

**EXIT TO COMMUNITY: STRATEGIES FOR MULTI-STAKEHOLDER OWNERSHIP IN
THE PLATFORM ECONOMY**

Morshed Mannan and Nathan Schneider[†]*

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* PhD Researcher, Company Law Department, Leiden Law School, Leiden University, The Netherlands and 2019 Research Fellow at the Institute for the Cooperative Digital Economy, The New School, New York City.

[†] Assistant Professor, Department of Media Studies, University of Colorado Boulder.

I. INTRODUCTION

The platform economy¹ is facing a crisis of accountability. Large Internet platforms, once regarded as sources of hope for democratic social movements or engines of a promising new economy—or, at worst, just superficial distractions—are now facing serious public scrutiny across the globe. The executives of Facebook, Google, and Twitter have been called before the US Congress to account for their roles in enabling foreign election interference. Scholars have raised concerns about algorithmic, data-driven business models,² the exploitation of digital labor,³ the abuse of market power,⁴ corporate governance failures,⁵ manipulation by

¹ See generally [Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES IN SCIENCE AND TECHNOLOGY 61 \(2016\)](#); [GEOFFREY G. PARKER, MARSHALL W. VAN ALSTYNE & SANGEET PAUL CHOUDARY, PLATFORM REVOLUTION: HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY AND HOW TO MAKE THEM WORK FOR YOU \(2016\)](#).

² This is alluded to by Balkin in the social media context as social media’s “grand bargain”—free communication technology in exchange for user data and loyalty—but such trade-offs can be seen in the gig economy as well (e.g. with respect to workers’ rights). See Jack M. Balkin, *Fixing Social Media’s Grand Bargain* (Hoover Institution Aegis Series Paper No. 1814, 2018) https://www.hoover.org/sites/default/files/research/docs/balkin_webreadypdf.pdf. See generally, NICK COULDREY & ULISES A. MEJIAS, *THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM* (2019); [SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM \(2018\)](#); [FRANK PASQUALE, THE BLACK BOX SOCIETY \(2015\)](#).

³ See generally [TREBOR SCHOLZ, UBERWORKED AND UNDERPAID: HOW WORKERS ARE DISRUPTING THE DIGITAL ECONOMY \(2017\)](#); [Juliet B. Schor, *Does the sharing economy increase inequality within the eighty percent?: findings from a qualitative study of platform providers*, 10 CAMBRIDGE J REGIONS ECON SOC 263 \(2017\)](#).

⁴ See [Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 \(2017\)](#); [TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 133 \(2018\)](#); [Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPECT. 69, 70, 75-76, 80-86 \(2019\) \(arguing for the need for skepticism about horizontal mergers involving ‘superstar’ firms given the growing body of evidence that the largest US firms have increasing market power, while conceding that the narrow interpretation of US antitrust laws in recent years diminishes the likelihood of successful antitrust enforcement against ‘tech titans’ unless a particularly strong case emerges against them\)](#).

⁵ See David Larcker & Brian Tayan, *Governance Gone Wild: Epic Misbehavior at Uber Technologies* (Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-70; Stanford University Graduate School of Business Research Paper No. 18-3, 2017), <http://ssrn.com/abstract=3087371>; [Robinson Meyer, *Twitter’s Famous Racist Problem*, THE ATLANTIC \(Jul 21, 2016\), https://www.theatlantic.com/technology/archive/2016/07/twitter-swings-the-mighty-ban-hammer/492209/](#).

oppressive governments,⁶ opacity and arbitrariness in content moderation,⁷ and corporate surveillance,⁸ to name just a few in an ever-growing body of literature on the depredations of the platform economy.

Part of the urgency surrounding such concerns lies in the fact that some platforms are near-impossible to escape. Internet users, and societies as a whole, have difficulty opting out of their services.⁹ Companies like Facebook, for instance, track users across the Web and create shadow user profiles even when the user does not have an account on their platforms.¹⁰ Not using such platforms may mean foregoing essential opportunities for work and social life—even access to basic services.¹¹ By not using social media platforms such as Facebook, people deprive themselves of one of the “most powerful mechanisms” to make their voices heard.¹² Conversely, for those who use such services, exit is not a costless exercise, as it involves the irrecoverable loss of social capital, reputational cache and assets.¹³

Additionally, users suffer from an extreme degree of information asymmetry with respect to platforms, in terms of the technology used, the manner and ends to which information about users are collected and, especially in the case of pre-IPO startups, about the business itself.¹⁴ In the terms of economist Albert Hirschman,

⁶ See generally, [ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST \(2017\)](#).

⁷ See, e.g., [Thomas E Kadri & Kate Klonick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 90-91 \(2019\)](#).

⁸ See generally, [SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER \(2019\)](#).

⁹ Erin Bernstein & Theresa J. Lee, *Where the Consumer is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 40 (2013) (“Companies like Facebook...and Twitter offer services used by billions of users that have become central to our day-to-day lives”).

¹⁰ [Beverly Skeggs & Simon Yuill, *Capital experimentation with person/a formation: how Facebook’s monetization refigures the relationship between property, personhood and protest*, 19 INF. COMMUN. SOC. 380, 382 \(2016\)](#).

¹¹ See generally, VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018).

¹² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

¹³ See, e.g. LAWRENCE LESSIG, *CODE: VERSION 2.0* (2006) (contending that “it may be harder to change communities in cyberspace than it is in real space. It is harder because you must give up everything in a move from one cyber-community to another, whereas in real space you can bring much of it with you”, at 290).

¹⁴ See, Balkin, *supra* note 2, at 5 (with respect to social media platforms in particular). See also, Gabriel J.X. Dance, Michael LaForgia & Nicholas Confessore, *As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants*, THE NEW YORK TIMES (Dec 18, 2018), <https://www.nytimes.com/2018/12/18/technology/facebook-privacy.html> (discussing an investigation

the platform economy presents diminishing possibilities of “exit” as a realistic option for participants, while also offering little in the way of “voice” for shaping platforms’ behavior from within.¹⁵ For instance, aside from independent advocacy groups, there are no meaningful blocs to represent user concerns that correspond to the role of labor unions in twentieth-century industrial firms.

This Article suggests that platform stakeholders, including its users, might find such a bloc through the tools offered by corporate ownership, and that founders and early investors in platform companies might see reasons to seek such an arrangement. The remainder of Part I is devoted to briefly reviewing existing proposals for improving platform regulation and governance, including the budding platform cooperative movement. This lays the foundation for our proposal that an alternate exit strategy—an *exit to community*—may be best positioned to render platform corporations accountable to their community of stakeholders, while permitting their founders and early investors a modest financial benefit. **Among various possible structures, we present three options for materializing an exit to community that appear to us as being particularly promising: transferring stock to a non-charitable perpetual purpose trust, federating the platform and tokenizing corporate stock.** To flesh out what we mean by an exit to community, as well as these options, we define certain terms that we use throughout the Article and outline the growth of a hypothetical platform company, CoSocial. This hypothetical case allows us, in Part II, to describe the means of implementing each option at greater length, explain the inspiration for each option and consider their respective governance and financial implications within a specific organizational context. While we have hued closely to what is already possible under existing California state and federal law, each of these strategies would benefit from the support of legislative interventions. The nature of these measures are discussed alongside each option. Part III engages in a discussion concerning the general merits of these options (and similar strategies), while directly addressing some of the potential challenges an exit to community would encounter. By pre-empting some of the possible criticisms of our proposals, we outline means to overcome them, which may be the subject of future research. Part IV concludes.

A. Existing Proposals for Platform Regulation & Governance

Proposals for remedying concerns about platforms have typically involved some form of privacy regulation, with the European Union’s (EU) General Data Protection Regulation (GDPR) (which, among other things, requires companies to disclose into Facebook’s data sharing practices with over 150 companies that, among other things, enables Netflix and Spotify to read Facebook users’ private messages).

¹⁵ See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

Protection Regulation (GDPR)¹⁶ and California’s Consumer Privacy Act¹⁷ being notable examples in the domain of end-user personal-data protection. We are skeptical of claims that privacy regulation alone—even if it is realized at federal level¹⁸—will be sufficient to address the concerns at hand as they extend beyond privacy.¹⁹ Aside from the scope of possible regulatory interventions, questions may be raised about the feasibility of such regulation in the near future and the legitimacy of any such intervention. Reliance on the state for appropriate regulation leaves platform stakeholders vulnerable to corporate lobbying²⁰ and regulatory capture,²¹ through which the rulemaking process falls under the control of special interests, such as the most powerful and well-endowed corporations. This is an especially material risk in the online economy, as several of these platform companies view regulatory entrepreneurship as a core part of their business plan.²²

¹⁶ Commission Regulation 2016/679, 2016 O.J. (L 119) 1 [hereinafter GDPR].

¹⁷ California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.100 (2018) (effective Jan. 1, 2020).

¹⁸ Stuart L. Pardau, *The California Consumer Privacy Act: Towards a European-Style Privacy Regime in the United States*, 23 J. TECH. L. & POL’Y 68, 73 (2018) (“[P]rivacy law in the wider U.S. remains a complex patchwork of narrowly tailored federal and state laws”); Rosie Brinckerhoff, *Social Network or Social Nightmare: How California Courts can Prevent Facebook’s Frightening Foray into Facial Recognition Technology from Haunting Consumer Privacy Rights Forever*, 70 FED. COMM. L.J. 105, 109 (2018) (“[C]omprehensive federal consumer privacy legislation is unlikely to be enacted anytime soon”).

¹⁹ In addition, as legal scholars have noted, one of the impediments to regulation is the narrowness of the commercial speech doctrine, which may make platform company representations to users, as well as the analysis, disclosure and sale of lawfully collected data, constitutionally protected by the First Amendment, see Bernstein & Lee, *supra* note 9, at 70-71; Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1194 (2016).

²⁰ [Kiran Stacey, Tech companies spent record sum on US lobbying in 2018, Financial Times \(Jan 23, 2019\) https://www.ft.com/content/7147935c-1f34-11e9-b126-46fc3ad87c65.](https://www.ft.com/content/7147935c-1f34-11e9-b126-46fc3ad87c65)

²¹ Dal Bó, *Regulatory Capture: A Review*, 22 OXF. REV. ECON. POLICY 203 (2006); Rui J. P. De Figueiredo & Geoff Edwards, *Does Private Money Buy Public Policy? Campaign Contributions and Regulatory Outcomes in Telecommunications*, 16 J. ECON. MANAG. STRATEGY 547 (2007); Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSPECT. 113, 114 (2017) (All three articles draw out the lineaments of regulatory capture and its implications on the economy, with Zingales in particular focusing on the reinforcement of economic and political power, a dynamic which he calls the ‘Medici vicious circle’. In words that foreshadow the title of a later New York Times Bestseller on a related theme, Zingales argues that in “a winner-take-all economy, entrepreneurs lobby and corrupt, not only to seize a crucial first-mover advantage, but also to preserve their power over time”. See ANAND GIRIDHARADAS, WINNER TAKES ALL: THE ELITE CHARADE OF CHANGING THE WORLD (2018), which presents a critique of corporate and high net-worth individual philanthropy).

²² [Elizabeth Pollman & Jordan M. Barry, Regulatory Entrepreneurship, 90 S. CAL. L. REV. 383, 392 \(2017\).](#) This is compounded by the fact that governments may be of the view that tech companies are best positioned to determine how they may be regulated—usually through voluntary self-

Coupled with the desire of governments to attract large internet and tech companies to their shores,²³ such capture can lead to a de-prioritization of the public interest, including that of platform users.²⁴ The transnational nature of online platforms means that national or regional level interventions will never legitimately represent the entire globally-dispersed user-base,²⁵ even while the GDPR makes clear that regulation in one jurisdiction will have cascading effects on a platforms' behavior in others.²⁶

While public figures as varied as right-wing activist Steve Bannon and left-wing technology critic Evgeny Morozov have called for state appropriation of

regulation—given the complexity of the issues raised by the industry, *see, e.g.*, FRENCH SECRETARY OF STATE FOR DIGITAL AFFAIRS, REGULATION OF SOCIAL NETWORKS - FACEBOOK EXPERIMENT 11 (May 2019) (discussing the merits and limits of a self-regulatory approach for online social networks).

²³ Damien Geradin, [Principles for Regulating Uber and Other Intermediation Platforms in the EU \(TILEC Discussion Paper No. 2017-037, Tilburg Law School Research Paper No. 18, 2017\)](https://papers.ssrn.com/abstract=3055023), <https://papers.ssrn.com/abstract=3055023>.

²⁴ 1 GARY A GIROUX, [BUSINESS SCANDALS, CORRUPTION, AND REFORM: AN ENCYCLOPEDIA 97 \(2013\)](#). It is also difficult to agree on the normative end(s) which government regulation should serve, thereby raising the possibility that a poorly-reasoned and -drafted piece of legislation leads to undesirable outcomes.

²⁵ *See* Mark Leiser & Andrew Murray, *The Role of Non-State Actors and Institutions in the Governance of New and Emerging Digital Technologies*, in THE OXFORD HANDBOOK OF LAW, REGULATION AND TECHNOLOGY 670, 670, 675 (Roger Brownsword, Eloise Scotford & Karen Yeung eds., 2017) (problematizing the traditional legitimacy of the Westphalian state to regulate Internet technologies or, indeed, their ability to do so); *see also*, Ingo Take, *Regulating the Internet Infrastructure: A Comparative Appraisal of the Legitimacy of ICANN, ITU, and the WSIS*, 6 REGUL. Gov. 499 (2012).

²⁶ This is due to the fact that GDPR encompasses all corporations that collect, process or store data of natural persons located in an EU Member State, as well as those that run offices in the EU, *see* GDPR, *supra* note 16, art. 44 et seq.; Alexander Tsesis, *Data Subjects' Privacy Rights: Regulation of Personal Data Retention and Erasure*, 90 U. COLO. L. REV. 593, 595 (2019).

platform assets²⁷—as have media scholars such as Nick Srnicek²⁸—this approach may only deepen the accountability crisis, given the past behavior of state intelligence and social welfare services with online user data,²⁹ together with the aforementioned challenge that internet networks are transnational in nature. Other proposed interventions fall short of the scale of the problem. Facebook’s proposed ‘Oversight Board’ is focused on ceding control over the moderation of content, but in its current form it would arguably be ineffective in that narrow function as well, given the shortcomings of its envisioned private ‘common law system’ as a method for online dispute resolution.³⁰ Most importantly, for our purposes, this concession to users’ views does not diminish the shareholder profit motive, which ultimately determines the subject-matter over which the Oversight Board has jurisdiction and guides the determination of ‘hard cases’ in content moderation.³¹ Technological resistance in the form of user obfuscation of their data to interfere with surveillance and data hacking, algorithmic hacking and the

²⁷ Evgeny Morozov, *Data populists must seize our information – for the benefit of us all*, THE GUARDIAN (Dec 4, 2016), <https://www.theguardian.com/commentisfree/2016/dec/04/data-populists-must-seize-information-for-benefit-of-all-evgeny-morozov>; Ryan Grim, *Steve Bannon Wants Facebook and Google Regulated Like Utilities*, THE INTERCEPT (Jul 27, 2017), <https://theintercept.com/2017/07/27/steve-bannon-wants-facebook-and-google-regulated-like-utilities/>. For more on bipartisan efforts to regulate big tech based on different objectives, see also Gilad Edelman, *A Conservative Senator’s Crusade Against Big Tech*, WASHINGTON POST (Aug 28, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/08/28/feature/a-conservative-senators-crusade-against-big-tech/>. In particular, at the federal level see the bipartisan sponsorship of the Do Not Track Act, S. ___, 116th Cong. (2019) (Bill to protect the privacy of internet users through the creation of a Do Not Track system); Social Media Addiction Reduction Technology Act, S. ___, 116th Cong. (2019) (Bill targeted at inhibiting practices by social media companies to capture users’ attention so as to serve their business model.) At the state level, see the It’s Your Data Act, A07736, Assemb. Reg. Sess. 2019-2020. (N.Y. 2019) (Bill for providing greater transparency and consumer privacy regarding the collection, use, retention and sharing of personal data).

²⁸ See generally NICK SRNICEK, PLATFORM CAPITALISM (2017).

²⁹ Eubanks, *supra* note 11; Pasquale, *supra* note 2.

³⁰ [Evelyn Douek, Facebook’s “Oversight Board”: Move Fast with Stable Infrastructure and Humility, 21 N.C.J.L. & TECH. 1, 28-39, 46-47 \(2019\) \(presents an overview of how the Oversight Board would function before critiquing its legitimacy as well as its technical capacity to address the immense volume of content-related appeals that will be generated. The author concedes that the Oversight Board may serve a useful function in providing a forum for public reasoning over content moderation\); see also Kadri & Klonick, *supra* note 7, at 95-97 \(presenting an optimistic view of the Oversight Board: the “platform is on the cusp of creating a meaningful check on its own power”, at 97\); but see David Pozen, *Authoritarian Constitutionalism in Facebookland*, KNIGHT FIRST AMEND. INST. \(Oct. 30, 2018\), <https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland> \(building the argument that by installing an Oversight Board, Facebook is emulating the absolutist constitutionalism of certain states which present the veneer of respecting civil liberties while concentrating ‘sovereign’ decision-making power in a single person’s hands.\)](#)

³¹ [Douek, *id* at 41.](#)

dissemination of viruses, while subversive, are by their very nature activities on the margins.³²

As with many tech startups, such platforms are venture capital funded and the path-dependent nature of such investment makes investor ownership very difficult to change later on in a corporation's life. Reputation management, through B Corp certification³³ may aid in corporate responsibility, but cases like that of Etsy—whose investors opted to rescind B Corp status for the sake of future growth³⁴—suggest that alone they may carry insufficient leverage to challenge impulses toward founders and investors seeking an IPO or sale to another business, such as a market incumbent.³⁵ Yet, the moment of a startup's 'exit'³⁶ to

³² [Alex Williams, *Control Societies and Platform Logic*, 84/85 NEW FORMATIONS 209–227, 227 \(2015\)](#); FINN BRUNTON & HELEN NISSENBAUM, *OBFUSCATION: A USER'S GUIDE FOR PRIVACY AND PROTEST 1* (2015) (“Obfuscation is the deliberate addition of ambiguous, confusing, or misleading information to interfere with surveillance and data collection” which can be operationalized through several means).

³³ See, e.g., [Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J BUS ETHICS 287 \(2013\)](#).

³⁴ [David Gelles, *Inside the Revolution at Etsy*, THE NEW YORK TIMES \(Jan 20, 2018\), <https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html>.](#)

³⁵ The empirical evidence suggests that an acquisition is more likely than an IPO. Xiaohui Gao et al., *Where Have All the IPOs Gone?*, 48 J. FIN. QUANT. ANALYSIS 1663, 1690 (2013) (documents the decline in IPOs between 2001-2012, which they argue occurred due to greater returns for investors being generated through a sale to a strategic buyer, such as a larger organization, rather than remaining as smaller, independent companies); Roberto Ragozzino & Dane P. Blevins, *Venture-Backed Firms: How Does Venture Capital Involvement Affect Their Likelihood of Going Public or Being Acquired?* 40 ENTREP. THEORY PRACT. 991, 992, 1002, 1006 (2016) (the authors also find that in a dataset of 3,600 VC-backed entrepreneurial companies between 1985-2010, 40% of businesses experienced exit by acquisition and 17% experienced an IPO within 10 years of being founded. The number of VCs invested in a company is significantly and positively correlated with the likelihood of exit by acquisition, but not the prominence or reputation of the VC); Pehr-Johan Norbäck & Lars Persson, *The Organization of the Innovation Industry: Entrepreneurs, Venture Capitalists, and Oligopolists*, 7 J. EUR. ECON. ASSOC. 1261, 1262-1263 (2009) (presents evidence that exits via acquisition by incumbents was more valuable than exits via IPOs, particularly in the United States during the early years of the millennium); Douglas Cumming, *Contracts and Exits in Venture Capital Finance*, 21 REV. FINANC. STUD. 1947, 1948 (2008) (indicates that VC funds in Europe are also likely to favor acquisitions over IPOs, particularly if the VC fund has strong control rights, by studying 223 investments between 1996-2005 across eleven continental European countries).

³⁶ [Dawn R. DeTienne, Alexander McKelvie & Gaylen N. Chandler, *Making sense of entrepreneurial exit strategies: A typology and test*, 30 J. BUS. VENTUR. 255, 256 \(2015\)](#) (“an exit strategy is the mode through which the entrepreneur intends to exit the firm”); [Dawn R. DeTienne, *Entrepreneurial Exit*, in WILEY ENCYCLOPEDIA OF MANAGEMENT 1, 1 \(Cary L. Cooper ed., 3rd ed. 2015\)](#) (an exit is “the process by which the founders of privately held firms leave the firm they helped to create; thereby removing themselves, in varying degree, from the primary ownership and decision-making structure of the firm”). An exit strategy may evolve during the lifetime of a startup and is thereby

acquisition or public offering can involve particular dangers for mission drift, potentially compromising its relationship with its end-users.³⁷ Claims that platform companies have a mission other than short-term profit maximization and founder aggrandizement are often dismissed as rhetorical flourishes, yet as online service providers and (in some cases) as creators of digital infrastructure, users genuinely come to depend on their affordances.³⁸ The fact that social media platforms can serve as safe havens for marginalized persons³⁹ and those seeking support for mental well-being⁴⁰ or that gig work platforms provide essential sources of income for immigrant communities⁴¹ have long been understood by researchers and many users themselves, but this has been underappreciated in the business world. As one commentator lamented, at the terminal decline of the

harder to measure, while an exit is a measurable event. For the sake of completeness, it should be noted that ‘exit to bankruptcy’ is a strategic option that is available to entrepreneurs wishing to renegotiate their relationships with creditors and other stakeholders during financial distress, but as mentioned earlier our focus is on an earlier stage in a business’s life cycle when multiple exit options may be possible—not just a strategic “last resort”, see Henrick Aalbers et al. *Does Pre-Packaged Bankruptcy Create Value? An Empirical Study of Postbankruptcy Employment Retention in the Netherlands*, 28 INT. INSOLV. R. 320, 322 (2019).

³⁷ Elmer describes this as part of the ‘preincorporation’ period of startups as it is the time when “a set of legal, political and economic conventions establish the prospects (the “future-look”) of a company”, reconstructing the capital structure of the company as well as its relationship to users and non-users. It is at this juncture that startups are typically required to rewrite their core values in a bid to attract external investment. Greg Elmer, *Preincorporation: or what financialisation can tell us about the histories of the Internet*, 1 INTERNET HISTORIES 90, 91, 93 (2017). However, DeTienne et al. in their typology highlight that founder-entrepreneurs may have exit strategies in mind that are geared towards stewardship and independence of the company over financial, profit-maximizing motives. [DeTienne, McKelvie, and Chandler, supra note 36 at 260.](#)

³⁸ Yuval Dror, *We are not here for the money’: Founders’ Manifestos*, 17 NEW MEDIA & SOC’Y 540, 547 (2015).

³⁹ See, e.g., Alexander Cho, *Default Publicness: Queer youth of color, social media, and being outed by the machine*, 20 NEW MEDIA & SOC’Y 3183, 3184, 3196 (2018) (discussing the preference of LGBTQI+ youth for Tumblr over Facebook and other social media platforms due to it avoiding communication that is public by default. This preference changed after the acquisition of Yahoo!-owned Tumblr by Verizon, which began to filter out LGBTQI+ user-generated content); Latoya A. Lee, *Black Twitter: A Response to Bias in Mainstream Media*, 6 SOC. SCI. 1, 6 (2017) (arguing that ‘black Twitter’ creates a digital homespace to address “social issues of racial bias and discrimination”).

⁴⁰ See, e.g., Rachel Berryman & Misha Kavka, *Crying on YouTube: Vlogs, self-exposure and the productivity of negative affect*, 24 CONVERGENCE 85, 87 (2018) (exploring the motivations for vloggers to create videos to lay bare their emotional vulnerability and seek community support). This is not to say this substitutes the need for medical and professional support.

⁴¹ See, e.g. Thor Berger et al., *Uber Happy? Work and Well-being in the “Gig Economy”*, 34 Economic Policy 429, 433 (2019) (presenting evidence that Uber drivers in London are primarily from Black, Bangladeshi and Pakistani ethnic groups, with driving for Uber being their main source of work).

Delicious link-sharing platform following its sale to Yahoo!, “If you make a startup we like, such as Delicious: please don’t sell it”.⁴²

Governing platform companies more democratically from within, along with reasonable regulatory guardrails, could offer a promising alternative.⁴³ If one agrees that social media companies offer a “public service”,⁴⁴ then cooperative or mutual business ownership offers a time-tested alternative to both private and state ownership for governing such a service. This alternative has been gaining momentum in recent years, largely under the banner of “platform cooperativism,” a burgeoning movement that calls for the reconfiguration of corporate ownership and governance in the online economy along the lines of the long-standing tradition of cooperative business.⁴⁵ This approach may point toward an especially desirable form of internal regulation in the long run, since it would confer greater legitimacy⁴⁶ on the decisions arrived at by the platform and will be intrinsically

⁴² Violet Blue, AVOS’ Delicious Disaster: Lessons from a Complete Failure, ZDNET (Sep 28, 2011), <https://www.zdnet.com/article/avos-delicious-disaster-lessons-from-a-complete-failure/>.

⁴³ [Douek, *supra* note 30, at 75 \(Douek observes that “Facebook is not a democracy--it is a business”\).](#) Our argument is that the history of cooperative and purpose-oriented businesses, as well as more recent experiences in using blockchain for solidaristic ends, can show that democracy and business are not mutually incompatible.

⁴⁴ There may be three interconnected public services offered by social media, “[f]irst, they *facilitate* public participation in art, politics, and culture. Second, they *organize* public conversation so that people can easily find and communicate with each other. Third, they *curate* public opinion through individualized results and feeds and through enforcing terms-of-service obligations and community guidelines”, see Balkin, *supra* note 2, at 9.

⁴⁵ See generally, [Nathan Schneider, *An Internet of Ownership: Democratic Design for the Online Economy*, 66 SOCIOLOGICAL REVIEW 320-340 \(2018\)](#); [SCHOLZ, *supra* note 3](#); [OURS TO HACK AND TO OWN: THE RISE OF PLATFORM COOPERATIVISM, A NEW VISION FOR THE FUTURE OF WORK AND A FAIRER INTERNET](#) (Trebor Scholz & Nathan Schneider eds., 2016).

⁴⁶ [JOHN RAWLS, POLITICAL LIBERALISM 217 \(Expanded ed. 2005\) \(this understanding of legitimacy draws on Rawls’ argument that the legitimacy of exercises of political power is predicated on a ‘duty of civility’, whereby citizens should be able to explain to one another how their choices and votes are supported by public reason and should be open, fair-minded and accommodating to the views of others\)](#). This understanding is premised on the normative view that platforms should be amenable to public reasoning and not considered a nonpublic ‘association’, given the importance of stakeholder retention (e.g. in the form of user attention) to their business model and the wide socio-economic impact that platforms can have as they become more prominent (e.g. in terms of market dominance), repercussions that extend beyond their employees, users and suppliers to the wider community. *Id.*, at 220. Arguably, from a civic republican point of view, granting stakeholders some of the deliberative tools of economic democracy will contribute to a more robust political democracy, see, e.g., [Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 369-372 \(2008\)](#) (reviewing empirical, social psychology and Habermasian arguments for this with respect to employee primacy and the extension of worker control in corporations).

transnational, as internet networks already are.⁴⁷ While we do not discount the value or necessity of government regulation, in this Article we focus on the potential of multi-stakeholder ownership⁴⁸ in the online economy, with particular attention to the inclusion of end-users.

Although platform cooperativism has garnered considerable interest, including a series of conferences, research projects, countless discussions in the popular press⁴⁹ and even a mention in a national political party's manifesto,⁵⁰ only a few Internet startups have achieved any success with a cooperative model and grown in international scale and membership. One such exceptional example is Stocksy, a stock photographers' cooperative registered in British Columbia but with global membership.⁵¹ Many such startups have run into existential barriers, particularly due to a lack of access to capital, mentorship, and other forms of infrastructural support.⁵² Meanwhile, some enthusiasts have sought to take the challenge to existing large Internet companies. A "#BuyTwitter" campaign in 2016 and 2017 proposed, through a petition and a shareholder proposal, that the popular microblogging platform Twitter, then being discussed as a potential acquisition target, should consider conversion to some form of user ownership.⁵³ Yet by demanding that the company merely "study" potential user-ownership models, the organizers and shareholders acknowledged that there is no go-to

⁴⁷ [Dwayne Winseck, *The Geopolitical Economy of the Global Internet Infrastructure*, 7 J. INFO. POLICY 228 \(2017\).](#)

⁴⁸ Multi-stakeholder ownership is considered to be beneficial for business models that combine production and consumption under a single organizational umbrella, such as online platforms, as they treat stakeholders as "allies rather than rivals, prioritize community solidarity over return on investment, and emphasize collective enhancement instead of value appropriation". Maurie J. Cohen, *Workers-and Consumers-of the World Unite! Opportunities for Hybrid Co-operativism*, in [THE OXFORD HANDBOOK OF MUTUAL, CO-OPERATIVE, AND CO-OWNED BUSINESS 374, 379 \(Jonathan Michie, Joseph R. Blasi, & Carlo Borzaga eds., 2017\)](#). The author explicitly advocates the exploration of multi-stakeholder ownership structures in platform co-operatives. *Id.*, at 378.

⁴⁹ The primary portal for this network is platform.coop, managed by the Platform Cooperativism Consortium at The New School in New York City. Both authors have been affiliated with these efforts.

⁵⁰ [JEREMY CORBYN, THE DIGITAL DEMOCRACY MANIFESTO \(2016\), https://d3n8a8pro7vhmx.cloudfront.net/corbynstays/pages/329/attachments/original/1472552058/Digital_Democracy.pdf \(last visited Feb 12, 2019\)](#); See also the mention of platform cooperatives in the new UK Labour leader's campaign manifesto, Keir Starmer, A Just Society, [https://keirstarmer.com/plans/a-just-society/](#).

⁵¹ [Trebor Scholz, *How to Coop the Digital Economy*, in MONEYLAB READER 2: OVERCOMING THE HYPE 197–214, 205–208 \(Inte Gloerich, Geert Lovink, & Patrice van der Burgt eds., 2018\) \(provides an overview of Stocksy's origins and business model\).](#)

⁵² [Schneider, *supra* note 45.](#)

⁵³ See [buytwitter.org](#) for the proposal text, press coverage, and other documents. One of us, Nathan Schneider, was closely involved in this campaign.

strategy for such a conversion to take place. Individual share ownership, while available for platform companies that have undergone an initial public offering, often confer weaker (or no) voting rights to individual shareholders,⁵⁴ and in any event is experiencing a secular decline with the rise of institutional investors.⁵⁵ In its current form, this does not present an attractive option for users. By 2018, the platform companies Airbnb, Postmates, and Uber had each sought the means to issue compensatory equity with their most loyal users, which remains largely untenable under current US securities law given the nature of the relationship of Airbnb hosts, Postmates couriers and Uber drivers with these platforms.⁵⁶

⁵⁴ On the decline of individual share-ownership in the United States, see Harwell Wells, *Shareholder Power in America, 1800-2000: A Short History*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 13-31, 18-19 (Jennifer G. Hill & Randall eds., 2015) (Wells notes the growth and diversity of individual shareholding in the United States till the decade after the Second World War before experiencing a decline precipitated by the growth of private and public pension funds); William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare* 36 SEATTLE U. L. REV. 489, 516-521 (2013) (presenting evidence that as of 2010, modal individual shareholders were in the top 1% wealth bracket, Caucasian and above 65). On the ubiquity of dual- and multi-class voting structures which depart from the one-share, one-vote structure to give founders holding a certain class of shares more voting power per share than other shareholders, see, e.g. Lucian Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1463 (2019) (“Since Google went public with dual-class stock in 2004, IPOs have increasingly featured dual-class stock: 19% of the companies listed on U.S. exchanges in 2017 used a dual-class structure, compared to just 1% in 2005”).

⁵⁵ Cf. Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 723, 725 (2019) (discussing the ten-fold increase in institutional investor ownership in the past 60 years, with the largest institutional investors—the Big Three comprising Blackrock, Vanguard and State—being passive investors, thereby being excessively deferential to the management of investee companies); John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* (Harvard Public Law Working Paper No. 19-07, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 (emphasizing the power that may be exercised and potentially abused by twelve management teams over their investee companies) . Coates explains that individual investors have some information rights with respect to investment funds, but do not have any shareholder rights with respect to the investee companies of the fund, see at 7.

⁵⁶ See 17 C.F.R. § 230.701(c) (2018); also see [Robert B. Robbins, Cindy V. Schlaefter & Jessica Lutrin, *From Home Sharing and Ride Sharing to Shareholding*, PILLSBURY LAW \(2018\), <https://www.pillsburylaw.com/en/news-and-insights/rule-701-revision-uber-airbnb.html> \(last visited Jul 3, 2019\)](#). Rule 701 of the Securities Act of 1933 allows companies to issue compensatory securities (of up to US\$10 million) to employees, independent contractors, advisors and de facto employees without filing a registration statement with the SEC. This exemption allows the company to avoid the lengthy and complex disclosures required of public companies. For Uber, Postmates and Airbnb’s response to a public consultation on *inter alia* the potential reform of Rule 701, see Comment Letter from Danielle Burr, Head of Federal Affairs, Uber Technologies, Inc., to U.S. Securities & Exchange Commission (Oct. 11, 2018), <https://www.sec.gov/comments/s7-18-18/s71818-4510185-175992.pdf>; Comment Letter from Robert Rieders, General Counsel & Vikrum D. Aiyer, Vice President of Public Policy & Strategic Communications, Postmates Inc., to U.S. Securities & Exchange Commission (Oct. 17, 2018),

Activists and corporate executives alike appear to agree on the need for clearer options for stewardship-oriented founders who are interested in sharing ownership.

The purpose of this Article is to make a contribution toward filling that gap. Using the example of an archetypical technology company that uses the multi-sided, matchmaking platform business model, we propose and analyze three strategies for rendering such firms more broadly accountable to participant stakeholders than conventional, investor-owned startups are. We submit that this is not only beneficial for the welfare of stakeholders but also to the business as a distinct entity. Many of the perverse incentives in the platform economy emerge from the obligatory, single-minded pursuit of a speculative liquidity event or “exit”—typically, an initial public offering or an acquisition by a more established company. While stock market offerings encourage the pursuit of short-term financial gains, acquirers often shut down the startups they buy altogether.⁵⁷ Each outcome risks marginalizing the platforms’ key stakeholders, such as users and employees. An alternative exit strategy, an *exit to community*, may be the best way to ensure that platform businesses remain within, and become accountable to, their community of stakeholders.⁵⁸

<https://www.sec.gov/comments/s7-18-18/s71818-4532609-176090.pdf>; Comment Letter from Rob Chesnut, General Counsel, Airbnb, Inc., to U.S. Securities & Exchange Commission (Sept. 21, 2018), <https://www.sec.gov/comments/s7-18-18/s71818-4403356-175575.pdf>.

⁵⁷ We agree with Lemley and McCreary that entrepreneurs starting a company with a focus on how it will eventually be shut down is “deeply misguided”, see Mark A. Lemley & Andrew McCreary, *Exit Strategy* 8 (Stanford Law and Economics Olin Working Paper No. 542, 2020), <https://ssrn.com/abstract=3506919> (they present evidence of, and arguments why, there has been a decline in IPOs, with the primary reasons being the speed and scale of incumbent acquisitions and the economic incentives that act upon VCs to promote such acquisitions).

⁵⁸ While strategies like employee and community buy-outs have long been considered in the context of founder(s) succession and financial distress, our proposed exit to community strategy draws attention to an earlier inflection point in the business’s lifecycle. On employee buy-outs as a strategy of founder succession, see, e.g. STEPHEN CLIFFORD & THE STAFF OF THE OHIO EMPLOYEE OWNERSHIP CENTER, AN OWNER’S GUIDE TO BUSINESS SUCCESSION PLANNING (2nd ed., 2008); David Wagner, *California Business Owners Spread the Wealth by Selling their Companies to their Workers*, LAIST, Nov 1, 2019, https://laist.com/2019/11/01/california_business_owners_spread_the_wealth_by_selling_their_companies_to_their_workers.php (last accessed Feb 19, 2020). On employee buy-outs as a strategy for rescuing a business from financial distress, see e.g. Susan Chaplinsky, Greg Niehaus & Linda van de Gucht, *Employee Buyouts: Causes, Structure, and Consequences*, 48 J. FIN. ECON. 283, 285-286 (1998). On community buy-outs of local ‘community assets’, see e.g. Tessa Lynn, *The Social Relations of Property: Motives, Means and the Outcomes of the Community Right to Bid in England* (2018) (unpublished Ph.D. dissertation, University of Reading) (on file with author).

This Article invites the reader to consider if a major gig platform could become owned by its gig workers? Could a successful startup be acquired by its employees and users, rather than through public markets or by a larger company? What role can new technologies such as blockchain have in easing the conversion process to more accountable ownership? The strategies we present are ones that build on long-standing corporate structuring options and corporate governance principles that are present in several industries and jurisdictions, but which have been largely overlooked when analyzing the accountability crises of platform companies. Through these proposals, we aim to make more plausible the prospect of democratic multi-stakeholder ownership and governance of such companies—which collectively affect critical economic, social, cultural and environmental infrastructure on a global scale. These strategies, or variations thereof, may appeal to existing, market-leading platforms, budding platforms with a small user base or ones that are in-between. If successful, we hope that these strategies may spur a new “race to the top” of companies competing to offer more attractive forms of economic democracy.

B. Defining terms

We understand *community* to be those persons who both use and contribute labor (broadly understood) to a platform business, as well as a term to encapsulate the bonds and sense of belonging that grows among these persons through the process of using and contributing to the platform over a sustained period of time.⁵⁹ This accords with the legal philosopher John Finnis’s view that the formation of a community involves social interactions “over a sustained period of time...with a view to a common objective”.⁶⁰ In discussing *multi-stakeholder ownership*, we include models in which one or more classes of stakeholders experience meaningful financial or governance rights from co-owning part or all of the company that operates a platform in which they participate. This is distinct from efforts by local communities to save local businesses by, for instance, helping them purchase expensive new equipment, as it does not involve a transfer of ownership.⁶¹ We take *user* from the colloquial—and likely intentionally vague⁶²—terminology that platform companies themselves typically adopt to refer to people who interact with

⁵⁹ On the importance of bonds and a sense of belonging in community formation, see e.g., ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 70 (2006).

⁶⁰ JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 153 (2nd ed., 1980).

⁶¹ Matthew Josefy et al., *The Role of Community in Crowdfunding Success: Evidence on Cultural Attributes in Funding Campaigns to “Save the Local Theater”*, 41 *ENTREP. THEORY PRACT.* 161, 168 (2017).

⁶² See [Tarleton Gillespie, *The politics of ‘platforms’*, 12 *NEW MEDIA & SOC’Y* 347 \(2010\).](#)

their services. The ambiguity of this identity category finds expression, for instance, in futurist Alvin Toffler's 1980 neologism 'prosumer', a blending of the activities of production and consumption without clear lines between the two—a term scholars have rediscovered to help describe the platform era.⁶³ Users may engage in contributing labor value (e.g., 'volunteer' moderators, ride-sharing drivers, content posters), consuming content (e.g., social-media account holders, viewers of targeted advertising), providing business services (e.g., restaurants that provide food for a delivery service), and investing financially (e.g., crowdfunding, micro-lending). Our understanding of users does not include platform companies' employees, although such employees are typically also users. Instead, employees are a distinct class of stakeholder. We draw attention to non-employee users as a distinct class because many employees already have access to stock ownership programs in US platform companies and because they are relatively few in number compared to contributing users as a whole.⁶⁴

By bringing attention to the emergent stakeholder group of platform users, we seek to join our voices to the chorus of corporate law scholars who have sought to recognize the essential contributions of participant stakeholders.⁶⁵ This line of argument stands in contrast to the dominant strand of corporate governance discourse in the United States, particularly in the state of Delaware, where the interests of shareholders are regarded as primary over other potential stakeholders.⁶⁶ By advocating the extension of ownership rights to users, we go

⁶³ See generally [George Ritzer & Nathan Jurgenson, *Production, Consumption, Prosumption: The nature of capitalism in the age of the digital 'prosumer'*, 10 J. CONSUM. CULT. 13 \(2010\); ALVIN TOFFLER, *THE THIRD WAVE* 292 \(1980\).](#)

⁶⁴ For instance, according to its 2019 S-1 filing, Uber Technologies' employees numbered 22,263, alongside 3.9 million active drivers, typically classified as independent contractors. On the frequency (and perils) of employee stock options as a form of compensation in technology startups, see Abraham J.B. Cable, *Fool's Gold? Equity Compensation & The Mature Startup*, 11 VA. L. & BUS. REV. 615, 616 (2017).

⁶⁵ See generally, [Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 \(1992\); McDonnell, *supra* note 46; Lynn A Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism \(in the Closet\)*, 36 SEATTLE U.L. REV. 1169 \(2013\); DAVID YOSIFON, *CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT* \(2018\).](#)

⁶⁶ Julian Velasco, *Fiduciary Principles in Corporate Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 61, 64 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019); [STEPHEN BAINBRIDGE, *CORPORATE LAW* 141 \(2nd ed., 2009\)](#). In the context of the platform economy, this can be most readily seen in the case involving the online classifieds platform Craigslist. See *Ebay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) in which the Court of Chancery of Delaware held that a shareholder rights plan which sought to preserve a corporate culture that didn't prioritize shareholder wealth maximization was inconsistent with the directors' fiduciary duties as "[p]romoting, protecting, or pursuing non-stockholder considerations must lead at some point to

beyond earlier recommendations for merely expanding the sphere of corporate purpose to multiple stakeholder groups,⁶⁷ as such multi-stakeholder ownership comes direct fiduciary duty,⁶⁸ legal standing for litigation, and governance rights.⁶⁹

We further stipulate that multi-stakeholder ownership must be *broad-based*, meaning that ownership accrues to all or most of that class, rather than to an elite few.⁷⁰ In the context of employee-ownership schemes, for instance, a company that offers voluntary stock options that only executives can exercise is not broad-based; an automatic employee stock-ownership plan (ESOP) from which all employees benefit, even if the benefits vary according to their pay scale, is broad-

value for stockholders”. *Id.*, at 33. Chancellor Chandler then went on to emphasize that the choice of a for-profit Delaware corporation and the ‘Inc.’ suffix are bound by the fiduciary standards that accompany that form, including the promotion of shareholder value. *Id.*, at 34. For a contrary view on shareholder primacy, see, e.g. Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1268 (1999) (arguing that shareholder wealth maximization can be considered as a default rule, rather than a mandatory rule if it is accepted that a corporation is a nexus-of-contracts in which shareholders can opt out of shareholder primacy).

⁶⁷ For a recent overview and critique of ‘stakeholderism’, see Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* (Mar. 1, 2020) (unpublished manuscript) (on file with author). Note that the critique of Bebchuk and Tallarita is directed at the concept of ‘enlightened shareholder value’ being indistinct from shareholder value and that the identification and serving of stakeholders imposes a ‘Herculean’ task on directors. This framing still views directors as being ‘mediating hierarchs’ with broad discretion, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 325 (1999). Multi-stakeholder ownership, in contrast, limits the scope for such discretion, as seen in the three strategies below, given that stakeholders, such as users, transition from having a contractual relationship with the corporation to one rooted in equity, whether that is in the form of share ownership or membership.

⁶⁸ The powerlessness of users and the indirectness of platform accountability to them is argued in Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1666 (2018). In recent years, there has been a lively debate concerning the recognition of a new class of “information fiduciaries”, partially extending the duties of care, confidentiality and loyalty expected of professionals—lawyers, doctors and accountants—to “online service providers”, including the platforms discussed thus far. For a representation of this view, see Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/> (last visited Mar. 5, 2020); Balkin, *supra* note 19, at 1222, 1225 (arguing that this fiduciary relationship should be legally recognized because of the significant vulnerability of users, users’ relative dependence on these providers, the providers’ expertise in the service they provide and the providers holding themselves out to be trustworthy, which would in turn allow the imposition of ethical obligations and regulations without violating the providers’ first amendment rights to collect, analyze, sell or disclose some end-user data). There has been some legislative interest in the idea of online service providers acting as fiduciaries, with Democratic Senators introducing the Data Care Act of 2018, S. 3744, 115th Cong. (2018) that directly draws on Balkin’s proposals. However, there has been some pushback on Balkin’s core arguments, see Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019) (pointing out the

based. Broad-based user ownership should include all, or a large majority of, value-contributing users. As a consequence, investor ownership or founder ownership alone would not be considered broad-based. For platforms that rely on a large pool of non-employee users regularly contributing value, even widespread employee ownership should not alone qualify as broad-based ownership of a company.

We seek to avoid specifying in advance the legal form such multi-stakeholder ownership should take, while presenting tangible examples of what it could look like. It might, for instance, take shape within a cooperative, a limited liability company, or some other legal entity. The corporation's shares might be wholly or partially owned by users, where the legal ownership of shares might be handled by an intermediary entity such as a trust or the shares might be owned by

gaps in Balkin's information fiduciary proposal, that online service providers cannot have a fiduciary duty in a meaningful sense to users if shareholder primacy is still maintained, that the business model of platforms makes 'user primacy' implausible and/or unworkable, that the creation of user vulnerability is deliberate and that there are extensive information asymmetries between the user and the platform. They add that the fiduciary concept is also vague in how it will be enforced and question whether the idea materially adds to the arsenal of contractual and privacy rights that already exists. They appear to be particularly concerned that the recognition of fiduciary duties will head off more ambitious regulatory interventions, such as vigorous antitrust enforcement. *Id.*, at 537. In view of these criticisms, while Balkin and Zittrain's approach would require either Congressional approval or judicial creativity, we seek to privately order changes in transparency and accountability in governance through strategies that transfer ownership and thereby shift who the platform owes fiduciary duties to. This is also intended to reconcile the (financial) interests of shareholders and stakeholders such as users. Arguably, a board of directors that is more representative of users' interests will be more sensitive—or at least more transparent—about why (and the extent to which) user- and non-user tracking is necessary. Khan and Pozen speak favorably of data interoperability with other platforms as a more 'felicitous' approach to platform regulation in the interest of competition. *Id.*, at 538-539. Our strategies are aimed at ensuring that there are viable, attractive alternatives for users to switch to.

⁶⁹ Our contribution—at least with respect to governance—is most closely aligned with those of Professor Maurie J. Cohen regarding multi-stakeholder platform cooperative ownership. MAURIE J. COHEN, *THE FUTURE OF CONSUMER SOCIETY: PROSPECTS FOR SUSTAINABILITY IN THE NEW ECONOMY* 124-125 (2017). It is also aligned with the more ambitious of Professor Yosifon's proposals, who argues in *Corporate Friction*, that the very largest corporations should be "structured to allow each major stakeholder group to elect at least one director to the board". *supra* note 65, at 200. Yosifon notes that the affordances of modern technology would particularly facilitate the voting of large stakeholder groups, such as consumers. *Id.*, at 201. In terms of changing who counts as a shareholder, the 'value(s)' they seek and extending their engagement, our first and third strategies are aligned with Professor Lynn Stout's proposal to create a Universal Fund, as a 'mega mutual-fund', to democratize citizen participation in corporate governance, see LYNN STOUT ET AL., *CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INFLUENCE AND INCOME TO ALL* 132 (2019).

⁷⁰ [Joseph Blasi, Douglas Kruse & Richard B. Freeman, *Broad-based employee stock ownership and profit sharing: History, evidence, and policy implications*, 1 J. PART. & EMP. OWN. 38 \(2018\) \(discussing the corporate governance benefits of broad-based employee ownership\).](#)

the users directly. The primary benefits of broad-based multi-stakeholder ownership might be financial returns (such as ensuring rank-and-file users receive dividends alongside investors) or oversight in governance (such as through board representation and voting rights in general meetings). Such ownership might include only one group of users being especially involved in the value creation process or it might balance the interests of multiple stakeholder groups. While many of these strategies fall short of classical aspirations for workers' control,⁷¹ we seek productive compromises that balance the interests of platforms' diverse stakeholders.

The bulk of what follows will review three strategies for converting founder- and investor-owned, closely-held Internet-native firms to multi-stakeholder ownership—strategies that could be relevant for both growth-stage and mature contexts: multi-stakeholder buyout via a trust, federation, and tokenization. In order to concretize the strategies we propose, we will be considering the case of a hypothetical platform company.⁷² This allows us to describe their means of implementation and possible outcomes within a specific organizational context.

C. The case of CoSocial

CoSocial Corporation (“CoSocial”) is a C corporation⁷³ incorporated and headquartered in San Francisco, California, that operates a social network made up of affinity-based groups, managed and moderated by users. In a short space of time, a bare bones website with a small, dedicated following grew to boasting 50 million monthly active users spread across the globe, both on the Web and its free smartphone application. Like its larger competitors, the platform derives revenue from advertising and promoted links.

In addition to its social media features, CoSocial developed into a peer-to-peer gig platform, wherein users can pay each other for services. A small

⁷¹ [David P Ellerman, *ESOPs & CO-OPs: Worker Capitalism & Worker Democracy*, 1 LAB. RES. REV. \(1985\); Immanuel Ness & Dario Azzellini, *Introduction, in OURS TO MASTER AND TO OWN: WORKERS' CONTROL FROM THE COMMUNE TO THE PRESENT 1* \(Dario Azzellini & Immanuel Ness eds., 2011\).](#)

⁷² The use of hypothetical scenarios is common for comparative corporate law scholarship, see generally Lynn M. LoPucki, *A Rule-Based Method for Comparing Corporate Law*, 94 NOTRE DAME L. REV. 263 (2018); Mathias M. Siems, *The Methods of Comparative Corporate Law*, in THE ROUTLEDGE HANDBOOK OF CORPORATE LAW (Roman Tomasic ed., 2016). We see it being useful not only for comparing jurisdictional approaches but also plotting different strategies towards exit to community.

⁷³ The C Corp continues to be the most common legal form for start-ups, see Gregg Polsky, *Explaining Choice-of-Entity Decisions by Silicon Valley Start-Ups*, 70 HASTINGS L.J. 409, 411 (2019).

commission is paid to the platform for each successful transaction. Partly because its early user-base included a critical mass of counter-cultural artists, CoSocial is widely viewed as a more community-oriented alternative to the more prominent social-media and gig platforms. The gig functionality, for instance, is often used by creatives, such as gallerists and filmmakers, to hire local or distributed teams for large-scale projects.

CoSocial initially launched with seed funding from the founders themselves, their families and friends, and through convertible notes issued to a small group of angel investors.⁷⁴ Subsequently, at a pre-money valuation of US\$6 million, the company received US\$3 million in Series A funding from a venture capital fund. This gave CoSocial a post-money valuation of US\$9 million and the venture capital fund 33 percent of preferred shares⁷⁵ in the business. As a consequence, following the conversion of the convertible notes, CoSocial had two classes of equity: 47 percent of common shares were held by the founders and family, 10 percent of preferred shares by a group of angel investors, 10 percent was left for the employee stock option pool, and 33 percent of preferred shares were held by a venture capital fund. The term sheet of the VC investment, among other provisions, included a non-participating liquidation preference for the investment amount, a broad-based weighted average anti-dilution provision, two investor-elected board seats and co-sale (tag along) rights.

Over the course of three years, the platform grew to its current user base of 50 million monthly active users. Following a Series B and Series C financing rounds, CoSocial had a post-money valuation of US\$500 million.⁷⁶ At this stage, 47

⁷⁴ The fact that founders typically look to these groups for seed funding is mentioned in, Elizabeth Pollman, *Startup Governance*, 168 U. Pa. L. Rev. 155, 167, 170 (2019). Convertible notes are a form of debt that may be converted into preferred shares upon maturing and pays interest, see, e.g. John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 151 (2014).

⁷⁵ Preferred shares (also known as preferred stock) are senior to common shares in a corporation's capital structure, which means that preference shareholders are paid in full before common shareholders are paid in the event of the corporation's liquidation. The preferred shareholders also receive dividends from the corporation's current income prior to common shareholders as well. See Ben Walther, *The Peril and Promise of Preferred Stock*, 39 DEL. J. CORP. L. 161, 168 (2014). While preferred shares typically do not have voting rights, it is standard for them to have voting rights over major corporate decisions such as changes in corporate control or dissolution of the corporation, see HAROLD MARSH JR., R. ROY FINKLE & KEITH PAUL BISHOP, MARSH'S CALIFORNIA CORPORATION LAW § 7.03 (4th ed. 2020).

⁷⁶ These figures conservatively approximate the user-base and valuation of the collaborative publishing network Medium, see Jim Edwards, *\$132 million later, Ev Williams says he's raising even more money for Medium*, BUSINESS INSIDER (Nov. 8, 2018), <https://www.businessinsider.nl/ev-williams-raising-more-money-for-medium-2018-11/>.

percent of common shares were held by the founders and family, 10 percent in the option pool and 43 percent of preferred shares by eight investors,⁷⁷ including the initial VC fund that now acts as a lead investor.

Growth slowed somewhat in the following months. Management began to face pressure from the lead investor⁷⁸ to begin monetizing the network through the introduction of more aggressive targeted advertising and increasing its share of transaction fees from gig services. Among other things, this would require CoSocial to step up its collection and processing of personal data for uses that would not be readily apparent for users, even if they consent to such collection.⁷⁹ For the moment, CoSocial enjoyed strong loyalty from its users and moderate recurring revenue from the gig transactions, and its reputation had not been tarnished by the scandals that plagued similar platforms. Yet analysts feared that without dramatically increasing growth and revenue, it would not be an attractive candidate for an initial public offering or a profitable buyout.

The founders, who had till then the power to appoint four members of the seven-member board, had so far resisted the investors' demands for fear that such changes would alienate the core user-base and undermine CoSocial's future.⁸⁰ They were searching for an alternative solution that would both satisfy the investors and further strengthen the community-oriented culture of the platform, which served as one of its principal competitive advantages. In other words, their consideration of exit options included factors not limited to maximizing short-term financial return. This challenge, and possible solutions to it, are what we turn to for the remainder of this Article.

⁷⁷ It is assumed that Series B and Series C preferred shareholders have different cash flow, liquidation, control and voting rights than the initial VC fund.

⁷⁸ There is a material risk that startup founder-CEOs are replaced by large, activist investors, particularly as the startup matures into a large corporation, see Pollman, *supra* note 74, at 169, 180, 184.

⁷⁹ See, e.g., Brinckerhoff, *supra* note 18, at 140 (arguing that users do not meaningfully consent to Facebook's implementation of facial recognition technology). Elmer documents the escalating rate at which the Facebook interface and core user services changed between 2004 and the year of its IPO in an effort to stimulate user engagement and time spent on the platform, see Elmer, *supra* note 37, at 94.

⁸⁰ This is a pivotal moment for CoSocial as investors typically gain more seats with further financing rounds, leading the startup from being primarily controlled by its founders to being controlled by its investors, see D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 326-327 (2005).

II. EXIT-TO-COMMUNITY STRATEGIES

Here we consider three distinct possibilities for the future of our fictional company, CoSocial, together with their backgrounds and implications. We understand that these strategies include features that may be beyond the realm of what is presently feasible; thus each section includes a policy discussion about modest, near-term interventions that could ease the way toward these strategies becoming more accessible.

A. *Option 1: Stockholding trust*

In this scenario, with the support of the founders and their family members, CoSocial’s board of directors established a non-charitable perpetual purpose trust, CoTrust, in the state of Delaware. Its purpose was to enable CoSocial users to participate in profit-sharing and governance within the CoSocial Corporation. This involved settling a trust agreement, a set of principles⁸¹ that CoTrust commits itself to and drafting a profit-sharing agreement that is to be approved by founders, investors, employees, and users. The board of CoSocial appointed an experienced trustee to handle administrative matters (e.g., trust distributions) and a trust “enforcer” to hold the role usually filled by beneficiaries (e.g., legal action to ensure the purpose of the trust is fulfilled), and it outlined a system of elections among founders, investors, employees, and active, confirmed CoSocial users to elect representatives onto a Trust Protector Committee. This Committee would have the power to remove the trustee and the trust enforcer, appoint future members to CoSocial Corporation’s board and approve profit distributions. The members of the Committee could vote on a one-member, one-vote basis or in proportion to the shares beneficially held by each class of stakeholder. Given the ease with which users may enter and exit the platform and obscure their identities, the platform’s system of cross-checking user identities with government-issued IDs and residency documents for its gig-work functionality was employed so that users could become confirmed participants in CoTrust.

Once established, one of CoTrust’s purposes was to gradually acquire 100 percent share ownership of CoSocial Corporation.⁸² This meant that initially external investors were one of the stakeholder groups represented on the Trust Protector Committee and received cumulative preferred dividends. However, eventually, the CoSocial board and the CoTrust trustees initiated a process of gradually buying out the outside investors. This involved approaching social finance and other values-aligned equity investors willing to provide loans for the buyback of shares, as well as the issuance of non-voting preferred shares to values-

⁸¹ For example: promoting forums for stakeholders to express their voice regarding important choices and decisions to be made by platform companies (including CoSocial).

⁸² The repurchase of stock is a common recent trend, *see* Pollman, *supra* note 74, at 175.

aligned accredited investors.⁸³ These shares were then transferred to CoTrust, which meant that they could not be sold by any of the stakeholders or the corporation. After consultation with affected employees, the employee stock option plan was cancelled in favor of integrating the employees into the financial and governance structure of the trust agreement, including the right to elect their own representatives to the Trust Protector Committee.⁸⁴ As a consequence, the shares set aside for the option pool were transferred to the purpose trust.

The early investors were reluctant to agree to the deal at first, but before long they embraced it. They came to recognize that CoSocial was not on track to accelerate its growth exponentially without compromising the reasons that its users had come to trust it. The company had become, as some business analysts put it, a “zombie”.⁸⁵ Faced with a never-ending wait for an acquisition or initial public offering, they supported the unusual arrangement. They knew that if they cash out after holding their shares in CoSocial for five years, they would not have to pay little to no capital gains tax.⁸⁶ While the VC fund managers have a fiduciary duty to their limited partners, whose capital they invest, they also owe a duty of

⁸³ This is the proposed approach of the Organically Grown Company, see Fifty by Fifty, *Organically Grown Company Transitions from ESOP to Perpetual Trust*, MEDIUM (Aug 8, 2018), <https://medium.com/fifty-by-fifty/organically-grown-company-transitions-from-esop-to-perpetual-trust-293107e62cd>.

⁸⁴ Pollman notes how employee participation in startup governance is typically indirect, see Pollman, *supra* note 74, at 194. She also observes that the granting of non-vested stock options are also vulnerable to being arbitrarily clawed back by the startup, see Thomas A. Smith, *The Zynga Clawback: Shoring Up the Central Pillar of Innovation*, 53 SANTA CLARA L. REV. 577, 578 (2013).

⁸⁵ Adam Golub and Carrie Lane, *Zombie Companies and Corporate Survivors*, 7 Anthropology Now 47, 47 (2015) (“The term ‘zombie company’ refers to a company that is officially ‘alive’ despite being financially dead...a company that can manage to pay the interest on its debts but not reduce the actual debt...[they] keep lurching along — not quite alive but not quite dead, either.”) While this adjective has been used to describe bailed-out banks, it is often used to refer to startups that earn enough revenue to keep running but are unlikely to achieve a large return for investors, see e.g., Sean Wise, *8 Signs Your Startup is a Zombie, and 3 Things to Do About It*, INC. (Dec 11, 2018), <https://www.inc.com/sean-wise/8-signs-your-startup-is-a-zombie-3-things-to-do-about-it.html> (last accessed Mar 5, 2020).

⁸⁶ This is due to the fact that CoSocial qualified as a ‘small business’ as a result of having less than US\$ 50 million in assets at the time they received these investments. 26 U.S.C. § 1202(d) (defining qualified small business). The amount that the investors could exclude from their income depends on their initial investment but it could be up to “10 times the aggregate adjusted basis of the [shares] issued by the corporation disposed of by the taxpayer during the taxable year, as measured on the original issue date”. *Id.*, 1202(b)(1)(B). Given the cap on assets to be qualified as a small business, the upper limit is US\$ 500 million in exemptions. In the case of CoSocial, the VC fund, for instance, would be able to exclude up to US\$ 30 million as its Series A investment was US\$ 3 million. However, as this only applies to shares that were originally issued by the corporation, it would not apply to shares acquired through secondary markets. *Id.*, § 1202(c)(1).

care to the portfolio company, CoSocial.⁸⁷ An exit to community via the CoTrust appeared to be the best option in the circumstances. They were able to walk away with their initial investment and a bit more, even if it was short of their highest ambitions.

From its inception, CoTrust gained a significant role in CoSocial's governance. In accordance with the deal struck with the early investors, the amended articles of incorporation provided that the Trust Protector Committee could appoint two members onto CoSocial's seven-member board. Over time, as the VC fund and other external investors exited CoSocial and the CoTrust grew from being a minority shareholder to a controlling shareholder, all of the seats came to be elected by the Trust Protector Committee.

As a consequence of these changes, users found a new set of reasons to appreciate the platform. They began to receive, in monthly transfers to their app wallets, a portion of the dividends on CoTrust's stock. As per the profit-sharing agreement, the users' dividends were in proportion to their transactions through the platform, for as long as they remained active users. The higher the platform's total transaction volume, and the higher their own activity, the higher their "divi".⁸⁸ Confirmed users, who proved their identities and used the platform above a certain threshold during the course of a year, became eligible to participate in CoTrust's governance system for as long as they maintained their engagement.

It all seemed complex at first, but a gamified interface made involvement in the governance process seem intuitive. Through a system of delegative (or "liquid") voting, users selected board members and allocated those funds not distributed in the divi to projects ranging from silly, viral stunts to sophisticated research on their own behavior and oversight of company practices. Compared to users of other platforms, CoSocial's users thus developed unusually high degrees of confidence that their personal data and financial dealings were being handled responsibly. This confidence, in turn, fueled the platform's growth. The divi even became an important source of income for many users, who in turn became committed to the platform's success and sustainability. While CoSocial never reached the size of some of its "unicorn" competitors, it became widely regarded as an important high-

⁸⁷ *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 46 (Del. Ch. 2013) (on this dual responsibility); Lemley & McCreary, *supra* note 57, at 47.

⁸⁸ This is an affectionate term borrowed from the British consumer cooperatives deriving from the Rochdale Society of Equitable Pioneers, founded in 1844. Katarina Friberg et al., *The Politics of Commercial Dynamics: Cooperative Adaptations to Postwar Consumerism in the United Kingdom and Sweden, 1950-2010*, [in THE COOPERATIVE BUSINESS MOVEMENT, 1950 TO THE PRESENT 243–262, 249 \(Patrizia Battilani & Harm G. Schröter eds., 2012\)](#).

road organization that raised expectations for others, analogous to Wikipedia, Mozilla, WorldCat, and the Internet Archive.

1. Background

This scenario takes inspiration from the US ESOP, which corporations may use to sell or contribute their shares to a trust so as to eventually vest in individual employees' accounts, often as part of their direct-contribution retirement package.⁸⁹ To qualify for their tax advantages, ESOPs must be broad-based among a company's employees rather than benefiting just top executives,⁹⁰ and they have frequently been used as a means for founders to transfer their stake in a business to employees.⁹¹ This process is often a leveraged transaction, financed by bank loans which are secured by a pledge of the shares and a guarantee from the corporation, so that neither the employer nor the employees pay upfront.⁹² These loans can subsequently be repaid by the company through tax-deductible employer contributions to the ESOP.⁹³ In terms of control rights, the terms of the Plan determine whether voting rights are passed through to ESOP participants, with it only being statutorily required that participants who have had shares allocated to their account be permitted to direct how the trustee votes such shares in major corporate transactions, namely mergers or consolidations, recapitalization, reclassification, liquidation, dissolution and the sale of substantially all assets of the business.⁹⁴

There are, however, limitations in applying the ESOP model to the platform economy, if we are to include the variety of stakeholders mentioned above. While the Internal Revenue Code's definition of "employee" for the purpose of benefit

⁸⁹ 29 U.S.C. § 1107(d)(6)(A) ("The term "employee stock ownership plan means an individual account plan...which is a stock bonus plan which is qualified...and which is designed to invest primarily in qualifying employer securities").

⁹⁰ See 26 U.S.C. § 1042(b)(2). The participants in a plan may be current and former employees as well as their beneficiaries, see 29. U.S.C. § 1002(7).

⁹¹ See *Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992) ("Congress explicitly intended that the ESOP would be both an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership"). While it is possible for an ESOP to hold all of a corporation's shares, typically most ESOPs only hold thirty percent of a corporation's shares, see Sarah J. Westendorf, *Compensation through Ownership: The Use of the ESOP in Entrepreneurial Ventures*, 1 ENTREPRENEURIAL BUS. L.J. 195, 204 (2007).

⁹² [JOHN H. LANGBEIN, DAVID A. PRATT & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW 58, 344 \(5th ed. 2010\)](#); see also [COREY ROSEN & SCOTT RODRICK, UNDERSTANDING ESOPs \(2018\)](#).

⁹³ [Norman P Stein, *An Alphabet Soup Agenda for Reform of the Internal Revenue Code and ERISA Provisions Applicable to Qualified Deferred Compensation Plans*, 56 SMU L. Rev. 49, 646-647 \(2003\)](#).

⁹⁴ 26 U.S.C. §§ 409(e)(3), 409(e)(5).

plans is broad, potentially including employees who have been retrospectively reclassified after having been regarded as independent contractors,⁹⁵ it would not extend to creators of voluntary, user-generated content or contractor-workers who have not been reclassified. Moreover, since the class of users is constantly changing, it becomes difficult to specify identifiable beneficiaries—a common requirement for settling most types of trusts.

The basic economic principles undergirding ESOPs, however, are not predicated on the existence of an employment relationship or indeed the maximal extraction of labor value. Instead, it rests on the idea of maximizing the productivity of capital and distributing the income generated through this production.⁹⁶ As part of a wider vision of “binary economics,” ESOP inventor Louis Kelso regarded the mechanism as only one of many possible leveraged buyout trusts; for instance, he outlined and experimented with a variant that would be owned by a company’s consumers, among other stakeholder groups.⁹⁷ The inclusion of such stakeholders, in the words of the constitution of the John Lewis Partnership, would allow them to “share the responsibilities of ownership as well as its rewards—profit, knowledge and power”.⁹⁸

The use of a non-charitable perpetual purpose trust would address some limitations of beneficiary trusts. Purpose trusts are trusts that are created for specific, non-charitable purposes rather than for identifiable beneficiaries.⁹⁹ In contrast to LLCs, these trusts place the trust property outside of the ownership of the settlor and mandatorily limit the discretion of both trustees and beneficiaries in how they handle the trust property. While purpose trusts were primarily developed in offshore jurisdictions, an increasing number of onshore jurisdictions have legislation that permits the creation of non-charitable perpetual purpose

⁹⁵ *Vizcaino v. Microsoft Corp.*, 97 F. 3d. 1187 (9th Cir. 1996). In the IRC Technical Advice Memorandum of July 28, 1999, Mr. Richard Wickersham of the Internal Revenue Service (IRS) explains that the Microsoft benefit plan did not explicitly exclude reclassified employees.

⁹⁶ See [Robert H. A. Ashford, *The Binary Economics of Louis Kelso: The Promise of Universal Capitalism*, 22 RUTGERS L.J. 3 \(1990\)](#).

⁹⁷ See [LOUIS O. KELSO & PATRICIA HETTER KELSO, *DEMOCRACY AND ECONOMIC POWER: EXTENDING THE ESOP REVOLUTION THROUGH BINARY ECONOMICS \(1986\)*](#). The sole, but successful, example of a Consumer Stock Ownership Plan (CSOP) was Valley Nitrogen Producers, Inc., headquartered in Fresno, California, which enabled its farmer-shareholders to acquire ownership of two fertilizer factories and buy their fertilizers from the factories at near-production cost between 1957 and 1963 when Congress changed the tax laws to inhibit such structures. *Id.*, at Chapter 7.

⁹⁸ JOHN LEWIS PARTNERSHIP, *THE CONSTITUTION OF THE JOHN LEWIS PARTNERSHIP* 7 (2017).

⁹⁹ See generally, [Richard C Ausness, *Non-Charitable Purpose Trusts: Past, Present, and Future*, 51 REAL PROP. TR. & EST. L.J. 321, 327 \(2016\)](#); [Christopher Michael, *The Employee Ownership Trust, an ESOP Alternative*, 31 PROB. & PROP. \(2017\)](#).

trusts, including the US states of Delaware, New Hampshire, Wyoming, and Maine. Major online platforms have already proposed the use of non-beneficiary trusts to resolve accountability challenges, such as the “civic data trust” of Google-affiliate Sidewalk Labs¹⁰⁰ and the trust intended to intermediate between Facebook and its Independent Oversight Board.¹⁰¹

An early example of a company adopting a stockholding trust explicitly for its users is NIO, a Chinese electric vehicle manufacturer that also offers a car-sharing app. In 2018, its founder Bin Li announced plans to deposit approximately one third of NIO’s shares, with financial rights but no voting rights, into a trust on behalf of users. Li wrote, in a letter included with NIO securities filings, “I believe this trust arrangement further advances NIO’s pursuit of our original aspiration of becoming a user enterprise and will also deepen our relationship with users”.¹⁰²

In general, legislation concerning such trusts requires that the purposes are specifically defined, certain, reasonable, not immoral or against public policy, and capable of being fulfilled.¹⁰³ The governance of such trusts is flexible, usually requiring, at a minimum, the appointment of one trustee to administer the trust property and a trust protector to enforce the purposes of the trust. The trustee’s fiduciary obligations are to fulfill the purposes of the trust through the administration of the trust property (e.g., shares in a company) rather than to a specified class of beneficiaries.¹⁰⁴ While people may benefit from purpose trusts, this benefit is indirect. This is particularly advantageous when involving users, as an entity like CoTrust is not required to constantly update the personal details of who its user beneficiaries are, given that the trust is for the benefit of active, confirmed users as a class. Users are furthermore not required to take on the

¹⁰⁰ [Alyssa Harvey Dawson, *An Update on Data Governance for Sidewalk Toronto*, SIDEWALK LABS \(Oct 15, 2018\), https://www.sidewalklabs.com/blog/an-update-on-data-governance-for-sidewalk-toronto/.](https://www.sidewalklabs.com/blog/an-update-on-data-governance-for-sidewalk-toronto/)

¹⁰¹ [Brent Harris, *Establishing Structure and Governance for an Independent Oversight Board* | Facebook Newsroom, FACEBOOK NEWSROOM \(Sept 17, 2019\), https://newsroom.fb.com/news/2019/09/oversight-board-structure/.](https://newsroom.fb.com/news/2019/09/oversight-board-structure/)

¹⁰² [Nio, Inc., *Letter from Bin Li, in Form F-1 Registration Statement under the Securities Act of 1933*, at iii \(filed with the SEC on Aug 13, 2018\), available at https://sec.report/Document/0001193125-18-247401/; Nio, Inc., *NIO Inc. CEO Transferred 50 Million Shares to the Newly Established NIO User Trust*, NIO \(Jan 24, 2019, 3:00 AM EST\), https://ir.nio.com/news-events/news-releases/news-release-details/nio-inc-ceo-transferred-50-million-shares-newly.](https://sec.report/Document/0001193125-18-247401/)

¹⁰³ See ROSE-MARIE BELLE ANTOINE, OFFSHORE FINANCIAL LAW: TRUSTS AND RELATED TAX ISSUES 48-50 (2nd ed., 2013).

¹⁰⁴ The possibility of shares in a corporation being owned by a purpose trust is explicitly referred to in *Id.*, at 51.

ordinary duties of a shareholder, nor are they required to dispose of any shares when leaving the platform. The “perpetual” dimension exempts CoSocial Corporation from having to buy back the shares held in CoTrust at the end of a statutorily defined period, as may otherwise be the case with trusts.¹⁰⁵ Alternatively, if many of the users of CoSocial are resident in the UK or another jurisdiction and there is concern that the perpetual trust will not be recognized, a suitably long duration of the trust (e.g., up to a maximum of 125 years for the UK) can be included in the trust’s governing instrument.

Depending on the jurisdiction, other structural options might be available, which for reasons of space we cannot delve into. For instance, cooperatives organized by user-members to hold shares in a platform company, akin to Québec’s ‘worker-shareholder’ cooperatives, could be developed as a means to advance user-ownership.¹⁰⁶ Non-equity profit-sharing bonuses to platform users could similarly align their economic gains with those of shareholders, executives and other non-executive employees who receive equity remuneration. Forms of employee co-determination in governance, without stock ownership,¹⁰⁷ might be expanded to include platform users. Such structures might be voluntary or required by law, but in either case they should be designed to ensure users have meaningful, enforceable collective power.

2. Implications for Governance

ESOPs have become a common feature in the US corporate landscape, but ordinarily they do not require significant employee participation in governance. As mentioned above, in private corporations, the voting rights of the shares held in the employee ownership trust are ordinarily exercised by trustees, with the exception of fundamental decisions such as liquidation or sale of the company when they are obligated to pass through their voting rights to employee-beneficiaries.¹⁰⁸ This is contrary to a growing body of evidence that finds that

¹⁰⁵ In California, an interest in a trust must vest or terminate no later than 21 years following the death of a potential beneficiary or actually vest or terminate within 90 years of being created. See CAL. PROB. CODE §§ 21200-21231. On the gradual decline of the Rules against Perpetuities in the United States and the concomitant rise of perpetual trusts, see generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003).

¹⁰⁶ [Sharit K. Bhowmik, *Workers as Shareholders: Case for Closer Examination*, 29 ECONOMIC AND POLITICAL WEEKLY 2580–2582 \(1994\)](#); [Yvan Comeau & Benoit Levesque, *Workers’ Financial Participation in the Property of Enterprises in Quebec*, 14 ECONOMIC AND INDUSTRIAL DEMOCRACY 233–250, 239–243 \(1993\)](#).

¹⁰⁷ Thomas Piketty recently made the case for extending co-management in Anglo-American companies, including through board-level representation of workers, by drawing on the experience of Nordic countries and Germany. see THOMAS PIKETTY, CAPITAL AND IDEOLOGY 513 (2020).

¹⁰⁸ Rosen & Rodrick, *supra* note 92, at 16-17.

employee financial participation is most effective when coupled with employee participation in governance ¹⁰⁹, which has spurred a growing interest in more participatory governance in ESOP workplaces.

A non-charitable perpetual purpose trust, as described above, can facilitate not only greater employee participation in the corporate governance of a corporation but also that of other stakeholders who are vested in its continued existence and prosperity. In the context of the platform economy, this notably includes committed, active users of platforms. The Organically Grown Company, a wholesale distributor of organic produce in the Pacific Northwest coast of the United States, has introduced a purpose trust after being both an agricultural market cooperative and operating an ESOP. Such a structure can give stakeholders such as users a direct voice in the election of a Trust Protector Committee, a say in the election of the board of directors of a corporation and a right to present grievances to the Committee if they feel that their interests are not being adequately catered to.¹¹⁰

A host of involvement mechanisms could be deployed to facilitate user governance. For instance, liquid democracy¹¹¹ and quadratic voting¹¹² appear to

¹⁰⁹ [Blasi, Kruse, and Freeman, *supra* note 70.](#)

¹¹⁰ [THE PURPOSE FOUNDATION, STEWARD-OWNERSHIP: OWNERSHIP AND FINANCE SOLUTIONS FOR MISSION-DRIVEN BUSINESSES 28 \(2019\).](#)

¹¹¹ [Liquid democracy refers to a system where voters delegate voting power to delegates over certain issues but can withdraw the delegation of that power at any time and vote directly. Steve Hardt & Lia C. R. Lopes, *Google Votes: A Liquid Democracy Experiment on a Corporate Social Network*, TECHNICAL DISCLOSURE COMMONS \(Jun. 5, 2015\), \[https://www.tdcommons.org/dpubs_series/79\]\(https://www.tdcommons.org/dpubs_series/79\) \(provides a case study of liquid democracy in action on Google's internal corporate Google+ social network\).](#)

¹¹² Eric A. Posner & E. Glen Weyl, *Quadratic Voting and the Public Good: An Introduction*, 172 PUBLIC CHOICE 1 (2017) (Quadratic voting is a voting tool “where individuals buy as many votes as they wish by paying the square of the votes they buy using some currency”). It is posited that quadratic voting would reduce vertical and horizontal agency costs, by giving minority shareholders—as well as stakeholders—the ability to increase the weight of their votes, see [Eric A. Posner & E. Glen Weyl, *Quadratic Voting as Efficient Corporate Governance*, 81 U. CHI. L. REV. 251, 253, 260 \(2014\). The response to criticisms that this would encourage plutocratic behavior has been that the sums contributed to acquire votes would go to the corporation initially, with large shareholders \(> one percent of shares\) only receiving one percent of the funds they spent on acquiring votes and the remainder going to other shareholders. *Id.*, at 261. It could also be that the currency used to pay for votes is not in fiat currency but a ‘voice credit’ that could be internal to the platform and obtained through means other than wealth. Most recently, Posner & Weyl have suggested that quadratic voting could also be used for a form of mutual management in online platforms, where “users could have voice credits that they receive for participation \(say, a certain number for every stay, ride, or post\) that they then could use to evaluate the performance of others on the system”. ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST](#)

have some promise for governance in digitally enabled corporate contexts, balancing scale with expertise and commitment. An updated version of ancient Greek sortition could employ relatively small virtual juries of users to study controversial issues and make decisions on behalf of users as a whole—a model used by the dispute resolution platform cooperative Kleros.¹¹³ If an election system proves to be unwieldy or leads to democratic entropy, a sortition method could be used to select representatives for the Trust Protector Committee.¹¹⁴

Such a system for user governance must contend with concerns about principal-agent costs that might accrue, leaving directors unaccountable to both shareholders and non-shareholder groups.¹¹⁵ The potential for tensions to emerge between shareholder-appointed directors (or employed executives) and stakeholder-appointed directors has also been acknowledged in the context of multi-stakeholder cooperatives, such as Japan’s medical cooperatives.¹¹⁶ The use of a purpose trust addresses this critique as it positions a large, fluid group of stakeholders as a class with a unified purpose. While critics of stakeholder theory have argued that stakeholder theory is vague in terms of its proposed objectives and this can render management unaccountable,¹¹⁷ the defined purposes and the broad powers of the Trust Protector Committee mitigates this risk. Even in purely economic terms, the inability of stakeholder groups to directly enforce the trust as

[SOCIETY 117 \(2018\).](#)

¹¹³ See [Federico Ast, *Genesis: When Greek Lotteries Meet Medieval Private Law*, IN DISPUTE RESOLUTION: THE KLEROS HANDBOOK OF DECENTRALIZED JUSTICE \(Kleros.io ed., 2019\) \(explaining how Kleros uses a sortition system to select ‘jurors’ to decide on disputes concerning online transactions\).](#) A similar system has been proposed for the blockchain-based social network Minds to handle content moderation, in the wake of Neo-Nazis exploiting its light touch approach to content moderation. See Ben Makuch & Jordan Pearson, *Minds, the ‘Anti-Facebook,’ Has No Idea What to Do About All the Neo-Nazis*, VICE (May 28, 2019, 2000 hours), https://www.vice.com/en_ca/article/wjvp8y/minds-the-anti-facebook-has-no-idea-what-to-do-about-all-the-neo-nazis.

¹¹⁴ [Simon Pek, *Drawing Out Democracy: The Role of Sortition in Preventing and Overcoming Organizational Degeneration in Worker-Owned Firms*, J. MANAG. INQUIRY \(forthcoming\) \(manuscript at 6, on file with authors\) \(describing sortition, the lottery system where representatives are selected at random from a larger pool of potential candidates, and its historical use in representative government\).](#)

¹¹⁵ [Frank H Easterbrook & Daniel R Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 \(1991\); Michael C Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q 23, 237 \(2002\); Richard A Posner, *Economic analysis of law* 396 \(3rd ed. 1986\).](#)

¹¹⁶ [Victor A. Pestoff, *The Social and Political Dimensions of Co-operative Enterprises*, in THE OXFORD HANDBOOK OF MUTUAL, CO-OPERATIVE, AND CO-OWNED BUSINESS 76, 88 \(Jonathan Michie, Joseph R. Blasi, & Carlo Borzaga eds., 2017\).](#)

¹¹⁷ [Jensen, *supra* note 115 at 242.](#)

beneficiaries, coupled with their financial interest in the company, would incentivize them to monitor the activities of the Committee and exercise their appointment rights carefully. The Committee's own financial stake and fear of replacement would motivate its members to supervise the trust officers and the board. Thus, the alignment of interests in such a structure, combined with its democratic qualities, would go some way toward addressing the problem of apathy that typically bedevils companies with dispersed retail share ownership¹¹⁸ as well as those with passive institutional investors.¹¹⁹

From a legal standpoint, the use of a purpose trust would permit fiduciaries to reorient their decision-making away from pursuing shareholder wealth maximization and toward fulfilling the specified purposes of the trust agreement. While it would be unreasonable to expect that founders, employees, users, and investors would agree on every issue, the emergent mechanisms to signal stakeholder voice and the Committee would provide fora to work out topics of disagreement on equal footing before arriving at a decision. This would not only confer decisions made by the trust and the corporation with greater legitimacy, it would diminish the fiduciary problems associated with ESOPs, where the fiduciary of an employee ownership trust may have divergent interests from the corporation in which the trust holds shares.¹²⁰ As such, elements of the governance structure of CoTrust, such as a Trust Protector Committee, may be of interest to emerging user trusts such as the Nio Inc User Trust, which seek to involve their users in decision-making about how the financial returns to the trust are employed but do not confer control rights over the company to the trust.¹²¹

3. Implications for Financial Rights

In the perpetual purpose trust outlined above, users would accrue divi (e.g., as bank deposits or payments to an account on the platform) from the CoTrust at the moment that CoTrust itself receives dividends from its share-holding of CoSocial Corporation shares. Unlike a conventional security holding, they would

¹¹⁸ [Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1314 \(2019\).](#)

¹¹⁹ [Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPECT. 89, 90, 100–101 \(2017\).](#)

¹²⁰ [Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459, 464–465 \(2015\).](#) In ESOPs this is the case because the people acting as plan administrators are often the same people as the directors and officers of the corporation, leading to a conflict between their ERISA duty to act in the best interests of plan participants and their general corporate duty of loyalty to the corporation. This conflict can arise when an offer is made to purchase a company or when a plan is to be amended.

¹²¹ [Nio, Inc. \(Aug 13, 2018\), *supra* note 102; Nio, Inc. \(Jan 24, 2019\), *supra* note 102.](#)

not have to accrue, hold or dispose of equity themselves, however, the trust may structure their payments so that employees as a class are preferentially paid before users. By being paid in fiat currencies, bank deposits, or other widely-accepted negotiable instruments, the platform can avoid the regulatory difficulties of privately issuing equity to a globally-dispersed and constantly changing user base. This liquidated form of financial benefit is also easier to transfer to other companies. In this regard, lessons can be drawn from the experience of collaborative platforms such as HITRECORD, which has been making payments of varying amounts to community contributors around the world since 2005,¹²² first by issuing cheques and more recently by using payment platforms like Hyperwallet.¹²³

It is important to clarify that given the length of time it generally takes before a platform company is profitable and able to distribute dividends,¹²⁴ it would be inadvisable for a non-charitable perpetual purpose trust to be considered a retirement benefit plan for employees or users (as ESOPs typically are) or as a substitute for a salary. The wildly varying nature of platforms, and their users' relationships to them, entails that the potential for financial returns would vary wildly as well. For gig work platforms, such a trust should be accompanied with portable benefit plans so as not to expose economically precarious individuals to undue risk.¹²⁵ This strategy may not initially seem attractive to highly-skilled employees who may have found the promise of lucrative stock options more alluring than the mission of CoSocial, but given the expense involved in exercising

¹²² [Melanie Fawcett, *Hollywood calling: Hitrecord and the power of online collaboration*, SCREEN EDUCATION 86, 87 \(2016\).](#)

¹²³ [HITRECORD, *Are artists outside the United States eligible to receive community payments?*, HELP.HITRECORD.ORG \(2019\), <https://help.hitrecord.org/help/are-artists-outside-the-united-states-eligible-to-receive-community-payments> \(last visited Sep 20, 2019\).](#)

¹²⁴ [Dan Caplinger, *Will Facebook Start Paying a Dividend in 2019?*, THE MOTLEY FOOL \(2019\), <https://www.fool.com/investing/2019/01/21/will-facebook-start-paying-a-dividend-in-2019.aspx> \(last visited Sep 20, 2019\).](#)

¹²⁵ Rachel Emma Silverman, *On-Demand Workers Need 'Portable Benefits'*, *Tech and Labor Leaders Says*, WALL ST. J. (Nov. 10, 2015, 6:46 PM ET), <https://www.wsj.com/articles/on-demand-workers-need-portable-benefits-tech-and-labor-leaders-say-1447199167> (reporting on a letter sent by some forty executives and public policy experts on the need for portable benefits for gig workers, including worker compensation and sick leave). The need for social protection systems to be portable, in acknowledgment of labor market mobility is mentioned in Christina Behrendt, Quynh Anh Nguyen & Uma Rani, *Social Protection Systems and the Future of Work: Ensuring Social Security for Digital Platform Workers*, 73 INT'L SOC. SEC. REV. 17, 26, 32 (2019).

stock options and the fact that the common stock will be relatively illiquid once the options are exercised (due to no IPO or acquisition being on the horizon) this strategy may be more beneficial to them as well in the long run.¹²⁶

Some trusts may, instead, be oriented more toward shared governance than distributing financial gains. For instance, in the case of social media platforms that most individual users do not generate a primary income from but which process their personal data. In such cases it may be preferable to design a purpose trust that retains the income from the stock it holds and allocates it toward user organizing and advocacy efforts toward the mission of user empowerment. The use of these funds should be determined through a process that involves users directly.

4. Implications for Public Policy

As with any business organization that seeks to chart a path that is distinct from shareholder wealth maximization, the major issue in mainstreaming the adoption of purpose trusts for platform users will be financing the acquisition of shares by the trust. **One option will be to introduce tax measures that make the creation of such trusts financially attractive, as was done previously in the United States at the federal level for ESOP trusts regulated by ERISA.** Individuals and LLCs that sell their shares to a qualified ESOP—including the founders of a business or a VC fund organized as an LLC—can indefinitely defer payment of capital gains tax under section 1042 of the Internal Revenue Code if they reinvest (“rollover”) the proceeds into a qualified replacement property. One advocate for the use of perpetual purpose trusts for employee ownership in the United States has already presented a proposal that the tax treatment of ESOPs should be extended to other kinds of employee ownership trusts, including perpetual purpose trusts.¹²⁷ We submit that this regime should extend beyond the employment relation to include multi-stakeholder trusts such as CoTrust.

We appreciate that by advocating the use of such trusts, we are stepping into one of the most heated debates in trust law jurisprudence: the recognition of non-charitable purpose trusts that do not have identifiable beneficiaries to enforce them.¹²⁸ Purpose trusts have long been seen to be controversial as they raise questions as to who a court should direct performance toward in the event that a trustee fails to meet their obligations. Their controversial status may be a risk

¹²⁶ Pollman, *supra* note 74, at 215 (providing examples of employees being harmed by the expense of exercising their options, the illiquidity of exercised common stock and/or falling share prices).

¹²⁷ [Michael, *supra* note 99 at 47.](#)

¹²⁸ [ALASTAIR HUDSON, GREAT DEBATES IN EQUITY AND TRUSTS 99 \(2014\).](#)

especially in the event that the trust's purposes are defined imprecisely. This controversy not only has doctrinal implications but also has ramifications for the validity of such trusts in jurisdictions other than the one in which it was settled. This in turn may impact user and platform company views regarding the feasibility of such trusts. It is therefore important to briefly explain how the judicial view of purpose trusts has evolved in recent years.

Purpose trusts seek to supplant the accountability and disciplining function of beneficiaries through the appointment of a trust enforcer.¹²⁹ Enforcers monitor whether a trustee is achieving the purpose of the trust and has the power to take action against the trustee if they fail to do so. Scholars such as Low have raised concerns about privately appointed enforcers being lax in their enforcement function or having conflicts of interest;¹³⁰ to guard against this risk, most jurisdictions provide for a court to be able to remove an enforcer if they are unable or unwilling to perform their duties.¹³¹ This too may be problematic as the state may lack knowledge or incentive to remove such an enforcer.¹³² Another option is to bifurcate the role of the enforcer, with one person (natural or legal) acting in the usual role of beneficiaries and another (e.g. a trust protection committee) being responsible for overseeing whether the mission of the trust is being pursued and approving any distributions made from the trust. This is akin to the role that state entities like the UK's Charity Commission have in overseeing whether trusts settled in the UK are genuinely charitable. In the case of non-charitable purpose trusts, this oversight function is legitimized by having the Trust Protector Committee democratically elected by CoSocial's stakeholders. This is a practice that was adopted by the aforementioned Organically Grown Company in 2018.¹³³

Despite the controversy over non-charitable purpose trusts, particularly in English legal scholarship, case law indicates that Australian¹³⁴ and Canadian¹³⁵ courts are willing to recognise the validity of such trusts. Even English courts have accepted such trusts on the condition that there are definable class of persons who can enforce the non-charitable purpose of the trust even if they only benefit from

¹²⁹ See [MARK HUBBARD, PROTECTORS OF TRUSTS 199 \(2013\)](#).

¹³⁰ See [Kelvin F.K. Low, Non-Charitable Purpose Trusts: The Missing Right to Forego Enforcement, in TRUSTS AND MODERN WEALTH MANAGEMENT 486 \(Richard C. Nolan, Kelvin F.K. Low, & Tang Hang Wu eds., 2018\)](#).

¹³¹ HUBBARD, *supra* note 129 at 203.

¹³² [Low, *supra* note 130 at 507](#).

¹³³ THE PURPOSE FOUNDATION, *supra* note 110 at, 24, 26 .

¹³⁴ *Dubois v. Hodgson* [1999] NSWSC 1065.

¹³⁵ *Keewatin Tribal Council Inc. v. Thompson (City)* (1989) 61 Man. R. (2d) 241, [1989] 2 C.T.C. 206.

the fulfilment of the purpose of the trust indirectly.¹³⁶ While these cases concern unincorporated non-charitable associations such as football clubs, religious organizations and a group of employees, it could potentially include a multi-stakeholder association of employees, users, founders and investors as well. The fact that the main international Convention on Trust law¹³⁷ acknowledges purpose trusts as valid trusts, the Uniform Trust Code¹³⁸ regulates purpose trusts and that the legislature of US states like Oregon have recently passed legislation to regulate non-charitable perpetual purpose trusts,¹³⁹ highlights their growing mainstream acceptance. In the wider realm of internet governance, this trust strategy complements the view of some that controversial governance issues concerning the allocation of critical resources for the infrastructure of the internet, such as generic top-level domain names, should be administered as a global public trust for the benefit of the global public interest.¹⁴⁰

¹³⁶ Re Denley [1969] 1 Ch. 373, Re Lipinski's Will Trusts [1976] Ch. 235; Grender v. Dresden [2009] EWHC 214 (Ch) at [18]. Hudson refers to these as 'people trusts', i.e. non-charitable purpose trusts "the intention of which is to benefit identifiable people as beneficiaries" instead of just an abstract purpose. See Hudson, *supra* note 128, at 173. The fact that The Perpetuities and Accumulations Act, 2009, c. 18, § 18 refers to the duration of non-charitable purpose trusts also indicates that such trusts can be settled, however, it is doubtful that its duration could be more than 125 years (the statutory perpetuity period in the UK). Professor Hudson recommends that to comply with this perpetuities period, there should be a provision limiting the future members' entitlement to the trust property, although the 2009 Act may rescue even the trusts that fail to do so, *see Id.*, at 196.

¹³⁷ Convention on the Law Applicable to Trusts and on their Recognition, § 2, Jul. 1, 1985, 23 I.L.M. 1389 (entered into force on Jan. 1, 1992).

¹³⁸ UNIF. TRUST CODE § 409 (amended 2016).

¹³⁹ Oregon's Legislative Assembly recently passed a Bill that would facilitate the creation of trusts for non-charitable business purposes, known as stewardship trusts. OREGON REVISED STATUTES § 130.193. While it was possible to establish a non-charitable purpose trust in Oregon prior to this statute being enacted, this new law explicitly defines the scope of non-charitable business purposes, provides details on the ownership interests that the trust can have as an asset, and makes the 90-year expiry limit of trusts a default rule that can be varied, *see Id.*, §§ 130.193(1)-(2), 105.965(8).

¹⁴⁰ [Milton L. Mueller & Farzaneh Badieli, *Governing Internet Territory: ICANN, Sovereignty Claims, Property Rights and Country Code Top-Level Domains*, 18 COLUM. SCI. TECH. L. REV. 435, 485-486, 491 \(2017\)](#). The conception of there being a distinct 'Internet community', in whose benefit ICANN should act, was articulated in *ICM v ICANN*, ICDR Case No. 50, 117 T 00224 08, 19 February 2010. Subsequently, ICANN created a mechanism whereby third parties could submit objections to generic top-level domains on specific grounds, including through an Independent Objector tasked to lodge limited public interest and community objections against highly objectionable domain names for the benefit of the global Internet community, *see Adamantia Rachovitsa, International Law and the Global Public Interest: ICANN's Independent Objector as a Mechanism of Responsive Global Governance*, in NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT 342, 343 (James Summers & Alex Gough eds., 2018) It should be noted that there has long been multi-stakeholder governance process for top-level domain names, which includes Internet users, with the heated debate over the proposed .xxx domain name being an illustrative example, *see*, Mark Leiser & Andrew Murray, *The*

All this is to say that purpose trusts appear to be a promising tool for enabling the kind of flexible, accountable user ownership that CoTrust represents.

B. Option 2: Federation

Our second option considers another way to reorient the company toward its community. In this scenario, CoSocial defined the outlines of a plan that, over a five-year period, would transition CoSocial from a single platform to a federated system called CoNet. Rather than continuing to manage the entire system through its vertically integrated organization, CoSocial's board decided to advance its market position by radically distributing decision-making power to the moderators and users of its platform. The first step in doing this involved converting CoSocial into a benefit corporation, so as to avoid derivative actions by disgruntled shareholders who disapprove of this distribution of power. A shift away from shareholder value maximization would also permit the board of CoSocial to ward off takeover bids from larger competitors, which are a persistent threat in the platform economy.¹⁴¹ The founders of CoSocial, who held 47% of the issued common shares, all agreed with this course of action and were instrumental in persuading some of the external investors that this conversion into a benefit corporation would allow them to gain long-term value. The non-vested employee options were unaffected by the conversion as it did not involve a change in control and would be transferred to the new benefit corporation. As a consequence, the requisite two-thirds of all classes of shareholders voted for the conversion at a shareholders' meeting, and the few that dissented were paid the fair market value of their shares.¹⁴² In its amended articles of incorporation, the new CoSocial Benefit Corporation stated that along with achieving a general public benefit,¹⁴³ the company committed to the specific public benefit of (i) distributing power over the CoSocial network and infrastructure among its users and (ii) stimulating broad-based ownership of CoSocial corporation.

Role of Non-State Actors and Institutions in the Governance of New and Emerging Digital Technologies, in THE OXFORD HANDBOOK OF LAW, REGULATION AND TECHNOLOGY 670, 686-687 (Roger Brownsword, Eloise Scotford, and Karen Yeung eds. 2017).

¹⁴¹ [Kim Doyle, *Facebook, Whatsapp and the commodification of affective labour*, 48 COMM., POL. & CULTURE 51, 56 \(2015\).](#)

¹⁴² CAL. CORP. CODE § 14603(a).

¹⁴³ The California Corporations Code defines this as “a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.” *Id.*, § 14601(c). The Code mentions a non-exhaustive list of 7 specific public benefits but other specific public benefits can be included as long as they are more specific than the general public benefit, but broad enough to accommodate future changes. The possibility of social media platforms registering as public benefit corporations was also alluded to, but not further explored, by Klonick, *supra* note 68, at 1168.

The new benefit corporation’s strategy of distributing network power had both technical and organizational dimensions. On the technical side, CoSocial released a new version of its software with a free, copyleft license (e.g. GNU Affero General Public License v3.0)¹⁴⁴ that allowed user-groups to download and run the software on their own servers, while ensuring that a certain percentage of revenues earned through network transactions were shared with the company. The terms of the license also meant that other user-groups could iterate on the software improvements made by any other user-group. User-moderators of the groups on the platform already had significant autonomy on CoSocial; now, they could run a customized version of the CoSocial platform on their own servers for local user communities. As CoSocial implemented a decentralized social networking protocol (e.g. ActivityPub),¹⁴⁵ users were able to interact with other user-groups that had installed their own servers, as well as servers running third-party software that adopted CoSocial’s open protocol.

Local legal entity forms that enabled member-ownership were registered to operate “user-group” Nodes. (These often were, but were not limited to, cooperatives.) Nodes were conferred the ability to make a wide range of decisions over matters such as user-onboarding,¹⁴⁶ user-interface design, content moderation, data management policies, advertising policies, group governance, and which other Nodes they chose to collectively remove from the network.¹⁴⁷ By distributing decision-rights to these Nodes, each Node was able to align its ‘gig work’

¹⁴⁴ We use the Free Software Foundation’s definition of free software, as being software that give users the freedom to run, copy, distribute, study, change and improve the software. This does not refer to price, as users can charge for modified software if they wish. A subcategory of free software can be licensed on copyleft terms, which means that users cannot restrict the freedoms associated with the software through their use and adaptations of it. See <https://www.gnu.org/philosophy/free-sw.html>.

¹⁴⁵ See ActivityPub, W3C Recommendation 23 January 2018, [w3.org/TR/activitypub](https://www.w3.org/TR/activitypub) (last visited Mar 13, 2020) (“The ActivityPub Protocol is a decentralized social networking protocol based upon the ActivityStreams 2.0 data format. It provides a client to server API for creating, updating and deleting content, as well as a federated server to server API for delivering notifications and content”).

¹⁴⁶ This includes setting the process of distinguishing genuine users from bots as well as those among the former who have a fleeting interest in CoSocial’s activities and those who wish to contribute to an alternative way of governing a platform business.

¹⁴⁷ It is not exceptional that platforms can decide what their “tone and tenor” is or involve users in content moderation processes, as even major platforms do so, see Klonick, *supra* note 68, at 1626, 1641. While this should be calibrated to the business model of the Nodes and be mindful of commercial confidentiality, as a practical matter there is “no excuse for members not to be consulted or engaged on any issue”. Peter Couchman, *Governance and Organizational Challenges*, in [THE OXFORD HANDBOOK OF MUTUAL, CO-OPERATIVE, AND CO-OWNED BUSINESS 246, 256](#) (Jonathan Michie, Joseph R. Blasi, & Carlo Borzaga eds., 2017).

functionality with local regulations and the demands of gig workers in their jurisdiction. This also entailed significant cost-savings, as CoSocial had to invest less in expansion strategies, content moderation, and several other previously centralized functions, as these were addressed by individual Nodes.

Some decisions, however, were not delegated to the Nodes. To maintain certain core services that benefit from operating at scale—the payments system, the advertising marketplace, and the popular AI-powered recommendation algorithms—Nodes were expected to financially contribute to CoNet. Some Nodes could seek to opt out of these services or develop them independently, but most Nodes saw the benefit of having an organization facilitate the coordination of certain issues and sharing resources among the Nodes.

With this in mind, some of the moderators and active users decided to form CoNet Cooperative, an entity organized under the Cooperative Corporation Law of California¹⁴⁸ that was dedicated to furthering the interests of its Node-members. These members enjoyed one-member, one-vote decision-making rights in the governance of the CoNet Cooperative. In return, the membership conditions of CoNet Cooperative required that the owners of the Nodes pay monthly dues and maintain a minimum level of patronage,¹⁴⁹ which was expansively defined to encompass a broad range of activities, from moderators/users of individual Nodes giving time to govern the cooperative to the contribution of meta-data and technical expertise to improve the offerings of the federated CoNet. For gig-work transactions that involved payments to individual users, the Nodes and CoNet Cooperative charged a small transaction fee that was set at a lower rate than competitor platforms.

Initially, a significant portion of these dues and fees went from CoNet Cooperative to CoSocial Benefit Corporation to cover overheads and the salaries of employees who remained with the company. However, as the model's popularity grew, CoNet Cooperative began to acquire shares in the CoSocial Benefit Corporation with the view of ultimately merging it with CoNet Cooperative once it had the means to tender an offer. This acquisition of shares was partially financed by the aforementioned member Nodes' dues and transaction fees from users. This was complemented by donations of shares from CoSocial Benefit Corporation, from shares that had been redeemed earlier, in an effort to comply with its specific public benefit of expanding broad-based ownership of the company. Over time, CoSocial became wholly owned by a cooperative of its member-owned Nodes.

¹⁴⁸ CAL. CORP. CODE § 12200.

¹⁴⁹ CAL. CORP. CODE §§ 12441, 12243.

Through this arrangement, users enjoyed the ubiquity of a common network along with a considerable diversity of Nodes to choose from. The emphasis on relentlessly growing CoSocial’s user base and maximizing shareholder value had gradually been replaced with a commitment to enhancing the welfare of users. Users simultaneously become part of two public spheres, at the level of their individual Nodes and at the level of the Cooperative. For the users who increasingly come to identify more with their favorite Nodes than with CoNet, the cooperative organizational network faded into the background as it gave rise to an ever more diverse, community-governed experience of Internet social media and gig labor.¹⁵⁰

1. Background

In comparison to the previous scenario involving a perpetual purpose trust, a federation is well-regarded by those acquainted with the governance of social and syndicalist movements,¹⁵¹ global common-pool resources,¹⁵² and, in particular, anyone familiar with the cooperative sector.¹⁵³ Its use in the cooperative sector,

¹⁵⁰ The relationship and behavior of the Nodes with respect to each other and the CoNet Cooperative can be described as polycentric governance. In contrast to a monocentric system of governance with a single decision-making authority, this is a system where there are various, overlapping centers of decision-making authority, with some degree of autonomy from each other, but with each center understanding that they have to take into account what others are doing. This interdependence typically leads to the formation of common rules and coordinating institutions. See Vincent Ostrom, Charles M. Tiebout & Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831 (1961); Keith Carlisle & Rebecca L. Gruby, *Polycentric Systems of Governance: A Theoretical Model for the Commons*, 47 POL’Y STUD. J. 927, 932 (2019); Mark Stephan, Graham Marshall & Michael McGinnis, *An Introduction to Polycentricity and Governance*, in GOVERNING COMPLEXITY: ANALYZING AND APPLYING POLYCENTRICITY 21, 29 (Andreas Thiel, William A. Blomquist & Dustin E. Garrick eds., 2019). The idea of friendly competition among Nodes has been referred to as genuine, competitive federalism. Shruti Rajagopalan & Richard E. Wagner, *Constitutional Craftsmanship and the Rule of Law*, 24 CONST. POL. ECON. 295, 306 (2013).

¹⁵¹ [William H. George, *Proudhon and Economic Federalism*, 30 J. POL. ECON. 531, 540 \(1922\); MICHAEL HARDT & ANTONIO NEGRI, ASSEMBLY 68 \(2017\).](#)

¹⁵² We adopt Quilligan’s distinction between public goods, common-pool resources and common goods. Going beyond notions of exclusivity and rivalrousness, the latter two are goods which are best governed by “social mutuality and collaboration” [James B. Quilligan, *Why Distinguish Common Goods from Public Goods?*, in THE WEALTH OF THE COMMONS: A WORLD BEYOND MARKET & STATE 73–81 \(David Bollier & Silke Helfrich eds., 2012\).](#)

¹⁵³ See [DAVID ELLERMAN, *DEMOCRATIC WORKER-OWNED FIRM: A NEW MODEL FOR THE EAST AND WEST* \(2016\); Sonja Novkovic, *Co-operative Networks, Adaptability and Organizational Innovations*, in CO-OPERATIVE INNOVATIONS IN CHINA AND THE WEST 47–63, 49 \(Caroline Gijssels, Li Zhao, & Sonja Novkovic eds., 2014\).](#)

including in the agriculture and financial industry,¹⁵⁴ has meant the use of federations is widespread in businesses and movements across the political spectrum. The CoNet structure described above incorporates the features of both a consumers' cooperative and a particular form of producers' cooperative—a shared-services' cooperative¹⁵⁵—which is appropriate given the blend of consumption and production involved in being a CoNet user.¹⁵⁶ The transactions between the user and their Node is akin to that of a consumers' cooperative, in that a member-owned and -governed Node operates in the interest of its user-members, with its services allowing them to, for example, consume other's social media content. The transactions between the Nodes and the CoNet Cooperative are similar to that of a shared-services' cooperative in that it allows scattered Nodes to maintain a high degree of operational autonomy while simultaneously permitting them to contribute content to, use, and share the costs of capital-intensive resources, while also exercising decision-making authority over the organization that manages these shared resources.

This kind of cooperative model allows economies of scale while maintaining greater local diversity than comparable investor-owned firms.¹⁵⁷ Indeed, as Elinor Ostrom identifies, the existence of “multiple layers of nested enterprises” is characteristic of successful institutions that manage large common-pool resources over a substantial period of time,¹⁵⁸ which arguably includes institutions such as the CoNet Cooperative as it manages common goods such as the protocol (according to some, the multifarious knowledge-building and sharing efforts of users can also be seen as a common good).¹⁵⁹ In terms of power, such cooperative federations invert the top-down logic of archetypical corporate groups, as it is the local entities that act as the ‘parents’ of a centralized, ‘daughter’ organization that

¹⁵⁴ See generally [CLAUDIA SANCHEZ BAJO, BRUNO ROELANTS & IAN MACPHERSON, CAPITAL AND THE DEBT TRAP: LEARNING FROM COOPERATIVES IN THE GLOBAL CRISIS \(2013\)](#).

¹⁵⁵ [Anthony C. Crooks, Karen J. Spatz & Marc Warman, *Basics of Organizing a Shared-Services Cooperative* \(1995\), <https://www.rd.usda.gov/files/SR46.pdf>](#) (“A shared-services cooperative is a business organization owned and controlled by private businesses or public entities that become members of the cooperative to more economically purchase services and/or products”).

¹⁵⁶ Crooks et al., *id.*; [Raym Crow, *Publishing Cooperatives: An Alternative for Non-Profit Publishers*, 11 FIRST MONDAY \(2006\), <https://journals.uic.edu/ojs/index.php/fm/article/view/1396/1314>](#).

¹⁵⁷ See Svend Albaek & Christian Schultz, *On the Relative Advantage of Cooperatives*, 59 ECON. LETTERS 397 (1998).

¹⁵⁸ [ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 90, 101–102 \(2015\)](#).

¹⁵⁹ [Mayo Fuster Morell, *Governance of Online Creation Communities for the Building of Digital Commons: Viewed through the Framework of Institutional Analysis and Development*, in GOVERNING KNOWLEDGE COMMONS 281–311, 281 \(Brett M Frischmann, Michael J Madison, & Katherine Jo Strandburg eds., 2014\)](#).

serve a defined common function¹⁶⁰ and enable local entities to provide a quality and diversity of services that would be impossible in isolation. This can also be seen in the development of both the Mastercard and VISA payment systems which, in the course of their organizational histories, were both organized as cooperative federations to gain these advantages.¹⁶¹

Consumer cooperatives have a storied history, being one of the earliest uses of the cooperative form,¹⁶² and they have had a constant presence in the retail sector in Western Europe and, to a lesser extent, the United States for more than a century.¹⁶³ Retail consumer cooperatives, in particular, permit retailers to cater to the interests of local consumers while benefiting from shared wholesaling, procurement, branding and marketing. The degree to which such structures decentralize decision-making and production differ across countries and over time, but Ekberg, in surveying the history of retail consumer cooperatives across Western Europe since the Second World War, found that retaining a federated structure—even during times of financial distress—has been successful in many instances while reverting to centralization has not.¹⁶⁴ In countries like Italy, in addition to a vibrant retail consumers' cooperative sector,¹⁶⁵ public utility services such as water and electricity supply are also furnished through consumer cooperatives.¹⁶⁶

Beyond retail and public utilities, consumer and shared-service cooperatives have also prominently featured in the media industry, particularly in news-wire services and radio. The Associated Press (AP) was organised as a cooperative so as to have exclusivity over news and to allow member-newspapers to share the costs of gathering news (e.g. telegram dispatches) by charging members based on their

¹⁶⁰ [Espen Ekberg, *Organization: Top Down or Bottom Up? The Organizational Development of Consumer Cooperatives, 1950-2000*, in THE COOPERATIVE BUSINESS MOVEMENT, 1950 TO THE PRESENT 222–242, 222 \(Patrizia Battilani & Harm G. Schröter eds., 2012\).](#)

¹⁶¹ [DAVID L. STEARNS, ELECTRONIC VALUE EXCHANGE: ORIGINS OF THE VISA ELECTRONIC PAYMENT SYSTEM viii, 27–28, 38 \(2011\).](#)

¹⁶² [PERCY REDFERN, THE STORY OF THE C. W. S. THE JUBILEE HISTORY OF THE COOPERATIVE WHOLESALE SOCIETY, LIMITED. 1863-1913 \(1913\); SIDNEY WEBB & BEATRICE WEBB, THE CONSUMERS CO-OPERATIVE MOVEMENT 5 \(1930\).](#)

¹⁶³ [Clarke A. Chambers, *The Cooperative League of the United States of America, 1916-1961: A Study of Social Theory and Social Action*, 36 AGRI. HIST. 59 \(1962\); Ekberg, *supra* note 160; FLORENCE E. PARKER, THE FIRST 125 YEARS; A HISTORY OF DISTRIBUTIVE AND SERVICE COOPERATION IN THE UNITED STATES, 1829-1954 66 \(1956\).](#)

¹⁶⁴ Ekberg, *supra* note 160, at 237-238.

¹⁶⁵ [Vera Zamagni, *A World of Variations: Sectors and Forms*, in THE COOPERATIVE BUSINESS MOVEMENT, 1950 TO THE PRESENT 63, 72 \(Patrizia Battilani & Harm G. Schröter eds., 2012\).](#)

¹⁶⁶ [Pier Angelo Mori, *Customer ownership of public utilities: new wine in old bottles*, 2 J. ENTREPRENEURIAL & ORG. DIVERSITY 54, 55 \(2013\).](#)

respective use of the news reports in their publications.¹⁶⁷ Despite a sequence of structural transitions, culminating in a direction from the US Supreme Court in *Associated Press et al. v. United States*,¹⁶⁸ to amend the manner in which it transacts with non-members, it continues to be a not-for-profit cooperative. Associated Press claims that its reports reach around half the world's population each day,¹⁶⁹ making its reach substantially greater than that of even Facebook. On the other end of the spectrum, in terms of scale, community radio stations (often organized as cooperative-like entities) were able to independently cater to widely different listener/supporter communities and involve them in organizational decision-making, while simultaneously building networks with other values-aligned community radio stations to create content and share technological resources (e.g., KRAB Nebula; the Pacifica Affiliate Network, coordinated by the non-profit Pacific Foundation). It was this decentralization in decision-making that allowed these stations to bring bold, epoch-changing content to the airwaves, starting with the views of Martin Luther King, Malcolm X and the civil rights movement.¹⁷⁰

The history of the Internet, particularly after it entered into mainstream use, also offers precedents for such models. In France, the French Data Network (FDN) is an Internet access provider that was formed in 1992 and is managed by organizations on behalf of their member-subscribers. The member-subscribers pay an annual membership fee and a monthly subscription to access the internet.¹⁷¹ In the past decade, the FDN has sought to federalize its structure, by encouraging the establishment of local cooperative and member-owned ISPs and VPN service providers under the umbrella of a federation (a non-profit association). While they individually seek to provide wifi, fibre-optic cable and VPN access to their member-subscribers, collectively they embark on community projects such as local file-sharing,¹⁷² lending each other resources such as servers and cheap bandwidth and

¹⁶⁷ [JONATHAN SILBERSTEIN-LOEB, THE INTERNATIONAL DISTRIBUTION OF NEWS: THE ASSOCIATED PRESS, PRESS ASSOCIATION, AND REUTERS, 1848–1947 2, 48–49 \(2014\)](#). See also, [MENAHEM BLONDHEIM, NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844-1897 \(1994\)](#); [VICTOR ROSEWATER, HISTORY OF COÖPERATIVE NEWS-GATHERING IN THE UNITED STATES \(1930\)](#).

¹⁶⁸ 326 U.S. 1 (1945).

¹⁶⁹ [Associated Press, *About Us*, Associated Press \(2018\), <https://www.ap.org/about/> \(last visited Oct 27, 2018\)](#).

¹⁷⁰ [William Barlow, *Community radio in the US: the struggle for a democratic medium*, 10 Media, Culture & Soc'y 81, 86, 88, 93 \(1988\)](#).

¹⁷¹ [Félix Tréguer, *Federating Community Networks: A Case Study from France*, III in THE COMMUNITY NETWORK MANUAL: HOW TO BUILD THE INTERNET YOURSELF 162 \(Luca Belli ed., 2018\), <http://bibliotecadigital.fgv.br/dspace/handle/10438/25696>](#).

¹⁷² *Id.*, at 164-166.

organizing in-person general assemblies.¹⁷³ As with progressive community radio, the FDN has also used their technology for socio-political ends, by e.g. putting up a mirror site for WikiLeaks and setting up modems and call-in numbers for Egyptians to connect to the internet when access to the internet was blocked in that country.¹⁷⁴ Similarly, the FDN represents the voice of the community on hot-button issues such as net neutrality.¹⁷⁵ Similarly, guifi.net, which originated in Catalonia, was formed as a bottom-up technological project to extend broadband internet access to underserved communities and is run by, and for, its 13,000+ registered members through digital participation tools and face-to-face meetings.¹⁷⁶

Finally, the capacities attributed to CoNet's Nodes are to be found in existing federated social networks such as Mastodon and GNU Social,¹⁷⁷ although they have fallen far short of the major centralized social networks in terms of reach. That being said, there are examples of member-owned technology networks which do have the size and global scale of the envisioned CoNet. WorldCat, for instance, is the premier international library catalogue which is stewarded by the OCLC Cooperative, an organization comprised of its 17,983 library-members in 123 countries, member-elected Regional and Global Councils of library-members, a member-elected Board of Trustees and a non-profit corporation governed by said Board.¹⁷⁸ The Cooperative enables library-members to share resources, cut costs (e.g. on original cataloguing) and increase their visibility, in exchange for *inter alia* contributing meta-data and holdings information. This immense store of data has, in turn, enabled OCLC to develop a host of web-applications, library management and cataloguing software.¹⁷⁹

These examples point toward a return to federated protocols, as opposed to platforms, as the basic container for online networks.¹⁸⁰ Early in the development

¹⁷³ *Id.*, at 169.

¹⁷⁴ *Id.*, at 163.

¹⁷⁵ *Id.*, at 171.

¹⁷⁶ [Roger Baig et al., *guifi.net, a crowdsourced network infrastructure held in common*, 90 COMPUTER NETWORKS 150, 160, 162 \(2015\).](#)

¹⁷⁷ See Matteo Zignani, Sabrina Gaito & Gian Paolo Rossi, *Follow the "Mastodon": Structure and Evolution of a Decentralized Online Social Network*, in PROCEEDINGS OF THE TWELFTH INTERNATIONAL CONFERENCE ON WEB AND SOCIAL MEDIA 541 (2018), <https://www.aaai.org/ocs/index.php/ICWSM/ICWSM18/paper/download/17862/17047>.

¹⁷⁸ [OCLC, *WorldCat Rights and Responsibilities for the OCLC Cooperative*, OCLC \(2010\), https://www.oclc.org/en/worldcat/cooperative-quality/policy.html \(last visited Oct 10, 2019\).](#)

¹⁷⁹ [OCLC, *All OCLC products and services*, OCLC \(2018\), https://www.oclc.org/en/services/a-z.html, https://www.oclc.org/en/services/a-z.html \(last visited Oct 10, 2019\).](#)

of Twitter, such protocol federation was considered but ultimately rejected.¹⁸¹ In other words, the technology for social-media federations have existed for years, as has the interest;¹⁸² what has been missing is the business model to make it more widespread. In recent times, Facebook CEO Mark Zuckerberg has lamented the difficulty of governing a massive, centralized platform and called for strategies that would enable more local governance.¹⁸³ Perhaps the scenario outlined in this section represents a means for doing so.

2. Implications for Governance

Alexander Galloway has pointed out the rigid forms of control that can arise in networks that share underlying protocols, where the designers of a difficult-to-change protocol wield outsized and often invisible authority.¹⁸⁴ CoNet would require such a shared protocol in order for its Nodes to be interoperable,¹⁸⁵ but the

¹⁸⁰ Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, [KNIGHT FIRST AMEND. INST.](https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech) (Aug 21, 2019), <https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech>.

¹⁸¹ NATHAN SCHNEIDER, *EVERYTHING FOR EVERYONE: THE RADIAL TRADITION THAT IS SHAPING THE NEXT ECONOMY* 167 (2018)

¹⁸² See, e.g. [GEERT LOVINK & NED ROSSITER, ORGANIZATION AFTER SOCIAL MEDIA; 3 \(2018\)](#); Robert W. Gehl, *Real (Software) Abstractions: On the Rise of Facebook and the Fall of MySpace*, 30 SOC. TEXT 99, 114 (2012).

¹⁸³ [Mark Zuckerberg, Building Global Community, FACEBOOK \(2017\), https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634 \(last visited Mar 17, 2019\).](https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634)

¹⁸⁴ See generally, ALEXANDER R. GALLOWAY, *PROTOCOL: HOW CONTROL EXISTS AFTER DECENTRALIZATION* (2004).

¹⁸⁵ Interoperability refers to the “extent to which one platform’s infrastructure can work with others”, see Bennett Cyphers & Danny O’Brien, *Facing Facebook: Data Portability and Interoperability are Anti-Monopoly Medicine*, EFF (Jul 24, 2018), <https://www.eff.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine>. While dominant platforms such as Facebook have benefited from the interoperability of other online service providers, they tightly control how third-party developers may use their interoperable tools. For instance, Facebook’s Platform Policy for Developers limits the ability of third party applications to change the appearance and functions of Facebook (§§ 4.1, 4.3) or to direct users away from Facebook (§ 4.7), see *Facebook Platform Policy*, FACEBOOK (Mar 4, 2020), developers.facebook.com/policy/ (last visited Mar 13, 2020). This has implications for federated social networks like CoNet as it would prevent them from being interoperable with dominant platforms, as the breach of such policies and associated terms of use could lead to lawsuits under the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030, for accessing a “computer without authorization” or exceeding “authorized access”, thereby obtaining information from the computer. *Id.*, § 1030(a)(2)(C). While a recent Ninth Circuit judgment concerning LinkedIn clarified that the automatic scraping and use of public profiles on LinkedIn was not considered to be access without authorization, this would not extend to information that the platform makes private through username and password requirements. *HiQ Labs v. LinkedIn Corp.*, 938 F.3d 985, 1001-

rigidity of protocol-based systems would be mitigated by its cooperative structure. Node operators would have a say in decisions about changes to their shared protocol, ensuring a measure of direct accountability that many protocols lack. Cooperative governance would also provide a forum in which issues and conflicts among Nodes could be coordinated and resolved (e.g. Nodes that may compete for users), as compared to more confederal structures in which secondary entities have a far weaker position.¹⁸⁶ This, in turn, would allow solidaristic ties to emerge among the Nodes as well as the sharing of best-practices across CoNet, which has been seen in non-digital cooperative federations with interlocking directorships.¹⁸⁷ While bearing these advantages in mind, the governance of federations raise their own challenges.

Among knowledge-economy sectors in which global, inverted federations are common, such as in certain large US, UK and German law firms,¹⁸⁸ common problems include a discrepancy in quality among members of the federation¹⁸⁹ and the gradual de-equitization of partners, depriving them of a meaningful voice in the management of the global firm.¹⁹⁰ Diverse examples, from transnational law firms to the Co-operative Wholesale Society in England (another complex cooperative federation) highlights how tensions may emerge between the primary entities, such as Nodes, and secondary entities such as the CoNet Cooperative, concerning the purpose of the latter. Over time it is possible that the secondary entity may come to expect that the local primary entities should serve their interest rather than vice versa.¹⁹¹ This will have to be actively mitigated, so as to not fall into similar patterns as existing platforms, with allegations of abuses of

1002, 1003-1004 (9th Cir. 2019). Along with lawyers such as Khan & Pozen, *supra* note 68, at ___, prominent finance and economics professors have also called for (major) online platforms to be made interoperable so as to reduce incumbency advantages and switching costs, *see* Sai Krishna Kamepalli, Raghuram G. Rajan & Luigi Zingales, *Kill Zone* 29 (Becker Friedman Institute for Economics Working Paper No. 2020-19, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555915.

¹⁸⁶ [Nicolás Brando & Helder De Schutter, *Federal Commons*, in THE COMMONS AND A NEW GLOBAL GOVERNANCE 37, 48 \(Samuel Cogolati & Jan Wouters eds., 2018\).](#)

¹⁸⁷ Interlocking directorships refers to the situation in which the director of a primary entity serves on the board of another entity, including secondary entities in a federation. [Kostas Karantininis, *The Network Form of The Cooperative Organization: An Illustration with the Danish Pork Industry*, in VERTICAL MARKETS AND COOPERATIVE HIERARCHIES THE ROLE OF COOPERATIVES IN THE AGRICULTURE INDUSTRY 19–34, 23, 28 \(Kostas Karantininis & Jerker Nilsson eds., 2010\).](#)

¹⁸⁸ Glenn Morgan & Sigrid Quack, *Institutional Legacies and Firm Dynamics: The Growth and Internationalization of UK and German Law Firms*, 26 ORG. STUD. 1765, 1775 (2005).

¹⁸⁹ [Debora L. Spar, *Lawyers Abroad: The Internationalization of Legal Practice*, 39 CAL. MAN. REV. 8–28, 22–23 \(1997\).](#)

¹⁹⁰ [James R. Faulconbridge & Daniel Muzio, *The financialization of large law firms: situated discourses and practices of reorganization*, 9 J ECON GEOGR 641–661, 651–652, 655–656 \(2009\).](#)

monopsony power.¹⁹² The federation model would, in effect, create a market for governance¹⁹³ among the Nodes for users to choose from. If some of the Nodes were to actively challenge the monopsony power of the CoNet Cooperative, concerns about an abuse of monopsony power could be somewhat allayed.

Governance concerns may also arise at the primary level of such federations. Self-hosted platforms such as Minecraft¹⁹⁴ and Wikia¹⁹⁵ suggest that heterogeneous governance practices can emerge in federated networks, ranging from micro-democracies to oligarchies and “benevolent dictators for life.” By registering as a member-owned legal entity, such as a cooperative, the Node could embed certain governance rules such as one-member-one-vote, the minimum number of members needed for a quorum, and the appointment and composition of a representative board. This would make explicit the terms of Node governance, which might otherwise be left to informal norms, allowing implicit power structures to arise.¹⁹⁶ A robust governance structure would provide guardrails against oligarchic behavior by certain members or the prioritization of short-term agendas that may harm the long-term interests of the Node. Additionally, the inclusion of users in decision-making would give them a voice on issues such as the form of encryption to be used over communications, the type of advertisers that will be allowed on the platform and how personal data will be managed, all of which directly affect their experience on the platform. The reconfiguration of decision-making rights proposed by this scenario would alter the terms of what viability means for CoNet, from a focus on ceaseless growth and expansion to growth that is “slow but sure”.¹⁹⁷ The creativity of founding members in designing the internal governance of a given

¹⁹¹ [James R. Faulconbridge, *Managing the Transnational Law Firm: A Relational Analysis of Professional Systems, Embedded Actors, and Time—Space-Sensitive Governance*, 84 ECON. GEOGR. 185, 194 \(2008\); Anthony Webster, John Wilson & Rachael Vorberg-Rugh, *The Rise, Retreat and Renaissance of British Cooperation: The Development of the English Cooperative Wholesale Society and the Cooperative Group, 1863-2013*, 27 in NEW OPPORTUNITIES FOR CO-OPERATIVES: NEW OPPORTUNITIES FOR PEOPLE, 93 \(Johanna Heiskanen et al. eds., 2012\).](#)

¹⁹² Khan, *supra* note 4, at 766.

¹⁹³ [Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J POL. ECON. 416 \(1956\).](#)

¹⁹⁴ [Seth Frey & Robert W. Sumner, *Emergence of integrated institutions in a large population of self-governing communities*, 14 PLOS ONE e0216335 \(2019\).](#)

¹⁹⁵ [Aaron Shaw & Benjamin M. Hill, *Laboratories of Oligarchy? How the Iron Law Extends to Peer Production*, 64 J COMMUN 215 \(2014\).](#)

¹⁹⁶ [Jo Freeman, *The Tyranny of Structurelessness*, 41 WSQ: WOMEN'S STUD. Q. 231 \(2013\).](#)

¹⁹⁷ To appropriate a motto of the Lincoln Equitable Co-operative Industrial Society (LECIS) from 1863. See [Andrew J. H. Jackson, *The Cooperative Movement and the Education of Working Men and Women: Provision by a Local Society in Lincoln, England, 1861-1914*, 90 INT'L LAB. & WORKING-CLASS HIST. 28, 37-41, 47 \(2016\).](#)

Node would only be limited by any mandatory rules imposed on its legal form (e.g., minimum number of members) in the jurisdiction concerned.

Another issue for such a cooperative structure to address is its exclusion of persons who do not consent to the new terms of use. The exclusive right of shared-services cooperatives to provide a service and its members to benefit from this service has, naturally, deprived non-members. This has been a cause for concern as cooperatives have grown in scale within a given market. Whether this is AP excluding non-members from news reports¹⁹⁸ or community radios preventing others from using a standard FM spectrum allocated by the US federal government to non-commercial broadcasters,¹⁹⁹ cooperative history is replete with such examples. This touches upon an important normative question raised by Hochheimer in the context of community radios: should community radios serve their communities or is the community a ‘resource’ that is intended for society as a whole?²⁰⁰ Transposing this onto CoNet, tensions might emerge between expectations of an individual Node to serve its users (i.e., seeing the network as a private good or club good) and serving the users of all the other Nodes in CoNet as well as the users of other decentralized social networking platforms that use the same protocol (i.e., seeing the network as a common good). While social media content is excludable, unlike breaking news reports and narrowly allocated radio spectrums, it is non-rivalrous and anti-rivalrous.²⁰¹ In other words, not only does social media content not diminish in value when simultaneously shared or consumed, it generally increases in value the more it is simultaneously shared or consumed.²⁰² An understanding of this property of the system may allow users to appreciate that the benefit of their individual Nodes is contingent, to at least some extent, on what is beneficial for other Nodes and indeed other decentralized social networking platforms. Educating users about the properties, architecture and political economy of platforms may help ameliorate some of these governance

¹⁹⁸ Associated Press et al. v. United States, 326 U.S. 1 (1945).

¹⁹⁹ Barlow, *supra* note 170, at 99.

²⁰⁰ John L. Hochheimer, [Organizing democratic radio: issues in praxis, 15 MEDIA, CULTURE & SOC'Y 473 \(1993\)](#).

²⁰¹ The gig work dimension of CoSocial is rivalrous.

²⁰² [F. Xavier Olleros, Antirival goods, network effects and the sharing economy, 23 FIRST MONDAY \(2018\)](#).

challenges and, as has long been the case with cooperatives.²⁰³ Such education could prove to be an important service provided by the CoNet Cooperative.

3. Implications for Financial Rights

By registering as member-owned legal entities, the Nodes could limit the liability of users from the financial risks of the collective enterprise, while, conversely, the separate legal personality of the entity, in conjunction with end-user licenses which inform users of their obligations to, among other things, avoid posting copyright protected content, could help shield the Node from intermediary liability.²⁰⁴ In contrast to a more centralized model, a federated network of Nodes would mean that most of the operating expenses, including shared services developed by CoNet Cooperative, will be met by individual Nodes. Local surpluses, therefore, will largely be reinvested in the CoNet ecosystem. If the Nodes are not entities and are permitted to make distributions,²⁰⁵ a divi can be paid to individual users after these operating expenses are met. Moreover, if a Node chooses to have distinct classes of membership, including a minority of investor-members, they could be included with the understanding that they would receive a capped return on investment (e.g. up to 6%).

²⁰³ On the importance of education for cooperatives, see, e.g., [Amelia Carr, Amanie Kariyawasam & Maureen Casile, *A study of the organizational characteristics of successful cooperatives*, 26 ORG. DEV. J. 79 \(2008\)](#); Jackson, *supra* no. 197, 37–41, 47; [JESSICA GORDON NEMBARD, COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE 101–103 \(2014\)](#).

²⁰⁴ Intermediary liability refers to the civil liability that intermediaries such as internet-service providers or online platforms may face for the actions of their users. Legislative interventions such as the Communications Decency Act, 1996, 47 U.S.C. § 230 (2012) were introduced to shield intermediaries from such liability and to incentivize them to play a quasi-regulatory role in blocking and screening certain objectionable content, including the moderation and removal of content. See Klonick, *supra* note 68 at 1606-1609 (providing an overview of how the interpretation of this section by state and circuit courts have served to preclude strict liability for intermediaries such as website operators, particularly in the case of corporations such as Facebook); [Virginie Aubrée & Mélanie Dulong de Rosnay, *Fostering sustainability of Community Networks: Guidelines to Respect the European Legal Framework*, III in THE COMMUNITY NETWORK MANUAL: HOW TO BUILD THE INTERNET YOURSELF 177–188, 181, 185 \(Luca Belli ed., 2018\), <http://bibliotecadigital.fgv.br/dspace/handle/10438/25696> \(discussing protection from intermediary liability for community networks\)](#).

²⁰⁵ See Nonprofit Public Benefit Corporations, CAL. CORP. CODE §§ 5237, 5410 prohibiting distributions and making directors jointly and severally liable for making distributions. Nonprofit Mutual Benefit Corporations can only make distributions upon dissolution and when memberships are redeemed or purchased subject to certain conditions. CAL. CORP. CODE §§ 7411-7414. Cooperative Corporations, in contrast, may make distributions but that cannot exceed 15% multiplied by contributions (whether by membership fees, capital credits, or otherwise) to capital. CAL. CORP. CODE § 12451. This is an important point as members may be liable for any amount that they knowingly receive which has been distributed wrongfully. CAL. CORP. CODE § 12455.

As is typical with a shared-service cooperative, the cooperative's own surpluses (if any) could in part be returned to member Nodes as patronage dividends, in proportion to their patronage. At the same time, the bylaws of CoNet Cooperative and individual Nodes would need to prevent excessive dividend-seeking by individual members, ensuring that sufficient resources can be retained and reinvested in the Nodes for developing the shared infrastructure, supporting existing or new Nodes and, based on the prior experience of cooperative federations such as Desjardins and Mondragon, establishing an indivisible reserve for times of financial distress.²⁰⁶ The acquisition of CoSocial Corporation by CoNet Cooperative, for instance, is an expensive endeavor and one in which the interests of various CoSocial shareholders have to be reconciled.

Previous experience of federated social networks²⁰⁷ suggest that most usage is likely to be clustered in a small number of successful Nodes, which will also capture a significant share of financial gains. The establishment of a CoNet Cooperative to unite the various Nodes would help prevent the system from being fully captured by the interests of the most successful Nodes, as it would allow the more successful Nodes to receive higher patronage dividends while limiting their control rights due to their being one-member, one-vote cooperative governance.

4. Implications for Public Policy

As in the case of existing network organizations such as franchises or those operating open-source software, such as email or WordPress-based websites, regulation would largely be localized. The individual Nodes and their servers would take responsibility for adapting their rules and norms to local legal regimes, such as those governing labor and employment relationships or the formation requirements for member-owned enterprises. Less of the regulatory burden would then fall on the central federation, which could result in a parsimony appealing both to regulators and to operators at various levels of the network.

Conversely, since the businesses of individual Nodes would benefit from a shared brand identity, their owners and the CoNet Cooperative as a whole would

²⁰⁶ In California, a worker cooperative can create an indivisible reserve, so long as the funds do not derive from the patronage of the members. CAL. CORP. CODE § 12454.5. *See also*, Sanchez Bajo, Roelants & MacPherson, *supra* note 154, at 161, 179 (on the advantages of having an indivisible reserve).

²⁰⁷ [Frey and Sumner, *supra* note 194; Matteo Zignani, Sabrina Gaito & Gian Paolo Rossi, *Follow the "Mastodon": Structure and Evolution of a Decentralized Online Social Network*, in TWELFTH INTERNATIONAL AAAI CONFERENCE ON WEB AND SOCIAL MEDIA \(2018\), <https://www.aaai.org/ocs/index.php/ICWSM/ICWSM18/paper/view/17862>.](https://www.aaai.org/ocs/index.php/ICWSM/ICWSM18/paper/view/17862)

have an incentive to ensure that all Nodes meet certain minimum technical and operational standards in order to prevent free-riding behavior. In addition to promoting healthy self-regulation, such incentives could also encourage proactive policy advocacy to protect the integrity of the network as a whole. For instance, the CoNet Cooperative board could see fit to lobby against ‘data localization’ laws that could, among other things, expose users to heightened privacy and cybersecurity risks.²⁰⁸ The existence of a wider member-owned network organization may act as a countervailing force to the imposition of oppressive regulation and aid in promoting more user-centric regulations.

Regulatory intervention could be a means of creating such a federated network. In the CoSocial scenario above, federation was a voluntary choice; one that allows for the creation of standardized common protocols for Nodes. However, such an outcome might also be dictated by a regulatory authority through an antitrust case, on the basis that a federated cooperative would result in a more competitive market than a platform controlled by a single, monopolistic company.²⁰⁹ The most famous example of this is the breakup of the Bell system operated by AT&T that at one point dominated both the telephone service and telephone equipment markets in the United States. The divestiture of seven independent companies, following an agreed consent decree on 8 January 1982, spurred competition in the market for long distance telecommunication, allowing competitors such as MCI and Sprint to emerge as well more productive R&D in the post-divestiture AT&T.²¹⁰ The need for more competitor platforms has also been echoed by others.²¹¹

However, there is reason to be skeptical that such action will be taken in the United States at present, given the recent history of lax antitrust enforcement and a narrow interpretation of anti-competitive behavior. The latter was most recently demonstrated in the US Supreme Court’s decision in *Ohio v. American Express Co.*²¹² That case concerned the operation of a two-sided market by credit card companies (i.e. involving cardholders and merchants), described by the Court as a ‘transaction platform’, which varies from the other platforms discussed till now in that they cannot provide services to one side of the market independently but must

²⁰⁸ [Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677, 719 \(2015\).](#)

²⁰⁹ See generally Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN ST. L. REV. 1 (2019).

²¹⁰ [Anusua Datta, *Divestiture and Its Implications for Innovation and Productivity Growth in U. S. Telecommunications*, 69 S. ECON. J.L 644–658, 648,656-657 \(2003\); John Pinheiro, *AT&T Divestiture & the Telecommunications Market*, 2 HIGH TECH. L.J. 303–355 \(1987\).](#)

²¹¹ See, e.g. Balkin, *supra* note 2, at 11.

²¹² 138 S. Ct. 2274 (2018).

facilitate simultaneous interactions between the two sides.²¹³ Through their contracts with merchants, companies like American Express were inhibiting merchants from steering their customers to other credit or debit cards that may offer lower merchant fees. The majority of the Court held that such ‘anti-steering’ clauses were not anti-competitive as *inter alia* the higher merchant prices could be converted into benefits for cardholders on the other side of the platform (e.g. cardholder rewards).²¹⁴ This can be read as harm on one side of the platform being permissible as long as it translates to some form of gain on the other side of the platform, so long as the harm is not to competition generally.²¹⁵ This approach relies on a particular definition of the relevant market, which in this case was held to include both sides—merchants and card holders—rather than each side operating in separate but interrelated markets. While some have interpreted this decision as not foreclosing the possibility of future antitrust cases against Facebook, Twitter and others, given that the scope of Court’s decision is limited to transaction platforms,²¹⁶ there has nevertheless been concern that this decision makes the task of mounting an antitrust challenge exponentially more difficult as it would require demonstrating harm on both sides of the platform.²¹⁷

In short, private efforts to federate platforms continue to be a pressing need, not just because of the difficulties inherent in an antitrust action or the challenges in drafting and passing suitable legislation, but also as it will contribute to the growing set of examples of what alternative platforms can look like and achieve.

C. Option 3: Tokenization

Our third option is perhaps the most future-facing, as it involves the use of blockchain technology and as such is predicated on this technology achieving

²¹³ Ohio, 138 S. Ct. at 2280-81.

²¹⁴ Ohio, 138 S. Ct. at 2287-88.

²¹⁵ [Geoffrey A. Manne, *In defence of the Supreme Court’s ‘single market’ definition in Ohio v American Express*, 7 J ANTITRUST ENFORCEMENT 104, 110–111 \(2019\).](#)

²¹⁶ [Tim Wu, *The American Express opinion, the rule of reason, and tech platforms*, 7 J ANTITRUST ENFORCEMENT 117, 118 \(2019\).](#) While Facebook generates its primary revenue by matching users with advertisers, it provides other services to users such as games and a search function. Uber is closer to being a transaction platform, but it too is moving towards separately serving its riders through its stop-start efforts at launching a fleet of autonomous vehicles.

²¹⁷ [Lina M. Khan, *The Supreme Court Case That Could Give Tech Giants More Power*, THE NEW YORK TIMES \(Mar. 2, 2018\), <https://www.nytimes.com/2018/03/02/opinion/the-supreme-court-case-that-could-give-tech-giants-more-power.html>.](#) Wu, *Id.*, posits after this decision, platform companies like Uber may be able to argue that their efforts at sabotaging competitors (e.g. creating and cancelling fake ride requests) were done out of an interest to retain drivers and keep rider waiting times low. In short, the anticompetitive behavior is beneficial to one side of the market.

mainstream adoption in upcoming years. In turn, it anticipates the reform of securities law to accommodate these technological developments.

In this scenario, as CoSocial's gig marketplace matured, the need for a new accounting system became clear. Increasingly, users were hiring each other with money earned on the platform itself, or spending money they earned on the platform with advertisers they discovered through it. Processing these transactions involved a multitude of currencies, exchange rates, transmission fees and intermediary payment platforms. To reduce some of these costs for their users, CoSocial white-listed Bitcoin, Ether and DAI crypto-tokens as additional accepted means of payment. These crypto-tokens were paid directly into individual user wallets.²¹⁸

A small fee was levied after each transaction, denominated in the crypto-token used. While this allowed CoSocial to obtain a trove of crypto-tokens to be reinvested in the platform, CoSocial decided to return a part of this sum to individual users based on their patronage of the platform. This was effectively a crypto-divi.

With the use of crypto-tokens and blockchain technology becoming more mainstream, the board of CoSocial Corporation, with the support of the founders and their family members, decided through an amendment of the corporation's articles of incorporation to represent all their issued certificate shares on a public blockchain²¹⁹ as tokens, 'CoShares', that was to be distributed to the wallet addresses of existing shareholders in proportion to their shareholding (1 share = 1 CoShare, 1 CoShare-holder = 1 vote).²²⁰ While this required a one-off valuation of the company, the expiration of contractual rights of first refusal and co-sale rights (if any) as well as the surrendering of physical share certificates,²²¹ the issuance of tokenized share certificates enhanced the liquidity of the privately held Corporation's shares as anyone could buy a CoShare (or a fraction thereof) through

²¹⁸ The integration of a wallet into a social media platform is akin to Telegram's ambition to integrate a Token Open Network (TON) Wallet into Telegram Messenger so as to facilitate adoption by the latter's 300 million monthly active users. *See* S.E.C. v. Telegram Group Inc., No. 19-cv-09439-PKC, slip op. at 28, 35-36 (S.D.N.Y. Mar. 24, 2020) [Hereinafter "Telegram"].

²¹⁹ In California, "blockchain technology" means a mathematically secured, chronological, and decentralized consensus ledger or database, CAL. CORP. CODE §204(a)(12)(B). In terms of functionality, the system must be able to decrypt the recorded information into a clearly readable format in a reasonable period of time, be usable to prepare a list of shareholders, record information required to be included on stock certificates and record required transfers of stock.

²²⁰ On the electronic transfer of shares over a blockchain, see CAL. CORP. CODE § 204(a)(12)(A), also [JAMES F. FOTENOS, EDWARD C. RYBKA & C. HUGH FRIEDMAN, CORPORATIONS §§ 4:126.2, 5:475, 6:591.2 \(2019\)](#). The default rule is one share, one vote but it is possible to vary this in the Corporation's articles of incorporation, so that a person only has one vote, irrespective of the number of shares they hold. CAL. CORP. CODE § 700(a).

²²¹ CAL. CORP. CODE § 416.

an exchange or a peer-to-peer transaction.²²² This included the users who had been accruing crypto-tokens in their individual wallets and could now use this to purchase CoShares. This was particularly beneficial for employees who had accumulated vested shares. In short, users were able to buy tokenized shares in CoSocial Corporation with little-to-no expense to themselves, given that they had been receiving crypto-tokens as a surplus.

By reducing the number of intermediaries involved in holding share certificates and voting shares as well as potentially fractionalizing the ownership of individual shares,²²³ retail investment became more affordable and shared governance became more transparent and direct. CoShare holders were able to individually monitor their holdings in near real-time and actively engage in the governance of the Corporation—from asking questions to voting—using the token-holders’ dashboard developed by CoSocial. CoShare holders were empowered to elect and remove directors and through the submission of proposals, suggest broad improvements to the platform. Conversely, the Corporation was able to track the ownership and transfer of the tokens on its electronic share register, as it was linked to each token and was being contemporaneously and accurately updated. The external investors who had viewed the crypto experiments of CoSocial with skepticism, were pleased at the opportunity to exit the platform through the acquisition of their shares by the CoSocial community and thereby obtain a return on their investment, even if it may not be as significant as they initially hoped.

At a future date, when the majority of CoShare holders were users, they were able to introduce a more complex voting system to CoSocial’s articles of incorporation (i.e. a voting shift).²²⁴ For instance, they could employ a reputation system that is not based on the wealth of users but on their *recent* valuable contributions to the CoSocial platform. This reputation score would be non-transferable and would degrade over time, if the user ceased to make valuable contributions. Holding a minimum reputation level could enable users to engage in the stewardship of the platform on a day-to-day basis, in addition to participating in shareholder governance. While their reputation-based voting power on day-to-day decisions could be calculated on the day the decision needs to be made, for annual general meetings this voting power could be calculated at the time the notice of the meeting is sent out. This system would recognize that building reputation requires time, effort and skill, in short, an asset-specific human capital investment that has to be retained for the long-term future of CoSocial.

²²² CAL. COM. CODE §§ 8301-8303.

²²³ CAL. CORP. CODE § 407.

²²⁴ CAL. CORP. CODE § 194.7.

The company continued to invest in advancing the platform’s features and interface, but it eventually faded into the background as a servant to the vibrant, self-governing community it enabled.

1. Background

‘Tokenization’ is the process by which the right to perform an action on an asset is embodied as a transferable data element on a distributed ledger. A tokenization scenario such as this turns to the possibilities now emerging with the development of blockchain technology. Indeed, blockchain technology may be uniquely aligned with peer production, given the shared emphasis on decentralized processes, mutual use of collectively-owned resources, and facilitation of heterodox values by enabling both monetary and non-monetary transactions.²²⁵ The above scenario is still marginally beyond the realm of what is currently possible, as a private placement by an issuer and an exemption from the securities registration requirement,²²⁶ is only available if the sale of the securities is to accredited investors (e.g. high net-worth individuals) and the security is not resold.²²⁷ A recent decision concerning Telegram, the private company behind Telegram Messenger, sheds light on why breaching the exemption requirements is a material risk. Telegram sold interests in Grams crypto-tokens to 175 well-heeled initial purchasers in 2018, so as to fund the development of a functional TON Blockchain and to subsequently issue Grams to these early investors in 2020. A District Court held that the economic incentives behind the sale, in terms of large discounts and lockup periods for re-selling Grams, meant that Telegram intended for the initial purchasers to sell Grams to the public rather than hold on to them.²²⁸ The Court held that this violated the conditions of being exempt to the registration requirement, that it amounted to a public distribution and consequently, granted an injunction against the issuance of the Grams tokens to the initial purchasers.²²⁹ As such, the sale of CoShares to users would likely be considered as a “disguised public distribution”²³⁰ at present and run afoul of the conditions that need to be exempt from registration requirements.

That being said, blockchain tools make possible strategies for user co-ownership and co-governance that bypasses traditional mechanisms available to shareholders, problematic as they are for tracing the beneficial ownership of shares

²²⁵ [David Rozas et al., *When Ostrom Meets Blockchain: Exploring the Potentials of Blockchain for Commons Governance* \(2018\), <https://papers.ssrn.com/abstract=3272329> \(last visited Oct 27, 2019\).](https://papers.ssrn.com/abstract=3272329)

²²⁶ 15 U.S.C. § 77d(a)(1)-(2); 15 U.S.C. § 77e(a), (c).

²²⁷ 17 C.F.R. §§ 230.506(a); 230.506(c); 230.502(d).

²²⁸ Telegram, *supra* note 218, at 41.

²²⁹ *Id.*, at p. 43.

²³⁰ *S.E.C. v. Cavanagh*, 155 F.3d 129, 337 (2d Cir. 1998)

and engaging individual investors.²³¹ If companies develop symbiotic ties to a cryptographic protocol, that protocol can become a mechanism for governing their behavior, thereby mutually shaping new forms of organization. In this way, the ubiquity of the modern corporation may be challenged, and even eclipsed altogether, by the token networks on which they operate.

There are precedents, at least in aspiration, to tokenization and rewarding user contributions. In 2014, Reddit CEO Yishan Wong announced that, as part of a \$50 million financing deal, the investors would set aside 10 percent of their shares to become the basis of a new cryptocurrency for users. The project was announced as Reddit Notes, but legal difficulties appear to have foundered the project by early the following year.²³² Other social media networks have employed tokenization as well. Twister, an early blockchain project, appeared in 2013 as a fully peer-to-peer microblogging system. Steemit and Minds are Web-based centralized platforms that employ their own cryptocurrencies, which trade on public markets, as internal payment systems for monetizing content.²³³ Over the past decade, Facebook has also been championing virtual currencies, first through the short-lived Facebook Credits, which could be purchased to access gaming and non-gaming applications on the Facebook platform as well as earned by users through testing new games or completing surveys. However, Facebook Credits had limited functionality as they were non-transferable and could not be exchanged for fiat currencies.²³⁴ More recently, Facebook has announced the launch of the cryptocurrency Libra, that will have a broader range of functions and will run on a permissioned blockchain governed by an association made up of member organizations.²³⁵ However, neither Facebook Credits nor Libra are used to reward valuable user contributions or extend governance rights to them. Blockchain projects such as Colony and

²³¹ Vice Chancellor [J. Travis Lester, *The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote*, Keynote Speech at Council of Institutional Investors \(Sept. 29, 2016\) \[https://www.cii.org/files/09_29_16_laster_remarks.pdf\]\(https://www.cii.org/files/09_29_16_laster_remarks.pdf\); Wonnie Song, *Bullish on Blockchain: Examining Delaware's Approach to Distributed Ledger Technology in Corporate Governance Law and beyond*, HARV. BUS. L. REV. ONLINE 9 \(2017\).](#)

²³² [Dan Primack, *Ex-employee: Reddit notes is "not going to happen,"* FORTUNE \(Jan 30, 2015\) <http://fortune.com/2015/01/30/reddit-notes-is-not-going-to-happen/>.](#)

²³³ Moon Soo Kim & Jee Yong Chung, *Sustainable Growth and Token Economy Design: The Case of Steemit*, 11 SUSTAINABILITY 1 (2019); Louise Metsakis, *Minds is the Anti-Facebook That Pays You for Your Time*, WIRED (Apr. 19, 2018), <https://www.wired.com/story/minds-anti-facebook/>.

²³⁴ Joshua S. Gans & Hanna Halaburda, *Some Economics of Private Digital Currency*, in ECONOMIC ANALYSIS OF THE DIGITAL ECONOMY 257, 261 (Avi Goldfarb, Shane M. Greenstein, & Catherine E. Tucker eds., 2015), <https://www.nber.org/chapters/c12992>.

²³⁵ [Libra Association, *Libra White Paper*, LIBRA.ORG \(2019\), <https://libra.org/en-US/white-paper/> \(last visited Jul 21, 2019\).](#)

DAOStack, instead, do have different forms of reputation systems that seek to incentivize continuous, valuable contributions to decentralized organizations.²³⁶

Ever since Overstock.com raised US\$ 1.9 million by selling preferred shares on a blockchain in 2016,²³⁷ businesses have sought to find ways to tokenize shares and other securities. It has now become common for companies engaged in blockchain technology to present the (off-chain) company as a temporary necessity, until the token network itself becomes a self-perpetuating vessel of governance and value creation.²³⁸ In other words, they have suggested the possibility of ‘platform operator redundancy’²³⁹ in which there is user control of a platform’s technological architecture, as well as the company that developed it, through token ownership.²⁴⁰ The tokenization scenario provides one stylized example of how such platform operator redundancy may be achieved.

2. Implications for Governance

In the past five years, primarily after the emergence of the Ethereum blockchain, there has been interest in exploring how distributed ledger technology and token systems may improve corporate governance. Some of the main advantages that have been posited are (1) improved transparency of corporate decision-making and operations, (2) more participatory and streamlined decision-making, at both board level and in general meetings of shareholders and (3) the reduction of socio-economic barriers to business ownership and financial independence.²⁴¹ In the sphere of corporate governance, most of the theoretical and preliminary empirical research²⁴² has focused on how these benefits can contribute to the reduction of agency costs within a corporate legal structure, rather than

²³⁶ See generally, [Morshed Mannan, *Fostering Worker Cooperatives with Blockchain Technology: Lessons from the Colony Project*, 11 ERASMUS L. REV. 190 \(2018\).](#)

²³⁷ Michael del Castillo, *Overstock Raises \$10.9 Million in First Blockchain Stock Issuance*, COINDESK (Dec 15, 2016), <https://www.coindesk.com/overstock-first-blockchain-stock-issuance>.

²³⁸ [Lana Swartz, *Blockchain Dreams: Imagining Techno-Economic Alternatives After Bitcoin*, in ANOTHER ECONOMY IS POSSIBLE: CULTURE AND ECONOMY IN A TIME OF CRISIS 82 \(Manuel Castells ed., 2017\).](#)

²³⁹ [Neufund, *Whitepaper v.2.0: Community-owned Fundraising Platform* 55 \(2017\), \[https://neufund.org/cms_resources/whitepaper.pdf\]\(https://neufund.org/cms_resources/whitepaper.pdf\).](#)

²⁴⁰ [Peter Zeitz, *Blockchain Governance*, 0X BLOG \(2018\), <https://blog.0xproject.com/blockchain-governance-7ff89e6ec383> \(last visited May 13, 2019\).](#)

²⁴¹ [Wulf A. Kaal, *Blockchain Solutions for Agency Problems in Corporate Governance*, in ECONOMIC INFORMATION TO FACILITATE DECISION MAKING \(Kashi R. Balachandran ed., 2019\); Carla Reyes, Nizan Packin & Ben Edwards, *Distributed Governance*, 59 WM. & MARY L. REV. 1, 18–20 \(2017\).](#)

²⁴² [Salvatore Esposito De Falco et al., *Corporate governance and blockchain: Some preliminary results by a survey*, in CORPORATE GOVERNANCE: SEARCH FOR THE ADVANCED PRACTICES 102, 107 \(2019\), <https://doi.org/10.22495/cpr19p3>; Christoph Van der Elst & Anne Lafarre, *Blockchain and Smart Contracting for the Shareholder Community*, 20 EUR BUS ORG L. REV. 111 \(2019\).](#)

exploring how they may lead to a redrawing of the boundaries of both firms and legal structures. A notable exception to this is a recent article by Fenwick et al., in which the authors acknowledge that successful platforms need to foster open engagement and dialogue with a broad range of stakeholders beyond those within the legal structure of a company.²⁴³

The above scenario presents one form of token-based governance for platforms, which can potentially include a wider range of stakeholders in decision-making processes. For instance, in stewarding the updates and development of the platform, some decisions could be made on a one token-holder, one vote basis and for others it could be dynamically calibrated according to the token-holders' up-to-date reputation score, relative to the total reputation score in a quorum of token-holders. Drawing from the experience of the token-based social news platform Steemit, CoSocial could also allow 'negative-voting',²⁴⁴ to enable smaller participants to band together to prevent collusion and arbitrary decisions by token-holders with high reputations. Conversely, by making reputation degradable, smaller participants would be incentivized to engage in governance processes rather than free-ride on the efforts of others. If regular decisions have to be made—for instance, about content instead of just strategy—the platform could require that reputation scores be temporarily diminished to prevent abuses of voting.²⁴⁵ As reputation is not transferable across users and cannot be purchased, this voting structure could go some way towards mitigating plutocratic governance of platforms.

Blockchain projects such as Aragon, Colony, DAOstack, and Democracy Earth offer varying techniques for implementing token-based governance at scale, including reputation-weighted voting, prediction markets, and the aforementioned quadratic voting.²⁴⁶ Such projects are highly experimental and it remains to be seen which techniques will achieve widespread adoption or are demonstrably useful for their intended purposes. Indeed, while the proposed token-based decision-making system may address some of the concerns with voting, it does not—and cannot—capture the politicking (i.e. the motivations, interests and negotiations) that determine a vote, much of which takes place off-chain. This, however, does not mean that the internet cannot be a suitable, alternative

²⁴³ [Mark Fenwick, Joseph A. McCahery & Erik P. M. Vermeulen, *The End of 'Corporate' Governance: Hello 'Platform' Governance*, 20 EUR BUS ORG L. REV. 171, 193–194 \(2019\).](#)

²⁴⁴ Negative voting is the practice of tactically downvoting decisions (or content) made on a platform.

²⁴⁵ Kim & Chung, *supra* note 233, at 7.

²⁴⁶ See, e.g., [Mannan, *supra* note 236 \(discussing the potential of reputation-based voting\); Zeitz, *supra* note 234; Posner & Weyl \(2014, 2017, 2018\), *supra* note 112.](#)

discursive arena to, among other things, express dissent about actions taken by delegated management in an organization.²⁴⁷

Thus far, the major token governance regimes in Ethereum and its ilk on the protocol layer have fallen short of the aspiration of decentralization²⁴⁸ and, in doing so, have left such projects in a vulnerable position in which private, competing interests can coalesce. This, in turn, has slowed decision-making and, in exceptional situations, enabled the rise of an unaccountable sovereign that fundamentally contradicts the values of public blockchains.²⁴⁹ These concerns about the governance of public blockchain protocols consequently raise questions about the governance of the project that are built on top of them as they are—to a certain extent—mutually interdependent. However, it is plausible that among the proposals on offer are the beginnings of mechanisms that will be suitable for enabling meaningful user participation through large-scale tokenized governance.

Separate from the platform's economics, there are other potential advantages to representing the share certificates of privately held platform companies as tokens on public blockchains. As observed by the lawyer Gabriel Shapiro, tokenized share certificates may be cleared faster than conventional shares and ownership of shares may be verified more accurately. Moreover, CoShare-holders are less required to trust those typically involved in corporate governance processes, such as proxy advisors and the corporation itself.²⁵⁰ Instead, CoShare holders can be confident that the token represents share certificates owned and controlled by the token-holder, which contrasts to having 'book entries' in a corporation's share register (that may be inaccurate) or bundled with innumerable other shares (and potentially mis-voted). It is hoped that this enhanced individual sovereignty over their shares will encourage shareholders to participate in the general meetings of CoSocial Corporation and exercise their rights to inspect the corporation's books and records.²⁵¹

The scenario deliberately omits discussion of the distributed ledger being used by CoSocial to store information about shareholder votes and the trading of shares, beyond noting that token-holders may have a dashboard to monitor their CoShares. Van der Elst and Lafarre have noted that it may be undesirable for a

²⁴⁷ Marcos Barros & Valérie Michaud, *Worlds, words, and spaces of resistance: Democracy and social media in consumer co-ops*, 27 ORGANIZATION 578, 581 (2020).

²⁴⁸ [Nathan Schneider, *Decentralization: An Incomplete Ambition*, 12 J. CULT. ECON. 265 \(2019\).](#)

²⁴⁹ See Wessel Reijers, Iris Wuisman, Morshed Mannan, Primavera de Filippi, Christopher Wray, Vienna Rae-Looi, Angela Cubillo Vélez & Liav Orgad, *Now the Code Runs Itself: On-Chain and Off-Chain Governance of Blockchain Technologies*, TOPOI (2018), <https://doi.org/10.1007/s11245-018-9626-5>.

²⁵⁰ [Gabriel Shapiro, *Tokenizing Corporate Capital Stock*, {ZERO LAW} \(Oct 28, 2018\), <https://gabrielshapiro.wordpress.com/2018/10/28/2/> \(last visited Oct 21, 2019\).](#)

²⁵¹ See, e.g. CAL. CORP. CODE § 1601(a) (2019).

company to have a public blockchain as their share register,²⁵² given that it may lead to the inclusion of participants that are ineligible and perpetuate inaccurate information. At the same time, there are serious questions over whether permissioned blockchains afford meaningful benefits over conventional client/server architecture when used for a limited purpose,²⁵³ such as tracking the transfer of tokenized share certificates. Companies could, instead, *ex ante* program tokens with certain functionalities that would impose transfer restrictions and include an event listener in the token's smart contract to track a transfer *ex post*.²⁵⁴

3. Implications for Financial Rights

Ordinarily, on platforms where a significant amount of external equity investment is needed (e.g. through a VC fund), agency theory suggests that the management of the platform company may exercise a suboptimal level of effort as much of the financial risk is externalized and as they can exploit the information asymmetry that exists with investors.²⁵⁵ With regard to those platforms reliant on platform-specific investments by users (e.g. through contributions of specialized knowledge or capital-investments for gig work), this suboptimal effort may prevent users from joining and, in a bid to attract more users, may lead the platform company seeking more external funding to finance user subsidies. This would cause holdup problems for both the investor and the user, inhibiting either from participating. For the investor, the holdup problem may arise in deciding the control rights that should be in a VC contract to mitigate agency risks and for the user, the holdup problem may arise from knowing that their platform-specific costs will be sunk.

For the platform, the prospect of users receiving crypto-tokens would be beneficial as they may be motivated to make frequent contributions. The fact that the users can also become shareholders of the company, may stimulate greater feelings of ownership over the platform and encourage higher-quality contributions, which in turn may draw new users. The consequence of this will be

²⁵² Van der Elst & Lafarre, *supra* note 242, at 127.

²⁵³ In public blockchains, consensus about the state of a blockchain is open to any interested miners, consensus is determined by miners, transactions on the blockchain are visible to the public, is near-immutable and has high latency. In contrast, in private blockchains, access to the consensus process is permissioned, consensus is determined by a centralized organization, transactions on the blockchain may not be visible to the public, is not immutable and has low latency. See Zibin Zheng et al., *An Overview of Blockchain Technology: Architecture, Consensus, and Future Trends*, in IEEE 6TH INTERNATIONAL CONGRESS ON BIG DATA CONFERENCE PROCEEDINGS 557-564, 559 (George Karypis & Jia Zhang eds., 2017), <http://DOI.10.1109/BigDataCongress.2017.85>.

²⁵⁴ Shapiro, *supra* note 250.

²⁵⁵ [Jens Burchardt et al., *Venture Capital Contracting in Theory and Practice: Implications for Entrepreneurship Research*, 40 ENTREP. THEORY PRACT. 25, 34 \(2016\).](#)

that the financial gains of CoSocial will be shared more widely for valuable and previously neglected labor, from remunerating content curation and work supervision to the provision of computing power to the network and framing the strategies of CoSocial. In short, it will be allocated on the basis of the value of the work done for the platform, as determined by the token-holders themselves.

Through this distribution of wealth, it should become easier for a broad range of users to become shareholders in CoSocial Corporation. It is unlikely that the shares in the Corporation will be held for the purpose of receiving a dividend, rather it will allow holders of CoSoC (including users) to become residual claimants of the company should the Corporation ever be liquidated.

4. Implications for Public Policy

The scenario outlined above is predicated on the understanding that over time a more conducive environment will emerge for crypto-tokens and tokenized share certificates to be circulated. This not only concerns the regulatory status of the crypto-tokens but also the rules governing the transfer of private company shares and the manner in which companies identify and communicate with their shareholders.

Tokenized share certificates such as CoShares raise distinct complications. The shares of privately held companies are typically illiquid, and often deliberately so, due to mandatory restrictions set by applicable securities laws in the interest of those who cannot fend for themselves²⁵⁶ and due to common default contractual provisions in share purchase agreements to protect the company/other shareholders, such as their rights of first refusal or co-sale rights when a shareholder wishes to transfer shares. The restrictions on transferability of the shares are typically mentioned on a legend on the share certificate. The result of this is that early investors can preclude the involvement of potential late investors.

This is not to say that the transfer of restricted securities cannot take place altogether. Rule 144 of the Securities Act, 1933 provides a safe harbor for a share certificate holder to endorse and transfer their share certificates to others if they have held the certificate for at least a year and have not been an executive or controlling shareholder of the company in the past three months.²⁵⁷ From the purchaser's perspective, if they have not been given notice of any adverse claim, their payment and control over the certificate would be sufficient to perfect their

²⁵⁶ See *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953).

²⁵⁷ See 17 C.F.R. § 230.144 (2019); [U.S. S.E.C., Rule 144: Selling Restricted and Control Securities \(2013\), https://www.sec.gov/reportspubs/investor-publications/investorpubsrule144htm.html](https://www.sec.gov/reportspubs/investor-publications/investorpubsrule144htm.html) (last visited Feb 11, 2020).

property right over the share.²⁵⁸ In other words, a transferor can endorse the share certificate in favor of the transferee without informing the issuing company.²⁵⁹

However, here we encounter the difficulty of programming tokens to be compliant with securities regulation.²⁶⁰ To accommodate existing investor protections, it should be possible to expand/contract the supply of tokens, enable transfer restrictions, track tokens, burn tokens on a forked blockchain,²⁶¹ and potentially swap tokens with other tokens with identical rights and obligations on other blockchains.²⁶² Even if this were possible, there would be questions of whether a given state jurisdiction would permit the representation of a share certificate on a blockchain and in what manner, given the personally identifying information generally available on a share certificate. It would appear that US states such as Wyoming are closer to enabling pseudonymity, given that they allow shareholders to be identified by their blockchain addresses.²⁶³

Following these caveats concerning the feasibility of tokenization, it is important to acknowledge the legislative efforts across the United States—and the world—to facilitate the use of blockchain by businesses. These initiatives range from de regulation and accommodation of the features of blockchain technology within the existing state record-keeping infrastructure²⁶⁴ to regulating tokens²⁶⁵ to promoting new legal entity forms.²⁶⁶ Given the novelty of such legislation, structures such as the one described in the scenario above have yet to be tested. There is reason to be optimistic though that the emergent regulatory competition

²⁵⁸ CAL. COM. CODE § 8303.

²⁵⁹ This is notably different from jurisdictions in which a civil-law notary has to be involved in the transfer of shares and physical presence of the shareholder or their duly-authorized representative is needed. In such cases, an off-chain trust or foundation structure is used, with it serving as the legal owner of the shares on behalf of on-chain token-holders and acting under their direction.

²⁶⁰ [Reyes, Packin, and Edwards, *supra* note 241 at 25.](#)

²⁶¹ In exceptional circumstances, a new, upgraded blockchain may fork from the older blockchain, with the result that the blocks or transactions from the older blockchain are not recognized. Participants in a blockchain-based system then have to decide which chain to follow. This may be determined by a technical rule, such as choosing the chain with the most confirmed blocks, or it may be influenced by social norms, including the social capital of certain participants. See PRIMAVERA DE FILIPPI & AARON WRIGHT, *BLOCKCHAIN AND THE LAW: THE RULE OF CODE 24*, 188 (2018).

²⁶² [Shapiro, *supra* note 250.](#)

²⁶³ W.S.1977 §17-16-140(a)(xlix) read with W.S.1977 §17-16-140(a)(xxxvii) and W.S.1977 §17-16-140(a)(xlvi).

²⁶⁴ DGCL §§ 219(c), 224.

²⁶⁵ Liechtenstein has enacted a Law on Tokens and Trustworthy Technology Service Providers, 2019.

²⁶⁶ Vermont has recently introduced a new legal entity known as the Blockchain-Based Limited Liability Company, *see* 11 V.S.A. § 4171-4175.

between states (within the US and abroad) will provide the necessary innovations and the SEC will issue further clarifications.

III. DISCUSSION

The three options presented here offer diverging models for how a startup in the online economy might transition into becoming an enterprise owned by its stakeholders, including its users. The focus of the Article has primarily been on the inclusion of individual end-users but we hope that our options are capacious enough to include other, important categories of users, such as businesses and advertisers, as needed.²⁶⁷ While Professor Post has previously suggested that users could benefit from a ‘market of rules’,²⁶⁸ in which platforms compete to provide ‘rule-sets’ of access and participation that users prefer, we take this further by suggesting pathways for a ‘market for ownership structures’ for users to choose from. A number of assumptions are at play and need to be acknowledged. The hypothetical company, CoSocial, is seen to be at a crossroads and it is presumed that they recognize that an important part of their value proposition depends on being considered trustworthy by their community. The hypothetical original term sheet of CoSocial confers relatively weak control rights to external investors and it is possible to imagine that many platforms have VC contracts in which, for example, the VC firm has a veto right to a change in a business plan or has the right to replace management.²⁶⁹ An early-stage, cash-strapped platform entrepreneur may be willing to allow VC funds to have such rights if they are able to attach themselves to a reputable brand name. However, the effect of these assumptions may be somewhat mitigated by the fact that there is some empirical evidence that California-based startups are subject to less onerous cash flow and control right terms by VCs.²⁷⁰ In other words, it is assumed that (intense) negotiation took place with external investors to change exit strategies. However, as the example of Kickstarter indicates, it is possible for external investors to

²⁶⁷ For instance, as of late 2018, Facebook has over 80 million businesses and 6 million advertisers on its platform. They are also arguably in a position of dependence with respect to the Facebook platform. Anne Helmond, David B. Nieborg & Fernando N. van der Vlist, *Facebook’s Evolution: Development of a Platform-as-Infrastructure*, 3 INTERNET HISTORIES 123, 123, 127, 134 (2019). This is not unique to Facebook, with Uber opening its API to white-listed third-party developers since August 2014, see Uber Developers, *Introducing the Uber API*, MEDIUM (Aug 20, 2014), <https://uber-developers.news/introducing-the-uber-api-ca86968eab50>.

²⁶⁸ David. G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L. art. 3, para. 42.

²⁶⁹ [Burchardt et al., *supra* note 255 at 28.](#)

²⁷⁰ [S. Abraham Ravid & Ola Bengtsson, *Geography and Style in Private Equity Contracting: Evidence from the U.S. Venture Capital Market* \(2011\), <https://papers.ssrn.com/abstract=1782382> \(last visited Oct 23, 2019\).](#)

support ambitious shifts in value systems.²⁷¹ It is also worth noting that while VC funds have a duty to their limited partners to maximize their investments, the business model of venture capital relies on achieving a ‘home run’ in only 10-20% of investments—not all of them.²⁷²

With respect to the employees of CoSocial during this transition process, it is assumed that some will stay and some will leave, as ordinarily occurs within the tech sector, with those among the former potentially wearing both hats—employee and user—will work to improve the functionality of the platform, engage in governance and benefit from financial returns beyond their wages.

From the perspective of users, all of the strategies extend to users a significant voice in the design and construction of online communities that have come to become a prominent part of daily life. The governance rights that are made available to users through these strategies, directly or indirectly, may be used to have these businesses voluntarily commit to higher privacy standards than may be required by the law, by limiting the personal data that is collected, used, sold or disclosed.²⁷³ Platform companies such as Craigslist have long been emblematic of this approach, driven by the vision of their founder and CEO.²⁷⁴

Conversely, each strategy could also be seen as a bulwark against the transfer or sale of their personal data, in the event of a merger, restructuring or bankruptcy proceedings of a platform company,²⁷⁵ by providing users a voice during

²⁷¹ [Kickstarter PBC, *Kickstarter PBC 2017 Benefit Statement 2* \(2017\), https://d3mlfygrfdi2i.cloudfront.net/181119_PBC_Report_PDF_Master.pdf](https://d3mlfygrfdi2i.cloudfront.net/181119_PBC_Report_PDF_Master.pdf) (last visited Oct 27, 2019).

²⁷² See Bob Zider, *How Venture Capital Works*, HARV. BUS. REV. (Nov-Dec. 1998), <https://hbr.org/1998/11/how-venture-capital-works>; Pollman, *supra* note 74, at 168. VC funds are well aware that only about 30% of seed-funded companies exit to an IPO or acquisition, with the rest either winding up or becoming self-sustaining, see *Venture Capital Funnel Shows Odds of Becoming a Unicorn Are About 1%*, CBINSIGHTS: RES. BRIEF (Sept 6. 2018) <https://www.cbinsights.com/research/venture-capital-funnel-2/> (last accessed Mar. 5, 2020). As Cable notes, at a certain stage the opportunity cost of continuing their investment in the hope of a profitable exit may be too high relative to monitoring and extracting value from their other portfolio companies, see Abraham J.B. Cable, *Opportunity-Cost Conflicts in Corporate Law*, 66 CASE W. RES. L. REV. 51, 53, 73-76 (2015).

²⁷³ See Balkin, *supra* note 19, at 1199.

²⁷⁴ JESSICA LINGEL, AN INTERNET FOR THE PEOPLE: THE POLITICS AND PROMISE OF CRAIGSLIST (2020).

²⁷⁵ See, e.g., §3.4, Twitter Privacy Policy (Jan 1, 2020) <https://twitter.com/en/privacy> (last accessed Apr 9, 2020); §3.7, LinkedIn Privacy Policy (Jan 6., 2020) <https://www.linkedin.com/legal/privacy-policy> (last accessed Apr 9, 2020).

such changes of corporate control.²⁷⁶ This is a pressing need, given that the acquiring company may process the personal data in a different manner and for different purposes than for which it was collected, even if the acquirer consents to remaining bound by the original privacy policy.²⁷⁷ The FTC and state regulators in the United States have underscored the importance of obtaining the consent of users when their personal data is transferred as part of an asset sale. For instance, in the bankruptcy cases concerning RadioShack²⁷⁸ and Borders,²⁷⁹ the court-approved settlement and judgment respectively required that inter alia users be allowed to opt out from the transfer of their data to the acquiring company. The existence of a representative Trust Protector Committee, CoNet Cooperative or a tokenized CoSocial would provide a forum in which such transfers could be deliberated, a mechanism to gauge the views of users individually and collectively and a body to oppose transactions entered into by the board of CoSocial that are contrary to an extant Privacy Policy. This approach concedes that the business model of corporations like CoSocial may need some form of data collection, processing and use, but addresses the chronic information asymmetry confronted by users and installs measures that provide them with a voice in how such policies evolve. In the words of McKenzie Wark, what is dystopian about information sharing is less the sharing “than the asymmetry of the sharing”.²⁸⁰ This symmetry in sharing may not only be with regard to participatory decision-making, but also

²⁷⁶ In certain situations, regulators have stepped in. For instance, at the federal level, the Children’s Online Privacy Protection Act (‘COPPA’) requires verifiable parental consent before children’s information is collected, used or disclosed. 15 U.S.C. § 6502(b)(1)(A)(ii). At the state level, California enacted the Student Online Personal Information Protection Act (‘SOPIPA’) in 2014, which restricts websites selling, using or distributing K-12 student data for targeted marketing purposes. In the case of a merger or acquisition, the acquirer is also bound by SOPIPA. Student Online Personal Information Protection Act (SOPIPA), CAL. BUS. & PROF. CODE § 22584(a)-(b)(4) (2016). California’s pathbreaking Consumer Privacy Act confers consumers of certain businesses that sell user data the right to request disclosures about the categories of personal information sold and the categories of business that buy this data, as well as the right to opt-out from this sale. CAL. CIV. CODE §§ 1798.115- 1798.120. A web page allowing users to opt-out should be signposted with a conspicuous link on the website’s homepage titled “Do Not Sell My Personal Information”. CAL. CIV. CODE § 1798.135. However, transfers of data as part of a merger, acquisition or bankruptcy are not included in the definition of ‘sale’ under the Act. CAL. CIV. CODE §§ 1798.140(t)(2)(D). In general, the “U.S system of virtually unlimited resale of information to third parties leaves data subjects vulnerable”, see Tsesis, *supra* note 26, at 599.

²⁷⁷ The GDPR, however, protects EU data subjects from such “function creep”, see GDPR, *supra* note 16 at art. 6(1a).

²⁷⁸ *In re RadioShack Corporation, et al.*, No. 15-10197 (BLS) (Bankr. D. Del.).

²⁷⁹ *In re Borders Group, Inc., et al.*, No. 11-10614 MG, 2011 WL 5520261 (Bankr. S.D.N.Y. Sept. 27, 2011).

²⁸⁰ MCKENZIE WARK, CAPITAL IS DEAD 1 (2019)

in sharing in the financial rewards of the platform, acknowledging the multifarious contributions they make towards a platform being successful.

As such, each proposal deliberately pushes against the path dependent tendencies of platform startups, but each is also plausible, given historical precedents and existing frameworks. Each comes with their respective strengths and weaknesses, touched upon in the sections above. The purpose of juxtaposing these strategies is not to identify one model as superior but to demonstrate the range of outcomes that could become available through community ownership. Past scholarship on collective user-based enterprises indicates that these strategies may be promoted to users by highlighting how they are being underserved by capitalist alternatives or by doubling-down on the humanistic and solidaristic values embodied by the platform.²⁸¹ Yet, the appropriateness of choosing one strategy over another is likely to be context dependent—depending on such considerations as the platform’s revenue sources, the culture of its user community, the local regulatory environment, and forms of path dependence such as its financing history.

For example, a platform whose users make a wide variety of financial transactions through it on a regular basis might be better suited to tokenization, whereas a platform that gathers user data but does not regularly transact with them might have an easier path toward a trust devoted solely to oversight and governance. In the context of a communications protocol with a large user base, which arguably has the characteristics of a natural monopsony, the federation scenario would enable competitive dynamics to operate within such a market. Alternatively, a governance-focused trust could provide oversight comparable to that of a utility regulator—without having to decide which state should be responsible for such regulation. In contrast, federation would not likely be a wise strategy for a startup in a market that is already competitive and dynamic as it could impose crippling governance overhead. A governance-focused trust would not likely appeal to a community of stakeholders solely interested in reaping financial returns alongside outside investors.

The online economy thus far has relied on a narrow range of strategies for ownership and financing, largely dictated by the venture capital ecosystem. These serve certain purposes very well. But strategies based on ownership by user communities would broaden the repertoire of options for startups and maturing companies. It remains to be seen in the field of practice which such strategies best

²⁸¹ [Marie-Claire Malo & Martine Vézina, *Governance and Management of Collective User-Based Enterprises: Value-Creation Strategies and Organizational Configurations*, 75 ANN. PUBLIC COOP. ECON. 113, 125, 130 \(2004\).](#)

meet user needs and take hold. Indeed, it is possible that a hybrid version of these strategies may emerge, blending the strategies described above or others.²⁸² Whichever strategy is utilized, it is imperative that the stakeholders involved are mindful of the overarching objectives of all the strategies: sensitivity to power dynamics, meaningful inclusion in decision-making, and serving the public interest.

This raises an important, general point concerning the long-term feasibility of an exit to community: *the need for responsibility and stewardship from the top*. This may initially be a founder who is willing to countenance exploring the strategies discussed in this article, but will eventually be a board representing a coalition of stakeholders who take their duty to monitor seriously and make timely, carefully deliberated interventions in decisions made by mid-level management.²⁸³ The fact that recent years have seen the emergence of cooperative start-up accelerators dedicated to incubating new cooperatives, including platform cooperatives, through financing, mentorship, knowledge-building and training is a promising method for inculcating the values of cooperative leadership and stewardship.²⁸⁴

As discussed throughout, the strategies detailed here are intended to be privately ordered, but they would benefit from the support of legislative reforms

²⁸² See, e.g., Mennan Selimi et al., *Towards Blockchain-enabled Wireless Mesh Networks*, in PROCEEDINGS OF THE 1ST WORKSHOP ON CRYPTOCURRENCIES AND BLOCKCHAINS FOR DISTRIBUTED SYSTEMS, THE 16TH ACM INTERNATIONAL CONFERENCE ON MOBILE SYSTEMS, APPLICATIONS, AND SERVICES (2018), <http://doi.acm.org/10.1145/3211933.3211936>.

²⁸³ The duty to monitor is one of the directors' duties, as noted in the seminal Caremark case. In re Caremark International, Inc. Derivative Litigation 698 A.2d 959 (Del. Ch. 1996). To discharge the duty to monitor corporations are required to establish "risk oversight, internal controls, and monitoring systems" as well as periodically evaluate their effectiveness. This means that corporate officers inform the board of directors about these systems and the board asks questions about how these controls and systems are performing. See Hillary A. Sale, *Fiduciary Law, Good Faith, and Publicness*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 763, 779 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019). Such systems can, for instance, concern content moderation or policies concerning how personal data is used or sold, see Kadri & Klonick, *supra* note 7, at 59-60, 89; Balkin, *supra* note 2, at 14. Failure to establish such systems, can lead to breach of fiduciary claims. This has taken place, for instance, in the case of Facebook, with a trade union in its capacity as a shareholder filing a demand to inspect the books and records of Facebook to assess whether there has been a breach of fiduciary duties, see In re Facebook, Inc. Section 220 Litig., No. 2018-0661, 2019 WL 2320842 (May 31, 2019). It should be noted that, in practice, Delaware courts afford a great deal of discretion to directors in taking business risks and have set a high threshold for allowing Caremark claims to proceed, see generally Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019).

²⁸⁴ See, e.g. Start.Coop, <https://start.coop/> (last visited Apr 10, 2020); UnFound, <https://unfound.coop/> (last visited Apr 10, 2020).

that make exits to community more attractive. In recent years, we have seen the emergence of regulation to support the development of online social media, ride-hailing and home-rental applications that operate under a capitalist logic. It remains to be seen whether regulation will emerge to support platform alternatives that operate under a logic of communitarianism and solidarity.

In order to make user ownership models possible, advocacy blocs will need to form to develop and implement the necessary policies. The need for this is increasingly being recognised, with the General Assembly of the International Co-operative Alliance (the global representative body of the cooperative movement) unanimously passing a resolution on 17 November 2017 to explore the potential of platform cooperatives.²⁸⁵ These advocacy blocs might be broad-based and populist, such as those that achieved enabling legislation for rural cooperatives in the early twentieth century²⁸⁶ or the more recent campaigns in support of net neutrality.²⁸⁷ They might also arise more in the realm of experts, such as the campaign that enabled pension funds to invest in venture capital²⁸⁸ or the development of the ESOP.²⁸⁹ A wide range of stakeholders could be potential allies—and strange bedfellows—in such an effort. Labor unions could see an opportunity to build worker power through co-ownership. Venture capitalists could see a new means for delivering returns from portfolio companies. Startup founders could see avenues for combining financial returns with social purpose.²⁹⁰ Established companies could see an attractive means for addressing crises of accountability. User advocates and grassroots activists could see tactics for holding platforms accountable. There would surely be critical differences among these types of stakeholders, but each

²⁸⁵ International Co-operative Alliance, *Motion to Support Platform Co-operatives Passed at General Assembly in Malaysia*, INTERNATIONAL CO-OPERATIVE ALLIANCE (Dec 13, 2017) <https://www.ica.coop/en/media/news/motion-support-platform-co-operatives-passed-general-assembly-malaysia> (last visited Mar 15, 2020).

²⁸⁶ Vaheesan & Schneider, *supra* note 209, at 20.

²⁸⁷ See, e.g. Jonathan Perri, *Building a Movement for Net Neutrality*, 27 SUR 51 (2018); Cyndi Suarez, *Campaign Seeks to Build a Grassroots Movement to Protect Net Neutrality*, NONPROFIT QUARTERLY (13 Jul, 2017), <https://nonprofitquarterly.org/campaign-seeks-build-grassroots-movement-protect-net-neutrality/>.

²⁸⁸ Bruce W. Marcus, *A Vote for ERISA's Prudent Man*, THE NEW YORK TIMES (May 14, 1978), <https://www.nytimes.com/1978/05/14/archives/point-of-view-a-vote-for-erisas-prudent-man.html>.

²⁸⁹ Kelso & Kelso, *supra* note 97, at Chapter 6.

²⁹⁰ That startups are exploring options other than IPO and sale are clear from their delays in deciding to IPO and the trend towards private secondary sales of early investor and employee shares, see, e.g., Eliot Brown, *The Latest Path to Silicon Valley Riches: Stake Sales*, WALL ST. J. (Nov. 19, 2017), <https://www.wsj.com/articles/investment-firms-buy-stock-in-startups-long-before-ipo-1511045818>. However, instead of a sale to wealthy investment firms with opaque interests, our proposed strategies would help ensure that the corporations continue to serve those who depend on them the most.

might also have something to gain, and to fight for, in a shared agenda for ownership.

IV. CONCLUSION

We have argued for the promise of multi-stakeholder ownership as a means of addressing the ongoing accountability crises of the online platform economy. Using hypothetical scenarios involving a fictional platform company, we described three strategies for conversion to multi-stakeholder ownership: buyout with a non-charitable purpose trust, federation, and tokenization. These rely on structurally distinct mechanisms to achieve democratic accountability through co-ownership. The overriding purpose in proposing these strategies is to spur further discussion about broadening the repertoire of company ownership and financing in the online economy, as well as about whether multi-stakeholder ownership of platforms would be a worthwhile norm.

Although we have attempted to show that each of these strategies is precedented enough to be plausible, we recognize that much more discussion and experimentation are needed to determine whether they can be regarded as truly feasible, practical, and even desirable. Firstly, there is a need for experiments in practice that approach and approximate these strategies where possible, recognizing that further policy reform may be needed to fully accommodate them; as noted at the outset, there does appear to be already a growing appetite for such experimentation. Secondly, both in theory and practice, these strategies should be more fully evaluated in comparison to alternative approaches to accountability for the online economy, such as regulation of platform behavior, civil-society pressure campaigns, market competition, and activism among employees or existing shareholders. Thirdly, recognizing that the three strategies presented here do not encompass all possible options, we welcome typologies of multi-stakeholder ownership strategies that improve on those we have offered. Wherever future research and discussions lead, we hope to have offered a constructive set of invitations for how to imagine democracy operating not just outside the online platform economy as it exists today, or against its abuses, but within it.