of AI systems[147] to the imposition of operational requirements according to the type of the AI system and its categorization. AI systems falling in the category of "high risk" would be subject to a strict standard of requirements,[148] including implementation of a risk management system[149] and data management governance standards.[150] Certain transparency obligations would also be required for the limited purpose of enabling the operator of the AI system "to interpret the system's output and use it appropriately,"[151] or to provide the operators with appropriate instructions.[152] However, these obligations regulate the relations between the manufacturer of high-risk AI systems and the operators of such systems, and it does not apply to the individual end-user.

Yet again, the standard of transparency and disclosure proposed by the AI Act was criticized for being more akin to the standard required by consumer protection laws, which imposes product liability standards, and for not setting a higher threshold in protecting individuals' rights.[153] The transparency problem concerning the use

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https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.pdf [https://perma.cc/72E4-BJSR].

[145] AI Act, COM (2021) 206 final 4 (Apr. 21, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 [https://perma.cc/FN6C-FKDE]. *See also* Inês de Matos Pinto, *The Draft AI Act: A Success Story Of Strengthening Parliament's Right Of Legislative Initiative?*, 22 ERA FORUM 619, 619 (2021).

[146] AI Act, COM (2021) 206 final 4 (Apr. 21, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 [https://perma.cc/FN6C-FKDE].

[147] *Id.* at 43.

[148] *Id.* at 45–46.

[149] *Id.* at 46–48.

[150] *Id.* at 48–49.

[151] *Id.* at 50.

[152] *Id.*

[153] Smuha et al., *supra* note 21, at 48–54 (explaining why the Proposal fails to ensure meaningful transparency, accountability, and rights to public participation and why the Proposal lacks meaningful substantive rights for individuals); Hannah Bloch-Wehba, *Transparency's AI Problem*, KNIGHT FIRST AMEND. INST. (June 17, 2021), https://knightcolumbia.org/content/transparencys-ai-problem [https://perma.cc/6QKN-Z4YR]; Sümeyye Elif Biber, *Machines Learning the Rule of Law: EU Proposes the*

of AI systems, particularly by the business sector, raises severe concerns that far exceed questions of product liability and consumer protection.[154] Various initiatives tasked with designing the principles underlying AI regulation have stressed that such legal framework should provide guarantees for the protection of human rights and the rule of law.[155] However, the proposed legislative initiative fails to provide a full-fledged guarantee for the protection of human rights because it does not confer any rights on individuals *vis-à-vis* the operators of the AI systems[156]—such as the right to receive full disclosure of relevant information by injured individuals, for example, by those whose content was blocked or taken down by an AI content moderation system.[157] Although the proposed AI Act signifies a substantial move towards regulating the field, it is not aimed at imposing public law standards on the business sector when operating AI systems.

The direct imposition of obligations introduces requirements aimed at enhancing accountability in the digital sphere based on public law rationales. As noted, accountability is a concept reflecting the need to maintain public interests, including guarantees for human rights, public trust in the government, government legitimacy, fair and equitable governance, and participation of the

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World's First Artificial Intelligence Act, VERFBLOG (July 13, 2021), https://ssrn.com/abstract=3951908 [https://perma.cc/MUF6-AWVQ]; Gianclaudio Malgieri, & Frank Pasquale, *From Transparency to Justification: Toward Ex Ante Accountability for AI* 1 (Brook. L. Sch., Legal Studies Working Paper No. 712, Brussels Privacy Hub Working Paper, No. 33, 2022), https://ssrn.com/abstract=4099657 [https://perma.cc/NR8G-J55A].

154 Charlotte Tschider, *Legal Opacity: Artificial Intelligence's Sticky Wicket*, 106 IOWA L. REV. 126, 160–64 (2021).

155 *See supra* notes 137-139 and accompanying text.

156 Smuha et al., *supra* note 21, at 51 ("[T]he lack of substantive individual rights in the Proposal reduces individuals to entirely passive entities, unacknowledged and unaddressed in the regulatory framework. The Proposal's silence on individuals is especially striking considering that one of the primary reasons why AI is being regulated at all is to protect those very individuals from the risks generated by AI systems.").

157 *Id.* at 52 ("[W]hile the Proposal does explicitly address the need for transparency, it does not guarantee that the general public receive sufficient information to understand the risks which they are being subjected to. Moreover, these transparency obligations are not grounded in a framework which gives individuals clear pathways for contesting the existence or operation of certain AI systems and thereby using the obtained information in a way which contributes to fundamental rights protection.").

citizens in the operation of the "bureaucratic state."[158] These notions are in the realm of public law. By contrast, in the domain of private law, private actors are motivated by personal interests, which in the business sector means maximizing profits.[159] The dividing line between public and private law, which is blurred in many European jurisdictions,[160] is still adhered to under American law. According to the "state action" doctrine developed by the Supreme Court, the constitutional rights of individuals apply only to state actors, not to private ones.[161] For example, although the United States Constitution proclaims the principle of nondiscrimination by the state, in the absence of federal or state statutory law to the contrary, private discrimination is not actionable.[162] The state action doctrine raises many questions, some controversial, about its limits, boundaries, and justification,[163] and it creates many uncertainties regarding a

158 *See* Dowdle, *supra* note 120, at 205–06, 209; Bovens, *supra* note 15, at 182–83, 193.

159 *See* American Law Institute, 1–2 Principles of Corporate Governance § 2.01, ("[A] corporation [§ 1.12] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."); *see also* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/8BHN-FPHE].

160 *See, e.g.,* Fischman-Afori, *supra* note 17; Eleni Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, 21 EUR. L.J. 657, 657 (2015) (reviewing various EU cases applying human rights in the private sphere).

161 *See* Civil Rights Cases, 109 U.S. 3, 18 (1883) (holding that Congress lacked power to enact legislation regulating private racial discrimination under the Fourteenth Amendment); *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 504 (1985) ("State action doctrines remain the dividing line between the public sector, which is controlled by the Constitution, and the private sector, which is not.").

162 U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972) (holding that a private restaurant or bar may discriminate against its clientele).

163 *See* Chemerinsky, *supra* note 161, at 506 (advocating for the abolition of the state action doctrine); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L. J. 779, 789 (2004) (calling for the doctrine's abolishment).

clear line between state and non-state actors.[164] But this rigid perception is still adhered to by the Supreme Court. For example, in June 2019, in the case of *Manhattan Community Access Corp. v. Halleck*, the Court held that a private company that contracted with New York City to run a television network was not a "state actor" and therefore was not constitutionally bound to protect freedom of speech.[165] Since in practice the state action doctrine does not compel non-state actors to uphold human rights standards, it is questionable whether it could extend genuine public law principles, such as full-fledged accountability and transparency, to the technology companies controlling the digital sphere.[166] Therefore, current United States law seems to significantly prevent the true imposition of public law obligations on private corporations. As noted, even EU legislative initiatives aimed at regulating the digital sphere and the operation of AI systems propose a limited legal framework for promoting a digital governance regime.[167] Thus, the establishment of a comprehensive, global, and uniform digital governance regime is not yet imminent, despite a pressing global public need.

B. Competition Law and the Consumer-Welfare Agenda

Competition law provides another possible path for restraining the power of technology companies. The gigantic size of such companies allows them to govern the digital sphere while enhancing their market dominance.[168] These companies are monopolies.[169] In some cases, the online users, i.e., the consumers, have no alternative

164 *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13, 22–23 (1948) (holding that judicial enforcement of a privately entered discriminatory contract qualifies as state action, while private discriminatory contracts alone are not state action); *see also* Fischman-Afori, *supra* note 17, at 151–55.

165 *See* 139 S. Ct. 1921, 1931 (2019).

166 Klonick, *supra* note 7, at 1659.

167 *See e.g., supra* note 153 and accompanying text.

168 See Hovenkamp, *supra* note 31, at 1965–66 (discussing the complexity of defining the relevant market in the case of online platforms, and arguing that "markets" in the digital sphere should be perceived broadly); *see also* OECD INTRO., *supra* note 25, at 36 (explaining the complexities in defining what the market is in the case of online platforms, especially if they provide a "two-sided" service and one side is offered for free).

169 *See* Roser et al., *supra* note 62; Complaint at 2-3, United States v. Google LLC, No.1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download [https://perma.cc/X 9YR-ZVLN].

to the services of the leading online business, which has unconstrained power over users.[170] The role of competition law is to restrain market dominance and enhance competition.[171]

The growing power of some of the giant online platforms has triggered significant public outcry around the world, including scholars,[172] civil organizations,[173] and public representatives,[174] all of whom call to restrain these platforms via competition law measures. One of competition law's main remedies is breaking up monopolies and preventing future consolidation.[175] Measures proposed against the monopolistic online platforms include the imposition of unbundling obligations that would limit the scope of their activities,[176] or interoperability mandates that require the large technology companies to provide competitors access to their systems.[177]

In recent years, the competition agencies in various jurisdictions have taken measures against alleged anticompetitive acts of large technology companies. In the United States, antitrust agencies, whose mandate is to protect consumers, have already taken measures against large online services, such as misrepresenting

[170] The lack of substitutes for consumers was a factor at the heart of the EU Commission Judgment held on November 10, 2021, concerning Google's abuse of monopoly power. *See* Google LLC v. European Comm'n, Case T-612/17, ¶ 44 (Nov. 10, 2021) ("[T]he Commission found that, from the standpoint of internet users' demand, there was limited substitutability between general search services and other internet services.").

[171] FED. TRADE COMM'N, THE ANTITRUST LAWS (2020), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/A7MN-N35X] ("[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.").

[172] *See, e.g.*, Khan, *supra* note 23, at 960; Wu, *supra* note 23, at 1.

[173] *See, e.g.*, Cory Doctorow, *Competitive Compatibility: Year in Review 2020,* ELEC. FRONTIER FOUND. (Dec. 30, 2020), https://www.eff.org/deeplinks/2020/12/competitive-compatibility-year-review [https://perma.cc/876A-SR5Y].

[174] *See generally*, DIG. MARKETS INVESTIGATION, *supra* note 27.

[175] *See* Clayton Act § 7, 15 U.S.C. § 18; Sherman Act § 2, 15 U.S.C. § 2; Federal Trade Commission Act, 15 U.S.C. § 45; *see also* Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 YALE L. J. 1916, 1917 (2018).

[176] *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1047–49 (2019).

[177] *See* DIG. MARKETS INVESTIGATION, *supra* note 27, at 19–21; Doctorow, *supra* note 173.

security or privacy practices.[178] More recently, the FTC filed an action against Facebook, claiming that it engaged in anticompetitive conduct, including consolidation with potential competitors.[179] The Department of Justice filed an action against Google, similarly claiming severe anticompetitive conduct that has "foreclosed competition for internet search."[180] In the EU, a series of actions against large online companies were filed, some of which have already reached a final ruling after appeal. For example, in November 2021, the EU General Court upheld a European Commission decision that concluded Google had abused its dominant position by promoting its own shopping services in its search engine results.[181] In December 2020, the EU proposed the Digital Markets Act (DMA), aimed at addressing problems stemming from the highly centralized digital services market.[182] The DMA includes an entire "package" of regulations for a new digital governance regime, aimed at minimizing various negative consequences of technology companies' dominance by preventing abuse of power and anti-competitive conduct.[183]

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178 *See* Terrell McSweeny, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027, 1035–37 (2017).

179 Amended Complaint at 1, FTC v. Facebook, Inc., No. 1:20-cv03590-JEB (D.D.C. Aug. 19, 2021), https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.75.1.pdf [https://perma.cc/4868-CN3D].

180 Complaint at 4, United States v. Google LLC, No.1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download [https://perma.cc/X 9YR-ZVLN].

181 *See* Google LLC v. European Comm'n, Case T-612/17, ¶ 69 (Nov. 10, 2021) ("[T]he conduct specifically identified by the Commission as the source of Google's abuse is, in essence, the fact that Google displayed its comparison shopping service on its general results pages in a prominent and eye-catching manner in dedicated 'boxes', without that comparison service being subject to the adjustment algorithms used for general searches, whereas, at the same time, competing comparison shopping services could appear on those pages only as general search results (blue links) that tended to be given a low ranking as a result of the application of those adjustment algorithms.").

182 *See generally Proposal for a Regulation of The European Parliament and of The Council on Contestable and Fair Markets in The Digital Sector (Digital Markets Act)*, European Comm'n (Dec. 15, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en [https://perma.cc/2T4M-VJBN]., [hereinafter Digital Markets Act].

183 For example, Articles 5 and 6 to the Digital Markets Act poses various obligations and restrictions on the relevant technology companies particularly towards other small

Regulatory enforcement actions focus on traditional aspects addressed by competition laws: consolidation, abuse of dominant power in a way that harms competition, and harm to consumers.[184] This is consistent with the general aim of competition law as currently perceived by the enforcing authorities; that is, to prevent constraints on trade.[185] Therefore, authorities are mandated to take measures against acts that harm consumers.[186] This mandate reflects the view that competition law and its enforcement should focus on consumer welfare—in other words, on the prices of products and services. On a descriptive level, current enforcement of competition law deals with the economic implications of anti-competitive conduct, and it does not handle broader issues concerning the effect of monopolies on the social environment and on democratic principles.[187] Antitrust's focus on the consumer perspective is at the heart of public discourse and scholarly writing.[188] Although there has been criticism of this narrow perception of competition law, and there is a public outcry for reform,[189] it remains to be seen whether American authorities will change their antitrust enforcement policy.

The current narrow approach as to the scope of competition law is not the only obstacle standing in the way of a comprehensive solution to the digital sphere's monopolization. Another barrier is the menu of remedies afforded by competition law. The traditional remedies include breaking up large companies, preventing future consolidations, and imposing fines.[190] The purpose of these remedies under the principle of consumer welfare is primarily to restore

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companies which are using their services, in order to make the digital economy more contestable. *Id.* at arts. 5, 6.

[184] Hovenkamp, *supra* note 31, at 2003 ("[T]he conduct alleged in the various government complaints filed in late 2020 against Facebook and Google mainly involves contracting with various suppliers or other business partners.").

[185] *See* FED. TRADE COMM'N, *supra* note 171.

[186] *About the FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc [https://perma.cc/AKW7-56U8]

[187] *See* FED. TRADE COMM'N, *supra* note 171.

[188] *See, e.g.*, Yoo, *supra* note 24, at 2147; Lande, *supra* note 24, at 257; *see also* Daniel Hanley, *A Topology of Multisided Digital Platforms*, 19 CONN. PUB. INT. L.J. 272, 274 (2020).

[189] WU, *supra* note 26, at 18.

[190] *See* Federal Trade Commission Act, 15 U.S.C. § 45; Clayton Act § 7, 15 U.S.C. § 18; Sherman Act § 2, 15 U.S.C. § 2.

competitive conditions.[191] However, the question is not only whether breaking up the online platform monopolies would advance consumer welfare.[192] Rather, the question is whether antitrust remedies can address the problems of the information market and the negative free speech consequences of online platforms' practices. Generating greater competition between search engine services or social media platforms would not eliminate this problem.

The need to adopt digital governance principles is not necessarily connected to the size of the company and its dominant position in the market. Even if an online social media service operates with a limited and local scope, it should not be exempt from certain core principles of online conduct aimed at protecting fundamental rights. Small and medium-size businesses should also be regulated if such norms are perceived as being in the public interest. Therefore, competition law, which is designed to impose remedies on monopolies, may fall short in providing a normative setting for a comprehensive digital governance regime. An example that highlights the need for governance of small and medium-size companies is the German NetzDG Act of 2017, which imposes certain obligations on social networks concerning the removal of hate speech, if the service has more than two million users.[193] Considering that the population in Germany exceeds eighty million people,[194] and the ubiquity of social media use in Western countries,[195] the two million users threshold reflects a standard that is far from targeting only those with a dominant market position. It is impossible, therefore, to impose a norm aimed at protecting human rights or democratic principles using traditional competition law measures, which are focused on abuse of market power. Given this incomplete alignment,

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191 Hovenkamp, *supra* note 31, at 2006 n.238.

192 *Id.* at 1956–57, 2006, 2010, 2020–21 (arguing that breaking up the online monopolies would not necessarily advance consumer welfare and noting the need for more creative or particularized remedies).

193 *See* Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, Bundesministerium der Justiz und für Verbraucherschutz [BMJV] at 3352 § 1.2 (Ger.).

194 Germany Population, WORLDOMETER, https://www.worldometers.info/world-population/germany-population/ [https://perma.cc/X74S-NRBY].

195 *See* Roser et al., *supra* note 62 (explaining that the average use of social networks by young people aged sixteen to twenty-four in OECD countries is close to 90%).

competition laws cannot be the sole path for establishing a digital governance regime, although they may serve as an important measure for promoting an adequate one.

III. INTRODUCING GLOBAL DIGITAL GOVERNANCE THROUGH CORPORATE REGULATION

Given the many obstacles described above in accomplishing an adequate and widespread digital governance regime, this Article proposes a new solution using corporate governance tools. The digital sphere is controlled by private corporations, so the desired regulation may be achieved using the tools of corporate law. Corporate governance refers to the system of rules and practices by which a company is directed and controlled.[196] It is a broad concept aimed at ensuring that companies are appropriately managed in order to accomplish their objectives of maximizing profits efficiently.[197] In particular, such requirements and standards address decision-making processes and control the balance of interests of relevant stakeholders. These include not only shareholders, but also creditors, suppliers, employees, customers, and the community at large.[198] In recent decades, corporate governance principles worldwide have focused on practices and procedures aimed at promoting corporate accountability.[199] Accountability norms promote stakeholder confidence that companies are managed in a way that best achieves their objectives, thereby boosting trust in the company and in the markets in general.[200]

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196 *See* OECD PRINCIPLES, *supra* note 32, at 2–3.

197 *See* Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance* 4 (Nat'l Bureau of Econ. Rsch., Working Paper 5554, 1996), https://www.nber.org/system/files/working_papers/w5554/w5554.pdf [https://perma.cc/8LDL-YHE7] ("Our perspective on corporate governance is a straightforward agency perspective, sometimes referred to as separation of ownership and control.").

198 CLAESSENS & YURTOGLU, *supra* note 35, at 3 ("Corporate governance is a relatively recent concept. Over the past decade, the concept has evolved to address the rise of corporate social responsibility (CSR) and the more active participation of both shareholders and stakeholders in corporate decision making.") (internal citations omitted).

199 *See* OECD PRINCIPLES, *supra* note 32.

200 *Id.* at 11, 17–29.

Corporate governance has been at the heart of legal discourse in the last two decades, attracting massive attention from policymakers and scholars, and is subject to ongoing expansion worldwide.[201] Corporate governance practices vary from country to country, but core principles are shared in developed democratic countries.[202] These principles pertain particularly to publicly listed companies because of the special need to protect the public interest and increase trust in the stock market.[203] Thus, corporate governance pertains to a complex set of norms, applied by various measures, that promote societal values in the business sector, especially in the financial arena.

The introduction of a digital governance regime through corporate governance may overcome the obstacles discussed above. Corporate governance may bridge the private-public law divide. Despite being a regulatory measure in the business sector, it could inject social and democratic values into corporate considerations. It may also leverage the corporate law infrastructure based on complex relationships between stakeholders' that extend beyond typical, contractual relations. Finally, corporate governance may affect the conduct of corporations that rule the digital sphere, and given that these are gigantic multinational companies, the outcome may be the establishment of a *de facto* global and uniform digital governance regime. The following proposal is based on the potential of corporate

201 *See, e.g.*, *id.*; G20/OECD PRINCIPLES, *supra* note 39; CLAESSENS & YURTOGLU, *supra* note 35; *see generally* Grant Kirkpatrick, *The Corporate Governance Lessons from The Financial Crisis*, *in* FINANCIAL MARKET TRENDS (2009), https://www.oecd.org/finance/financial-markets/42229620.pdf [https://perma.cc/T8CA-73VC]. For discourse regarding corporate governance policies in legal literature in recent years only, see Gregory E. Louis, *Unlocking Progressive Corporate Governance: The Black and Brown HDFC Key*, 10 AM. U. BUS. L. REV. 79 (2021); *see also* Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 934 (2021); Jeffrey Meli & James C. Spindler, *The Promise of Diversity, Inclusion, and Punishment in Corporate Governance*, 99 TEX. L. REV. 1387, 1391 (2021); Abdullah Ahmed Almanie, *Corporate Governance Reforms in the United Kingdom*, 106 J. L. POL'Y & GLBLIZAT'N 30, 30 (2021).

202 For example, transparency is regarded as a bedrock of a developed stock market. *See* G20/OECD Principles, *supra* note 39, at 37–38.

203 OECD PRINCIPLES, *supra* note 32, at 11 ("Corporate governance is one key element in improving economic efficiency and growth as well as enhancing investor confidence.").

governance to address the challenges presented by the digital sphere, generated by the inherent merits of corporate governance.

A. The Merits of Corporate Governance

1. Introducing Public Law Principles into the Private Business Arena

A corporate governance regime includes a combination of mandatory rules and default rules that a company may choose to adopt or modify in its certificate of incorporation and bylaws. American companies are guided by various legal regimes concerning corporate governance. These regimes include the corporate law of the state where the company is incorporated, such as the Delaware General Corporation Law; applicable federal rules and regulations, including those of federal agencies like the SEC, and; various regulations imposed by the stock exchange where the company is listed for trading, such as the rules of the New York Stock Exchange.[204] The mandatory rules typically concern directors' and officers' obligations and duties, the institutional structure of the company, and the responsibilities of each body.[205] Some rules refer to shareholders' rights and duties, especially for controlling shareholders.[206] Moreover,

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[204] Holly J. Gregory et al., *United States*, *in* CORPORATE GOVERNANCE 174 (Holly J. Gregory ed., 2021) (explaining the primary sources of law, regulation, and practice relating to corporate governance).

[205] *See* Principles of Corporate Governance: Analysis and Recommendations, *Part III—Corporate Structure* (AM. L. INST. 2023); *see, e.g.,* 1-3 Principles of Corporate Governance: Analysis and Recommendations § 3.01 (AM. L. INST. 2023) ("The management of the business of a publicly held corporation [§ 1.31] should be conducted by or under the supervision of such principal senior executives [§ 1.30] as are designated by the board of directors, and by those other officers [§ 1.27] and employees to whom the management function is delegated by the board or those executives, subject to the functions and powers of the board under § 3.02.").

[206] *See* Principles of Corporate Governance: Analysis and Recommendations, *Part V—Duty of Fair Dealing* (AM. L. INST. 2023); *see, e.g.,* 1–5 Principles of Corporate Governance: Analysis and Recommendations § 5.10 ("A controlling shareholder [§ 1.10] who enters into a transaction with the corporation fulfills the duty of fair dealing to the corporation with respect to the transaction if: (1) The transaction is fair to the corporation when entered into; or (2) The transaction is authorized in advance or ratified by disinterested shareholders [§ 1.16], following disclosure concerning the conflict of interest [§ 1.14(a)] and the transaction [§ 1.14(b)], and does not constitute a waste of corporate assets [§ 1.42] at the time of the shareholder action.").

increasing requirements concerning reports and disclosure obligations by all stakeholders have been adopted as part of the mandatory corpus of corporate governance.[207]

In addition to the mandatory rules concerning corporate governance, a company may adopt its own corporate policies. Such self-regulation may pertain to the rights and obligations of the stakeholders, as long as they do not contradict the mandatory norms, as well as various managerial and procedural aspects of running a business. A corporation may also voluntarily adopt standards enshrined in various codes of best practices, which are common self-regulation tools.[208] These are basic principles of corporate law worldwide.

The realm of voluntary mechanisms to induce compliance with higher standards has evolved extensively in the last two decades, reflecting the decline of the mandatory versus voluntary dichotomy with respect to regulatory measures.[209] A prominent mechanism developed in this period concerns the obligation to disclose whether a certain recommended code of conduct was adopted voluntarily by a company, and if not, to explain why—commonly known as "comply or explain."[210] Although it does not compel companies to comply with higher standards and obligations, it nevertheless puts significant market pressure on publicly listed companies to comply with these codes.[211] This semi-mandatory mechanism is regarded as a sophisticated vehicle for imposing corporate governance rules in a relatively gentle manner that generates little resistance. Disclosure rules in the United States serve as an example of this type of mechanism. Although most are mandatory, some additional "comply or

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207 G20/OECD PRINCIPLES, *supra* note 39, at 37 ("The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.").

208 Gregory et al., *supra* note 204.

209 Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 78–81 (2002).

210 The term was first coined in the UK by the Cadbury Report. *See* REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (1992) (Cadbury Report), https://ecgi.global/code/cadbury-report-financial-aspects-corporate-governance [https://perma.cc/P8D8-SQAZ].

211 ORG. FOR ECON. CO-OP. & DEV., OECD CORPORATE GOVERNANCE FACTBOOK 2021, www.oecd.org/corporate/corporate-governance-factbook.htm [https://perma.cc/REX4-MTL7].

explain" provisions have been introduced by the Sarbanes-Oxley Act.[212] One of the significant advantages of "comply or explain" is that it is not an entirely loose and voluntary framework, but rather a clear requirement by the regulator, leaving companies the choice of either complying with a fixed norm or explaining non-compliance. There is no "code shopping," because the companies may not define the desired norm according to their own will, and therefore the policy imposes high standards of conduct.[213] "Comply or explain" is based on the idea that the business sector should be nudged toward higher standards of conduct and management gradually, using a combination of top-down, bottom-up, and in-between regulations. Therefore, the mechanism is the OECD's recommended method for implementing a corporate governance code of best practices, as an in-between regulatory model.[214]

Generally speaking, the collection of corporate governance norms aims at promoting several values. Some of these have to do with traditional economic concerns of efficient markets. Yet, examining the principle of efficiency reveals additional principles that have become standard measures of corporate governance. One such principle is fairness,[215] particularly toward minority, non-controlling shareholders.[216] Enhancing trust in the markets requires protecting public shareholders' interests and guaranteeing fair distribution of resources and wealth between shareholders.[217] The notion of

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212 Sarbanes-Oxley Act of 2002, § 406(a)–(b), 15 U.S.C. § 7264 (2012).

213 Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting,* 21 LEWIS & CLARK L. REV. 317, 334 (2017).

214 G20/OECD PRINCIPLES, *supra* note 39, at 13 ("The legislative and regulatory elements of the corporate governance framework can usefully be complemented by soft law elements based on the 'comply or explain' principle such as corporate governance codes in order to allow for flexibility and address specificities of individual companies.").

215 *Id.* ("The corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement.").

216 OECD PRINCIPLES, *supra* note 32, at 19 ("Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class."). *Id.* at 24 ("Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.").

217 *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 646 (Del. 2014) (holding that under Delaware corporate law, controlling shareholders are subject to fiduciary duties to the company, requiring full fairness in the various transactions in which they are involved, which may be reviewed by the court).

fairness has evolved further into the principle of equality. Wealth and resources should be distributed on an equal basis between shareholders (on a *per ratio* basis).[218] Although fairness and equality are adopted in corporate governance as instrumental principles for promoting economic growth, they became a fundamental element in judicial review.[219] Fairness and equality are the core moral principles of public law.[220] The private sector, at least in the United States, is not bound by the principle of equality, as discussed above. But corporate governance has introduced these public law notions into the corporate realm because it is considered a catalyst in promoting the public good in its broadest sense.[221]

The principles of efficiency and fairness have evolved under the prism of corporate governance to certain standards and specific rules aimed at enhancing accountability. Company directors and officers must be accountable to shareholders, particularly to public shareholders, to guarantee that corporations meet their objectives.[222] Accountability is an acknowledged principle in public law; and in administrative law it means that public authorities should act according to basic standards of transparency, providing reasons for their decisions, and their decisions should be subject to objective external

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[218] G20/OECD PRINCIPLES, *supra* note 39, at 24 ("All shareholders of the same series of a class should be treated equally.").

[219] *See, e.g.*, Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939, 941–42, 946–47, 951–57 (2019); Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole,* 72 VAND. L. REV. 1977, 1980–81, 1983 (2019); *see also* Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014) (stating that bylaws, even though legally permissible, may not be enforceable depending on how they are adopted and invoked).

[220] G.A. Res. 217 (III) A, art. 1, Universal Declaration of Human Rights (Dec. 10, 1948) ("All human beings are born free and equal in dignity and rights.").

[221] Katelouzou & Zumbansen, *supra* note 44, at 9–10 ("Today, 'corporate governance' is no longer a quasi-technical term internal to corporate law as a distinct legal area, but figures as a reference point for wide-ranging debates around the structure of the board, gender parity, executive compensation ('equal pay/say on pay') as well as issues touching on the corporation's wider social as well as environmental 'responsibilities.'"); *see also* Zumbansen, *supra* note 44, at 71.

[222] G20/OECD PRINCIPLES *supra* note 39, at 45 ("In some countries, companies have found it useful to explicitly articulate the responsibilities that the board assumes and those for which management is accountable . . . The board is not only accountable to the company and its shareholders but also has a duty to act in their best interests.").

review.[223] Corporate governance adopted a nuanced version of these standards, adjusted to the realm of publicly listed companies.[224] The accountability of corporate directors and officers is reflected in their duty to provide adequate reports and disclosures, as specified in detail by the various rules.[225] Transparency, reflected by disclosure obligations, is the bedrock of securities regulations.[226]

To summarize this point, corporate governance is a legal regime that introduces, in various ways and to a different extent, some core public law principles and standards into the private business sector.[227] Despite the general obstacle of imposing public law norms in the private law sphere, the public-private law divide faces gradual developments that are blurring the distinction. Corporate governance is a mechanism that allows further embedding of the principles and managerial standards of public law into the corporate realm, in accordance with emerging societal needs.

2. Promotion of Social and Liberal Values Beyond Short-Term Economic Considerations

In recent decades, corporate governance has been used to promote the greater agenda of CSR, including attention to ESG aspects of corporate conduct.[228] Within this framework, various soft, usually non-coercive, mechanisms are used to push for the adoption of

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223 *See* BREYER, *supra* note 129; Cary Coglianese*, Administrative Law: The U.S. and Beyond*, *in* INTERNATIONAL ENCYCLOPEDIA OF SOCIAL & BEHAVIORAL SCIENCES 109, 109 (James D. Wright, ed., 2d ed. 2015); Administrative Procedure Act, 5 U.S.C. §§ 551–559 (1946).

224 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1305 (1984).

225 *See* G20/OECD PRINCIPLES, *supra* note 39, at 37.

226 *See About the SEC*, U.S. SEC. & EXCH. COMM'N [hereinafter *About the SEC*], https://www.sec.gov/about.shtml [https://perma.cc/UJ9Z-RTGY] ("The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public's trust.")*; see also* G20/OECD PRINCIPLES, *supra* note 39, at 38 ("A strong disclosure regime can help to attract capital and maintain confidence in the capital markets.").

227 Katelouzou & Zumbansen, *supra* note 44, at 10.

228 M. Rosario Gonzalez-Rodriguez et al., *The Social, Economic and Environmental Dimensions of Corporate Social Responsibility: The Role Played by Consumers and Potential Entrepreneurs*, 24 INT'L BUS. REV. 836, 836–37 (2015). *See also* Hazen, *supra* note 40; Chaffee, *supra* note 40.

higher standards of conduct and to promote corporate accountability toward both the shareholders[229] and the public at large.[230] The underlying rationale is that companies, as proliferating legal entities in modern life, are expected to act as "good citizens" in society and to contribute to the wellbeing of the public.[231] CSR and ESG address a growing array of social challenges worldwide, such as fair labor, appropriate employment conditions, and environmental protection.[232] The principles of social responsibility adopted by companies reflect a significant engagement to promote values that are not necessarily consistent with short-term economic goals. For example, companies may voluntarily undertake measures for the sake of cleaner manufacturing, although such undertakings may increase their production costs. These moves may come in response to public pressure, and may be intended to gain social benefits, such as a better reputation in the stock market.

These mechanisms of voluntary compliance with higher standards have been the subject of debate. Although some have praised their merits as legal tools achieving best results under the given circumstances of no regulation,[233] others have criticized them as ineffective measures resulting from the failure to regulate the relevant behavior.[234] In light of the criticism of the voluntary mechanisms,

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229 Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577, 579–81 (2007); Allison M. Snyder, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer*, 2007 COLUM. BUS. L. REV. 565, 573 (2007).

230 *See generally* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 77 (2005).

231 *See* Chaffee, *supra* note 40; UN PRINCIPLES, *supra* note 41, at 13 ("Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.").

232 OECD RBC GUIDELINES, *supra* note 41; *see generally* INT'L ORG. FOR STANDARDIZATION, ISO 26000 GUIDANCE ON SOCIAL RESPONSIBILITY (2010), https://www.iso.org/standard/42546.html].

233 *See, e.g.*, Rachel Kyte, *Balancing Rights with Responsibilities: Looking for the Global Drivers of Materiality in Corporate Social Responsibility & the Voluntary Initiatives that Develop and Support Them*, 23 AM. U. INT'L L. REV. 559, 560–65 (2008); Williams & Conley, *supra* note 230, at 102.

234 Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with*

the inducement of behavioral change, aimed at encouraging companies to pursue social ends, is occasionally based on regulation imposing disclosure. For example, in 2010, the SEC released guidelines requiring disclosure of issues relating to climate change.[235] Similarly, in 2014, the EU adopted the Non-Financial Reporting Directive, which imposes transparency obligations on large companies regarding the impact of their activities on the environment and on social and employment issues, their human rights compliance, and their anti-corruption and anti-bribery measures.[236] This type of regulation, similar to the "comply or explain" mechanism, is perceived as an in-between regulatory model, nudging the business sector toward higher standards of conduct.[237]

CSR and ESG have significantly expanded in recent years to address issues beyond the traditional scope, such as fair labor or environmental challenges. Corporations are recruited to promote core liberal principles, such as non-discrimination and gender equality, that have no direct or immediate economic effect on their business.[238] In the latest phase of the CSR and ESG movement, corporations are urged to adopt higher standards of conduct for the sake of strengthening liberal-democratic values in civic society. This aspect of CSR and ESG, as part of the corporate governance regime, is also gaining increased public attention as an effective tool for accomplishing social change. These liberal-democratic principles may be advanced by the tools used for tailoring corporate governance,

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Responsibilities, 23 AM. U. INT'L L. REV. 451, 453–55 (2008); Usha Rodrigues & Mike Stegemoller, *Placebo Ethics: A Study in Securities Disclosure Arbitrage*, 96 VA. L. REV. 1, 35–41 (2010).

235 SEC Commission Guidance Regarding Disclosure Related to Climate Change, SEC Interpretation, Release No. 33-9106, FR-82 (Feb. 8, 2010).

236 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014; *see also* Constance Z. Wagner, *Evolving Norms of Corporate Social Responsibility: Lessons Learned from the European Union Directive on Non-Financial Reporting*, 19 TENN. J. BUS. L. 619, 643–67 (2018).

237 Hazen, *supra* note 40.

238 Meli & Spindler, *supra* note 201, at 1403–05 (describing various legislative initiatives aimed at promoting greater diversity in the corporate board of directors); *see also* Richa Joshi, *Board Diversity: No Longer Optional*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 11, 2020), https://corpgov.law.harvard.edu/2020/10/11/board-diversity-no-longer-optional/ [https://perma.cc/V75K-JED9].

such as top-down binding regulation, or alternatively, by softer measures such as the "comply or explain" mechanism.[239] For example, in 2019, the SEC released new Compliance and Disclosure Interpretations, requiring companies that have adopted a policy concerning self-identified diversity characteristics to explain how they factor diversity into nomination decisions and other company policies.[240]

The issue of diversity and equal representation in the board of directors of publicly listed companies stands at the heart of a fierce legal battle in California. In 2018, California adopted a law addressing gender equality in the board of directors by setting mandated quotas,[241] and it was followed by a 2020 law concerning mandated quotas of directors from unrepresented communities.[242] These laws were struck down by courts in April and May 2022. Two successive decisions ruled that they violated the Equal Protection Clause of the California Constitution.[243] Without discussing these rulings and

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[239] Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L. J. 167, 205 (2018).

[240] SEC Compliance and Disclosure Interpretations of S-K, 116.11, 133.13 (Feb. 6, 2019), https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm [https://perma.cc/G6CB-H7NS]; *see also* SEC Advisory Comm. on Small & Emerging Companies, Recommendation Regarding Disclosure of Board Diversity (Feb. 16, 2017), https://www.sec.gov/info/smallbus/acsec/acsec-recommendation-021617-coporate-board-diversity.pdf [https://perma.cc/WAC3-2X2B].

[241] The 2018 California law required a minimum mandatory number of female directors in publicly listed companies whose principal executive office is in California. *See* S.B. 826, 2017-2018 Cal. S., Reg. Sess. § 2 (Cal. 2018).

[242] The 2020 California law required at least one director from an underrepresented community (as defined by the law) in publicly listed companies whose principal executive office is in California. *See* Cal. Assemb. B. 979 (AB 979).

[243] In April 2022, the Los Angeles County Superior Court ruled that the law imposing an obligation to include a director from unrepresented communities is unenforceable. *See* Crest v. Padilla, No. 20-STCV-37513 (L.A. Super. Ct. Apr. 1, 2022). In May 2022, the same court ruled that the law imposing an obligation of gender equality is unenforceable. *See* Crest v. Padilla, No. 19-STCV-27561, at 17 (L.A. Super. Ct. May 13, 2022) ("Neither Plaintiffs nor Defendant have identified any case holding that the government has a compelling interest in remedying societal discrimination or even specific, private-sector discrimination that justified the use of suspect classification."); *see also* Sarah Fortt et al., *California Gender Board Diversity Law is Held Unconstitutional,* INST. (June 12, 2022), https://corpgov.law.harvard.edu/2022/06/12/california-gender-board-diversity-law-is-held-unconstitutional/ [https://perma.cc/MBC7-296U].

their legal and constitutional aspects,[244] the rulings reinforced the pragmatic path of softer disclosure mechanisms for introducing higher standards of liberal principles, such as diversity of gender and race in the board of directors.[245] The merits of a semi-voluntary adherence to higher standards of non-discrimination and gender equality lie in providing a powerful tool for affecting the conduct of companies in areas that are beyond their core business,[246] and in its ability to overcome legal obstacles such as those raised by the California court.

The bottom line is that the CSR and ESG movements are still in their infancy, and the time may not be ripe yet for fully-fledged regulation that takes the business sector the extra mile into the normative realm of the public sector.[247] Nevertheless, non-coercive regulatory models enjoining corporations to meet various goals promoting the public interest at large serve as a pragmatic path for promoting desired public policies.

3. Integrating Multiple Stakeholders' Interests

Corporate governance is aimed at easing various conflicts of interest between key stakeholders, thus overcoming market failures that would otherwise prevent the operation of a company. For example, corporate governance attempts to solve the tension between the shareholders and company management through a set of rules

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[244] For the legal challenges of the California laws regarding diversity in the board of directors, see Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* (Stan. L. School, Working Paper No. 232, 2019), https://ssrn.com/abstract=3248791 [https://perma.cc/89FW-DMSM]; David A. Bell et al., *New Law Requires Diversity on Boards of California-Based Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 10, 2020), https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/ [https://perma.cc/RCE2-DG66].

[245] Meli & Spindler, *supra* note 201, at 1404–05 (describing Nasdaq's "comply or explain" policy); Grundfest, *supra* note 244 (proposing alternatively to induce major institutional investors to mount more aggressive activist campaigns that can rapidly and materially increase boardroom diversity).

[246] Andrew Keay, *Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?*, 34 LEGAL STUD. 279, 302 (2014).

[247] *See* Berger-Walliser & Scott, *supra* note 239, at 170 ("[C]ontrary to what the growth of CSR and its legalization may suggest, it has in no way undermined the notion of shareholder primacy, and in fact, the legalization of CSR may serve to foster the growth of the shareholder primacy mind-set across the globe.").

addressing the agency problem.[248] Corporate governance also regulates tensions between the shareholders themselves, particularly protecting against potential abuse by the controlling shareholders. Lastly, corporate governance equips the parties with tools for easing the complex tension between shareholders and creditors. The underlying rationale is to address these multifaceted conflicts and create a legal entity that operates through a complex regime of checks and balances.[249]

There are many examples of mechanisms of checks and balances in corporate governance, allowing the integration of multiple considerations and interests in the daily management of companies. Some are regarded as the basics of corporate law worldwide; others are more advanced contemporary doctrines. A prominent example concerns the nature of the charter and bylaws, which are the backbone of the operational norms of the company.[250] The rights of a shareholder are enshrined in a company's charter and bylaws, which emulate a contract, although these legal instruments are not full-fledged contracts.[251] For example, the charter and bylaws may be amended by a shareholders' majority vote.[252] In other words, some parties may force a change of contract on others. Such a reality is disallowed in contract law, where a contract may be changed only with the consent of all parties to it, but the charter and bylaws of a company are subject to a democratic-majoritarian legal regime.[253]

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[248] *See generally* Shleifer & Vishny, *supra* note 197, at 4.

[249] *See* OECD PRINCIPLES, *supra* note 32, at 12 ("The Principles therefore have to be complementary to a broader approach to the operation of checks and balances."); *see generally* Malcolm Rogge, *Bringing Corporate Governance down to Earth: From Culmination Outcomes to Comprehensive Outcomes in Shareholder and Stakeholder Capitalism*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241 (2021).

[250] *See, e.g.,* DEL. CODE ANN. tit. 8, § 109(b) (2020); *see also* Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, 318 (2015) ("Just as today, ancient Roman professional guilds, veterans' organizations, and social clubs needed rules to establish who could join and how the organization would function.").

[251] *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 374 (2018) (using the term "contract metaphor" to describe the quasi-contractual character of the charter and bylaws).

[252] *See, e.g.*, DEL. CODE ANN. tit. 8, § 109(a) (2020); *see also* Gregory et al., *supra* note 204, at 5.

[253] Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. REG. 1124, 1131–32 (2021).

The underlying rationale is that a company must enjoy flexibility and allow changes to accommodate a dynamic reality.[254] The charter and bylaws should therefore be governed by democratic principles.

The dynamic nature of a company is also reflected by the fact that the identity of the shareholders is not static.[255] Shares are often sold, bringing in new shareholders with new and different ideas. Therefore, a charter and bylaws are not bound to the original founding shareholders' agreements, and new shareholders may promote changes through democratic governance. In this way, corporate law protects not only the interests of the current shareholders, but also those of future shareholders who may wish to influence the company's business. A company is a private legal entity, but it is subject to norms that consider the interests of unidentified future beneficiaries. This mechanism, which protects the interests of future stakeholders by means of a binding democratic corporate governance regime, reflects the underlying rationale that promoting the good of the company requires adopting a complex set of rules that integrate the interests of multiple stakeholders, some of whom represent the public interest at large.[256]

The framework for easing conflicts in the corporate setting raises the key question of whom the corporation should serve or what its final goal should be. This question is one of the main building blocks of corporate law, yet as discussed above, it is a

254 *See e.g.,* DEL. CODE ANN.DEL. CODE ANN. tit. 8, § 109(b) (2015) (specifying that a company's bylaws can regulate anything relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees).

255 Under corporate default rules, shareholders can freely sell their shares. *See, e.g.,* DEL. CODE ANN. tit. 8, § 202 (2020).

256 For the democratic structure of shareholders' meetings see, for example, James McConvill, *Shareholder Empowerment as an End in Itself: A New Perspective on Allocation of Power in the Modern Corporation*, 33 OHIO N.U. L. REV. 1013, 1015 (2007); *see also* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 91–96 (2008); Michael J. Goldberg, *Democracy in the Private Sector: The Rights of Shareholders and Union Members*, 17 U. PA. J. BUS. L. 393, 402–04 (2015). However, many failures were observed regarding shareholders' meetings. *See generally* Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503 (2006).

controversial one.[257] The basic tension is between the traditional approach, stressing the end goal of a company to serve its shareholders' interest in maximizing profits (the shareholders primacy or shareholderist approach), and those promoting a multi-stakeholder's regime (stakeholderism).[258] Under American law, the common understanding is that the corporation should ultimately serve its shareholders, an end goal that may be implemented also within a complex corporate setting,[259] where the purpose of the corporation is translated into a complex set of considerations that should be reconciled with each other, rather than a rigid and binary choice between two extremes.[260] Although maximizing shareholder profit may be the final goal, reaching this goal entails decisions along the way that factor in other relevant players, including creditors, suppliers, employees, customers, and the community at large. Without integrating the interests of all these stakeholders, the company may fail to maximize its profits in the long term.[261] Corporate governance is therefore aimed at devising instruments to fuse and integrate various interests,

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[257] *See e.g.,* David G. Yosifon, *The Law of Corporate Purpose*, 10 U.C. BUS. L.J. 181, 183 (2013); *see also* Lipton, *supra* note 37, at 865; Mayer, *supra* note 37.

[258] Berger-Walliser & Scott, *supra* note 239, at 173. *See also See* 1–2 Principles of Corporate Governance: Analysis and Recommendations § 2.01 (AM. L. INST. 2023) ("[A] corporation [§ 1.12] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."); *see e.g.*, Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/8BHN-FPHE].

[259] The stakeholder approach was articulated by R. Edward Freeman in his seminal work. *See generally* R. EDWIN FREEMAN, STAKEHOLDER MANAGEMENT: A STAKEHOLDER APPROACH (1984) (proposing a normative model for effective management in which corporate managers consider the interests of all stakeholders when making decisions). *See also See* 1–2 Principles of Corporate Governance: Analysis and Recommendations § 2.01, comment f*,* (AM. L. INST. 2023) ("The modern corporation by its nature creates interdependencies with a variety of groups with whom the corporation has a legitimate concern, such as employees, customers, suppliers, and members of the communities in which the corporation operates. The long-term profitability of the corporation generally depends on meeting the fair expectations of such groups. Short-term profits may properly be subordinated to the recognition that responsible maintenance of these interdependencies is likely to contribute to long-term corporate profit and shareholder gain. The corporation's business may be conducted accordingly.").

[260] *See e.g.,* Mayer, *supra* note 37, at 2; Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 533–39 (2020).

[261] *See supra* notes 260–261 and accompanying text.

which may occasionally conflict, and make it possible to promote the goals of the business sector in a balanced way, consistent with the public good at large.[262] This perception of the integration of multiple interests goes beyond the CSR and ESG agenda discussed above. It touches upon the basic prioritization that corporate management should conduct as part of its day-to-day business. It reflects the managerial flexibility that is essential for promoting the best interest of the corporation as a whole.[263] Aligning with general public policies may be consistent with the traditional understanding of the end goal of corporations.

4. Local Means for Multinational Corporations

Corporate law is territorial.[264] Nevertheless, to a large extent, corporate governance norms bind companies incorporated in a certain territory wherever they may be conducting their business.[265] The norm compels the incorporeal, abstract legal entity; its binding force is therefore extraterritorial. For example, if corporate governance norms specify how a decision should be made or by which officer, the company cannot circumvent such a norm by transferring

[262] *See* 1–2 Principles of Corporate Governance: Analysis and Recommendations § 2.01 (AM. L. INST. 2023) ("(B) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: (1) [omitted] (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business."); *id.* § 2.01, comment h ("The ethical considerations reasonably regarded as appropriate to the responsible conduct of business necessarily include ethical responsibilities that may be owed to persons other than shareholders with whom the corporation has a legitimate concern, such as employees, customers, suppliers, and members of the communities within which the corporation operates. The content of these responsibilities may vary according to the type of business in question and the history and established standards of the particular corporation."); *see also* Rogge, *supra* note 249, at 268 ("The battle over the heart and soul of corporate governance is, I contend, a battle between the two poles just described. The shareholder primacy approach prioritizes rules that promote efficiency through maximizing the desired culmination outcome (shareholder value); while the alternative view calls for a systemic and comprehensive approach that gives broader latitude to corporate decision makers to consider a plurality of values, some not at all reducible to ranked culmination scores."); Malcolm Rogge, *Humanity Constrains Loyalty: Fiduciary Duty, Human Rights, and the Corporate Decision Maker*, 26 FORDHAM J. CORP. & FIN. L. 147, 157–79 (2021).

[263] *See supra* note 261 and accompanying text.

[264] *See* Katelouzou & Zumbansen, *supra* note 44, at 11 n.26.

[265] Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 501 (2008).

the place where such a decision would be made to another country following a different rule. A company incorporated in Delaware is subject to the Delaware corporate governance norms, even if its activities are conducted globally.[266] In addition, companies are subject to the substantive law of the territory in which they operate, which occasionally may have an extraterritorial effect.[267]

In the modern economy, especially from the 1980s onward, companies have increasingly conducted their activities worldwide. Multinational companies sell products or provide services or resources in many countries around the world, have local branches and hire a significant portion of their workforce in many countries, and therefore are regarded as multinational corporations.[268] Often, multinationals operate through local subsidiaries, but this enterprise structure does not change their multinational nature, as several local companies are controlled by the parent company. Many subsidiaries engage only in a portion of the business activities conducted by the parent company, such as customer services, production, or research and development. At the end of the twentieth century, typical examples of multinational corporations were energy companies (Exxon, Shell) and pharmaceutical companies (Roch, Ely Lilly). In the twenty-first century, typical examples of multinationals are technology corporations: Apple, Microsoft, Amazon, Alphabet (Google), Meta (Facebook), and others.

Multinational corporations present many challenges to modern societies, which are extensively documented and discussed by

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266 JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW, 143–44 (2006). The Economist noted that multinational corporations may choose to replace their "citizenship," seeking a more convenient jurisdiction for purposes of tax reduction and corporate governance requirements. *See Here, There and Everywhere: Why Some Businesses Choose Multiple Corporate Citizenships,* ECONOMIST (Feb. 24, 2014), https://www.economist.com/business/2014/02/24/here-there-and-everywhere [https://perma.cc/8DYD-NR9M].

267 *See* Backer, *supra* note 265, at 502; *see also* Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37, 41 (2011) [hereinafter Backer, *On the Evolution*].

268 *See* John Gerard Ruggie, *The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms*, 5 (M-RCBG Faculty, Working Paper Series No. 2020-01, 2020), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/FWP_2020-01v2.pdf.

policymakers and scholars.[269] Occasionally, these corporations have grown to immense size in capital, making them powerful players in both economic and political terms.[270] Their size has generated problems far beyond questions of competition in the market and has raised concerns about their influence on key aspects of modern democracies. These challenges are at the heart of a fierce public debate calling for imposing strict norms on multinational corporations, which should not behave as if they operate in "no-man's land."[271] Tight international cooperation is essential for promoting such an end.[272]

Yet, multinational corporations, like other companies, are subject to the applicable corporate governance regime, which is determined by the rules of the place of incorporation. If the shares of the company are publicly traded, the applicable securities rules and stock market regulations apply. The fact that a company conducts business worldwide does not exempt it from complying with these binding rules, and the establishment of local subsidiaries does not affect the obligation of the parent company to meet all applicable rules and standards.[273] Therefore, corporate governance norms that apply to multinational corporations may have a global reach.[274] The complex set of norms applied by the corporate governance regime pertaining to various standards of conduct, including norms

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269 *See, e.g.,* OECD RBC GUIDELINES, *supra* note 41, at 13–14; s*ee also* ZERK, *supra* note 266, at 37; Backer, *On the Evolution*, *supra* note 267, at 41.

270 Grace A. Ballor & Aydin B. Yildirim, *Multinational Corporations and the Politics of International Trade in Multidisciplinary Perspective,* 22 BUS. AND POL., 573, 574 (2020) ("[T]hese economic actors with close connections to national governments and international policymakers alike are at the heart of the global trade regime, and thus have the power to significantly influence the frameworks of transnational economic governance.").

271 *See, e.g.*, Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 396–97 (2005); *see also* Snyder, *supra* note 229, at 566.

272 *See* Backer, *supra* note 265, at 507; *see also* Backer, *On the Evolution*, *supra* note 267, at 42–43.

273 *See* Backer, *supra* note 265, at 502.

274 *See generally* Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 36 FORDHAM INT'L L.J. 1557 (2013).

concerning social values, may affect the conduct of these companies worldwide.[275]

Corporate governance may therefore be used to promote global standards applied by multinational corporations. Whereas public law systems seek paths for directly regulating multinational corporations, the corporate governance framework may generate an alternative path for introducing various norms to the worldwide conduct of these companies, especially through the use of soft law mechanisms.[276] In a broader context, it may be argued that a mechanism for establishing a transnational corporate governance regime has emerged, as part of other trends in transnational law and global law.[277] Multinational corporations, therefore, may assist in building and disseminating a "global corporate governance" regime.[278] This may be an ancillary outcome of the dominant nature of some of the giant companies that operate on a wide global scale, such as the technology companies that rule the digital sphere. This outcome, however, should be distinguished from the quest for a single, global corporate governance metric, which may be misguided.[279] If a few companies incorporated in Delaware or California control the digital sphere, the detriment of their almost absolute dominance may be turned into an advantage: Delaware and California corporate

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[275] *See* Katelouzou & Zumbansen, *supra* note 44, at 10 ("[C]orporate law and in particular corporate governance, both as fields of hybrid, public-private norm creation, and policy making, have long 'grown' beyond the borders of the nation state to become fields of transnational regulatory politics in which domestic and international, public and private actors together create a newly spatialized regime constituted by law and norms.").

[276] *See* Backer, *supra* note 265, at 508.

[277] *See* Zumbansen, *supra* note 44, at 56–59; *see also* Fabrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation*, 36 U. PA. J. INT'L L. 875, 878–88 (2015).

[278] This is similar to the development of Global Administrative Law (GAL) by supranational organizations. *See, e.g.,* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 44–53 (2005); *see also* Sabino Cassese & Elisa D'Alterio, *Introduction: The Development of Global Administrative Law*, *in* RSCH. HANDBOOK ON GLOB. ADMIN. L. 1, 8 (Edward Elgar & Sabino Cassese eds., 2016); *see generally* Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law*, 68 L. & CONTEMP. PROBS. 63 (2005); *Global Administrative Law*, INSTIT. INT'L L. & JUST., www.iilj.org [https://perma.cc/P2MU-T4US].

[279] *See* Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1269 (2009).

governance measures could be used to leverage a global corporate governance norm, which in turn could promote other societal goals, such as an appropriate global digital governance regime.

B. B. From Corporate Governance to Global Digital Governance

Corporate governance can be leveraged to design a global digital governance regime that would address the various challenges of the digital sphere. The digital sphere is controlled by corporations.[280] Aside from regulating individual technologies or markets (or even instead of such regulation altogether), corporate governance norms can serve as an efficient and comprehensive tool for introducing digital governance norms into the conduct of the operators of the digital sphere.[281] Moreover, corporate governance may be used to implement the required regulation in a way that is organically integrated with the existing operational structure of corporations. Digital governance could be combined with other norms that a corporation must comply with, which would likely be continually evolving, similarly to many other aspects concerning the management of businesses. For example, a company must meet various financial standards, including those of disclosure, that are part of corporate governance rules.[282] Under the proposed model, relevant companies would also need to meet some digital standards. Financial standards are continually developing to accommodate the changing reality, and corporate governance adapts accordingly; the same could be true of digital governance norms.

Corporate governance may be used to effectively promote a comprehensive digital governance regime that would also promote uniformity and certainty. Appropriate digital governance principles must introduce basic procedural standards into the day-to-day operation of the corporations presiding over the digital sphere, emulating

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[280] *See* Harper Ho, *supra* note 213, at 329.

[281] *See generally* Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691 (2003) (taking a general stance supporting the use of enforced management tools in regulating the private sector for promoting the public interest).

[282] For various disclosure obligations, see *About the SEC*, *supra* note 226; *see also* G20/OECD PRINCIPLES, *supra* note 39, at 38.

public law accountability standards.[283] Technology companies should meet standards of accountability and meaningful transparency that allow individuals to contest decisions,[284] such as common administrative law norms that call on them to provide the reasoning behind their decisions, and allow for review of those decisions by an objective body.[285] As noted, a key obstacle to directly imposing full-fledged public law standards in the digital sphere stems from the fact that corporations are private, for-profit entities. The traditional perception of the divide between public and private law hinders such legal moves.[286] However, corporate governance norms can transplant nuanced public law standards into the realm of private law.[287] In other words, corporate governance functions as a bridge connecting the two legal domains. Publicly listed corporations are private, for-profit entities subject to a rigid set of norms aimed at protecting the public interest, and therefore such norms adhere to various principles of accountability and transparency.[288] This feature may serve as a key element in designing digital governance norms to be applied to the conduct of corporations through corporate governance mechanisms. This may be accomplished, at least in the first stage, through the softer "comply or explain" tools.[289] In the recommended codes of conduct that publicly listed companies are encouraged to follow in their disclosure documents, a section addressing digital governance can be incorporated. This section should include recommended standards of genuine transparency beyond general reports, and it should include an obligation to provide

[283] *See supra* Part II.A. *See also supra* notes 113–129 and accompanying text, and notes 153–157 and accompanying text (stressing the criticism on current legislative initiatives that fail to grant adequate protection of human rights in the digital sphere); Smuha et al, *supra* note 21, at 48–54; Fischman-Afori, *supra* note 17, at 364–69.

[284] *Id.; see also* Smuha et al, *supra* note 21, at 51.

[285] *See* Smuha et al, *supra* note 21, at 48–54; *see also* Fischman-Afori, *supra* note 21, at 24–30; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 533–44 (2003) (describing the goal of administrative law in reducing arbitrariness in the decision-making processes).

[286] *See supra* section Part II.A, and in particular notes 160–166 and accompanying text.

[287] *See* Frug, *supra* note 224.

[288] *See supra* notes 198–200 and accompanying text.

[289] Katyal proposed a somewhat similar path of "inside" corporate tools, yet the measures recommended were voluntary codes of conduct based on ethical guidelines provided by the AI industry. *See* Katyal, *supra* note 95, at 108–09. We propose a much more rigid framework, including imposing direct obligations on corporations.

information about decisions affecting individuals, with the algorithmic transparency that would allow in-depth inspection of the decision-making process. The standard should specify the decision-making process, such as through the insertion of a "human" layer in the decision-making loop. Moreover, the standard should require companies to provide reasons and justifications for the decisions, and provide them to affected individuals and to establish an objective and independent body overseeing decisions.[290] The "comply or explain" mechanism encourages the adoption of such standards of conduct by the business sector, emulating true administrative law standards and providing adequate protection of individuals' human rights, as well as providing a framework that maintains core democratic values.

All the other merits of corporate governance discussed above could contribute to an effective and appropriate digital governance regime. Digital governance needs to address questions beyond those of economics alone. The challenges of the digital sphere concern the protection of fundamental rights in modern democracies—not only the efficiency of markets. As noted, the activities of online platforms raise concerns about adequate safeguards for the protection of human rights, including freedom of speech. Therefore, when regulating the activities of the business sector, digital governance norms must address normative, constitutional questions.[291] The need to consider questions of human rights in the business sector is not new to the corporate governance agenda, and its framework allows advancing democratic and liberal values in the business domain.[292] Corporate governance is a cutting-edge tool for promoting social responsibility goals in a way that is compatible with increasing profits.[293] Adequate standards of digital governance should be acknowledged as the social responsibility goal of the 2030s.

One of the complexities of digital governance stems from the need to reconcile multiple conflicting interests. This nexus of interests involves private entities wishing to maximize profits while

290 *See* Smuha et al., *supra* note 21, at 48–54; Fischman-Afori, *supra* note 21, at 24–30.
291 *See supra* notes 82–88 and accompanying text.
292 *See supra* Part III.A.2 discussing the promotion of social and liberal values beyond short-term economic considerations by corporate governance.
293 *See supra* notes 238–239 and accompanying text.

acknowledging the public interest, as well as satisfying present stakeholders and future ones. As stressed above, the ultra-complex digital environment necessitates a sophisticated and pragmatic legal framework for establishing an effective digital governance regime.[294] Corporate law and corporate governance mechanisms are well suited for dealing with such a complex array of interests and stakeholders in the digital environment. A company's charter and bylaws are inherently dynamic and flexible, designed to adapt governing norms to changing reality. Corporate governance principles are based on a system of checks and balances that often focus on the decision-making process, without referring to concrete results.[295] If this procedural regime is implemented in the business sector, it may provide the required legal infrastructure needed for the adoption of a proper and proportionate digital governance regime.

Lastly, the digital sphere is borderless. Content uploaded to online platforms is disseminated worldwide. The blocking of online speech potentially affects every person on the globe. Additionally, the key players in the digital sphere are multinational corporations.[296] Therefore, digital governance should present a comprehensive regime with a global scope.[297] Once these multinational corporations subordinate their activities to some standard through the corporate governance mechanism, these standards will apply to corporate activities around the world. In other words, the gigantic size of the key players in the digital sphere could be turned into an advantage if their global dominance is used to promote a uniform recommended norm.[298]

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294 *See generally* Douek, *supra* note 7.

295 *See supra* notes 261–262 and accompanying text.

296 OECD RBC GUIDELINES, *supra* note 41, at 13 ("With the rise of service and knowledge-intensive industries and the expansion of the Internet economy, service and technology enterprises are playing an increasingly important role in the international marketplace.").

297 OECD INTRO., *supra* note 25, at 22–23 (explaining that a key characteristic of online platforms is that they are based on the positive direct and indirect effects of the network, on a global scale. The potentially global reach is a significant catalyst for the growth of the platforms).

298 *See* Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1027 (1996) (describing a somewhat similar argument in the pre-digital era, according to which there are also positive consequences stemming from mergers that create mega media corporations; for instance, better ability to finance

The unprecedented size of the large technology companies requires new thinking. It is likely unrealistic to break up these large corporations. Instead, their size should be leveraged. There has been a movement toward suspicion of large companies, even if they do not harm competition;[299] however, this view has faced criticism,[300] and it has not been adopted by those authorities who regulate competition.[301] The large technology companies are probably here to stay, and should be made to comply with digital governance principles through corporate legal mechanisms, restraining their potential impulse to avoid regulation by locating their activities in more convenient territories.[302] Corporate governance, therefore, can serve to establish a *de facto* digital governance regime that is global and harmonized.

Along this line, in 2019, the OECD stressed online platforms' important role in the global digital sphere,[303] and published CSR guidelines for online platforms to resolve potential conflicts with human rights, including the "right to free expression, non-discrimination, the right to information, and the safety and security of persons."[304] But these guidelines do not include concrete measures or mandatory elements. Domestic regulators should design precise, concrete, and effective "good governance" norms, aiming for the desired higher standard.[305] The corporations controlling the digital

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diversified content, or that "large companies are often better positioned to combat government censorship and support First Amendment freedoms.").

299 *See generally* WU, *supra* note 26; Khan, *supra* note 26; OECD INTRO., *supra* note 25.

300 In criticizing this approach, it has been argued that size may also have advantages for consumers, such as the ability for profitable companies to reduce prices, and that antitrust law is aimed to restrict injury to competition, not to punish big companies for being big. *See* D. Daniel Sokol, *Antitrust's Curse of Bigness Problem*, 118 MICH. L. REV. 1259, 1278 (2020).

301 OECD INTRO., *supra* note 25.

302 *See* Kristen E. Eichensehr, *Digital Switzerlands*, 167 U. PA. L. REV. 665, 685–702 (2019) (describing the American technology companies as "Digital Switzerlands" because they are not completely regulated by their host nations).

303 OECD INTRO., *supra* note 25.

304 ORG. FOR ECON. CO-OP. & DEV., PLATFORM COMPANIES & RESPONSIBLE BUSINESS CONDUCT 5 (2019), http://mneguidelines.oecd.org/RBC-and-platform-companies.pdf [https://perma.cc/7KSH-E8TX].

305 *See* Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 431 (2005).

spheres cannot be relied upon to develop meaningful and burdensome guiding principles on their own.

The proposed path for introducing adequate digital governance regulation through corporate governance mechanisms has many additional advantages. It uses an existing and effective legal framework which could facilitate smooth implementation of the desired digital governance norms by both the regulating authorities and the companies.[306] The proposed path may also rely on the extensive experience of the existing authorities in overseeing corporate governance compliance and enforcement regarding a range of issues, without the need to generate new regulatory bodies.[307] This would allay concerns over the proliferation of regulatory bodies.[308] The

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306 *See* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 287 (2017) (discussing the advantages of compliance with corporate governance and ways to enhance such behavior. The authors sum up their arguments by stressing a survey of firms revealing that the cost of noncompliance is more than double the price of following the rules.); *see also* Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 685 (2017) (discussing the effective use of nudges by corporates to facilitate corporate compliance with the rule of law).

307 For example, the SEC, which is the relevant authority in charge of compliance with corporate governance norms, operates various divisions (Corporation Finance, Examinations, Economic and Risk Analysis, Investment Management, Enforcement, and Trading & Markets), as well as various offices aimed at promoting special social goals, such as the Office of the Strategic Hub for Innovation and Financial Technology (FinHub), and the Office of Minority and Women Inclusion. *See SEC Divisions and Offices*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions.shtml [https://perma.cc/T22K-FQ8S]. Therefore, the SEC may be well suited to oversee the compliance with digital governance matters imposed on corporations. In the UK, the Online Harms White Paper, proposes a new regulation for the content regulation practices of digital platforms, named Ofcom as the relevant authority in charge of the new proposed enactment based on the similar rationale of using an existing experienced administrative infrastructure. *See Online Harms White Paper: Full Government Response to the Consultation*, DEP'T FOR DIGIT., CULTURE, MEDIA & SPORT (Dec. 15, 2020) https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response [https://perma.cc/QHE7-GV86] ("The government can now confirm that Ofcom will be named as the online harms regulator in legislation. Ofcom has a strong strategic fit for this role, and relevant organizational experience as a robust independent regulator. Empowering an existing regulatory body will help the timely introduction of the online harms regime by allowing Ofcom to begin preparations now to take on the role.").

308 *See generally Over-Regulated America*, ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547789 [https://perma.cc/67B9-FF6Y]; Matthias Lehmann, *Legal Fragmentation, Extraterritoriality and Uncertainty in Global Financial Regulation,* 37 OXFORD J. LEGAL STUD. 406, 406–07 (2017) ("A lack of sufficient

proposed path adds another layer to an existing legal framework, under the supervision of existing authority, without increasing the number of regulatory bodies.[309]

IV. POTENTIAL HURDLES TO THE PROPOSED CORPORATE GOVERNANCE PATH

The proposal to create a digital governance regime via corporate regulation raises a number of concerns. One issue is that of increased and excessive bureaucracy.[310] This hurdle reflects the potentially negative effect on accountability, which could lead to excessive regulation that harms efficiency.[311] As it was stressed with regard to the accountability standards of public agencies, "too rigorous democratic control will squeeze the entrepreneurship out of public managers and will turn agencies into rule-obsessed bureaucracies."[312] In other words, the fear is from over-proceduralism, which occasionally has been associated with administratively-imposed accountability.[313] Similar complaints have been raised with regard to other accountability standards imposed on private entities, such as

regulation has been blamed for being at the root of the 2008 global financial crisis (financial crisis). Today, it seems that this problem has been overcome, but that another has taken its place: too much regulation. In the regulatory wave of the last years, states have created a plethora of new rules. Often these rules are applied extraterritorially and therefore overlap; this poses a challenge for transnational market actors, who must comply with two or more regimes. The duplicity is worsened where these measures have contradicting content, which makes it impossible for a transnationally active firm to comply with all of them simultaneously.").

309 *But see* Aviv Gaon & Ian Stedman, *A Call to Action: Moving Forward with the Governance of Artificial Intelligence in Canada*, 56 ALTA L. REV. 1137, 1159, 1161 (2019) (advocating for the establishment of a new enforcement authority designated to oversee the operation of AI systems).

310 *See* Evelyn Douek, *The Siren Call of Content Moderation Formalism, in* NEW TECHNOLOGIES OF COMMUNICATION AND THE FIRST AMENDMENT: THE INTERNET, SOCIAL MEDIA AND CENSORSHIP (Lee Bollinger & Geoffrey Stone eds., 2022) (arguing that imposition of procedures for content moderation practices is a formalistic and inefficient approach). The argument against bureaucratic burden is not new. *See, e.g.,* Frug, *supra* note 224, at 1279–80.

311 Bovens, *supra* note 15, at 194; Lehmann, *supra* note 308, at 407.

312 Bovens, *supra* note 15, at 194.

313 *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 349 (2019).

compliance with disclosure obligations in the financial sector,[314] and compliance with privacy protection regulations.[315] But as long as it is agreed that there is a pressing public need to regulate various aspects of the digital sphere, the only remaining question is how such regulation should be achieved. All regulatory measures may incur some bureaucratic burden; procedural safeguards are nevertheless the bedrock of adherence to public law standards, aimed at protecting human rights.[316] In terms of proceduralism, the proposed path of corporate governance is not inferior to the other legal measures, such as the legislation proposed in the United States and EU. Considering the other merits of the corporate governance path, the fear of excessive bureaucracy should not be the reason for rejecting the proposition.

Another concern about the proposed corporate governance path relates to the question of its feasibility and efficacy. First, the "comply or explain" mechanism, which is expected to encourage the adoption of higher standards of conduct by the business sector on a semi-voluntary basis, relies on the market to generate the needed pressure to compel companies to adopt such standards.[317] The market's power, however, stems from the competitive environment and from relevant stakeholders' ability to put pressure on companies to align with the desired outcome.[318] With regard to shareholders, the stock market's competitiveness may generate the necessary pressure, but the leverage exercised by consumers is limited because of the dominant position in the market of some of the large technology corporations.[319] In other words, the consumers' ability to exert

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314 *See, e.g.*, Douglas Friedman, *Financial Transparency or Needless Bureaucracy—Analyzing the California Nonprofit Integrity Act of 2004*, 3 INT'L J. CIV. SOC'Y L. 52, 52–53 (2005).

315 *See, e.g.,* Jan Philipp Albrecht, *How the GDPR Will Change the World*, 2 EUR. DATA PROT. L. REV. 287, 288 (2016) ("In times where merely no company can afford to not be present in the digital sphere and use services of Internet companies from all around the world this creates massive bureaucracy and legal uncertainty."); Rachel F. Fefer & Kristin Archick, *EU Data Protection Rules and U.S. Implications*, 32 CURRENT POL. & ECON. OF EUROPE, 255, 258 (2021).

316 NICOLAS SUZOR, LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES 144–45 (Cambridge Univ. Press, 2019).

317 *See supra* notes 210–211 and accompanying text.

318 *Id.*

319 *See supra* notes 60–64 and accompanying text.

pressure for adopting higher standards of conduct may not be significant enough. Therefore, the mechanism is based on shareholder action. In fact, any voluntary CSR initiatives may raise similar concerns.[320] Yet, the shareholders' interest in promoting broad societal goals may be more limited, particularly if it may cause a drop in corporate profits, at least in the short term. Therefore, the proposed "comply or explain" mechanism is workable if the adoption of the desired higher standards meet the shareholders' interests. A mechanism that depends entirely on consumer forces may not yield the expected outcome, and in such case, coercive regulatory measures may be inevitable.[321] The corporate governance path may involve mandatory measures as well; but if a top-down regulatory path is followed, it could be argued that such regulation may be anchored outside the realm of corporate law, like the current European DSA and AI Act initiatives.[322] Nevertheless, as explained above, the corporate governance path may involve mandatory measures, not only semi-voluntary ones. Corporate governance can encourage adherence to higher standards of conduct on social matters which are not part of the core of the business; it may promote efficient implementation of accountability and transparency standards in the business sector; and it may generate a comprehensive global practice adapted to the reality of multinational corporations. Therefore, the conclusion that mandatory corporate governance norms pertaining to digital conduct standards are inevitable does not eliminate all other benefits of the corporate governance path. Instead, it may be the best legal framework for facilitating the introduction of a new digital governance agenda. The possibility of initiating a process for developing a global and uniform digital governance should not be underestimated.

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320 *See e.g.,* Berger-Walliser & Scott, *supra* note 239, at 170.

321 Corporate governance may include a broad range of legal measures, from voluntary self-regulation codes of conduct to top-down rules. *See supra* notes 191–193 and 222 and accompanying text.

322 *See DSA*, *supra* note 19; Eur. Comm'n, Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final (Apr. 21, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 [https://perma.cc/FN6C-FKDE; Pinto, *supra* note 145.

CONCLUSION

The digital world has dramatically changed society. Alongside the many positive effects on human welfare and the public good, negative consequences have emerged as well. When examining the attributes of the digital sphere, two core challenges arise: that it is operated and controlled entirely by private, for-profit companies, and that these companies are increasingly deploying AI technologies in their businesses. This reality poses severe threats to democracy and to human rights. Therefore, there is a worldwide acknowledgement of the need to regulate the conduct of those companies that use AI technology to dominate the digital sphere. Policymakers and legislatures around the world are taking their first steps in this direction. As usual, the legal response lags behind the giant technological leaps forward. Law reforms fail to keep pace with the accelerated developments in digital technologies. Policymakers understand the need to adopt a long-lasting and comprehensive framework that imposes genuine accountability standards on the companies ruling the digital sphere, but their hands are tied by contemporary legal perceptions of the limits of intervention in the private sector.

In the face of this realpolitik barrier, the present Article proposes a pragmatic alternative. Introducing the digital governance regime through a corporate governance framework may advance the desired full-fledged accountability norms, providing operative guarantees for human rights in the digital sphere, with an extensive global effect. Corporate governance is a highly sophisticated legal framework capable of accommodating the dynamic reality efficiently and promptly. Therefore, regulators should use the large technology companies as a vehicle for promoting their legal agenda. Corporate governance is not merely a conduit for implementing digital regulation; it may turn out to be the right locus for adjusting the law to technology, given the need to generate a comprehensive and unified regime that addresses global challenges.