Global platform governance and the internet-governance impossibility theorem

ABSTRACT
Economist Dani Rodrik argues that global economic governance is characterized by a trilemma: ‘we cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three’. This trilemma can also be applied to internet governance and global platform governance as a corollary global internet-governance impossibility theorem. This trilemma, which emphasizes who sets the rules and the degree of democratic accountability they face, offers us a way to evaluate online content-regulation proposals. This article applies this framework to four prominent platform-governance proposals: Facebook’s proposal for a global ‘Oversight Board’; David Kaye’s book Speech Police; the United Kingdom’s Online Harms White Paper; and French president Emmanuel Macron’s speech to the 2018 Internet Governance Forum. Of the four, only Macron’s framework offers a pathway to reconciling democratic accountability with the existence of different legitimate views on how content should be regulated.

KEYWORDS
platform governance content moderation information sovereignty internet governance global governance structural power
INTRODUCTION

Global online content regulation represents a ‘hard’ issue in global governance. It touches internet governance’s two ‘third rails’: the normative preference for a global internet, and speech issues. At one end of this debate are fears of domestic censorship (by democratic and authoritarian countries) and concerns about the splintering of a supposedly global internet, including disagreements about what type of content should be regulated or even banned. At the other lies concerns about the imposition of global rules by democratically unaccountable monopolies such as Facebook and Google. Attempts to address these issues have led to a burgeoning cottage industry in regulatory proposals and reviews (see Winseck and Puppis 2019).

Overlapping jurisdictions, conflicting norms and a multitude of public and private actors in play for any exercise in internet governance can complicate the analysis of proposed internet-regulation regimes, particularly as they relate to highly contentious issues like content regulation. However, global online content regulation, despite its complexity, is still a straightforward contest over two key questions: who will set the rules, and what the rules will be.

As a global-governance problem, it comes up against what Harvard University economist Dani Rodrik calls the ‘fundamental political trilemma of the world economy’ (Rodrik 2010: 200). Applied to the global economy, this trilemma holds that:

we cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three. If we want hyperglobalization and democracy, we need to give up on the nation state. If we must keep the nation state and want hyperglobalization too, then we must forget about democracy. And if we want to combine democracy with the nation state, then it is bye-bye deep globalization.

(Rodrik 2010: 200)

Hyperglobalization here refers to a situation of unchecked cross-border trade and financial flows. Rodrik’s trilemma starts from the premise that the global norm of democratic accountability should be the fundamental principle against which global economic governance is judged. This choice fits with Braithwaite’s observation that ‘[d]emocracy is virtuous because it can increase freedom, particularly when we conceive freedom as nondomination’ (2017: 1508). Adopting a democratic norm makes sense for global economic policy since there exist a great deal of uncertainty and honest disagreement regarding both the means and ends of economic policy (Rodrik 2010: 239).

This trilemma also holds for global platform regulation, especially as it relates to content. (In the internet sphere, hyperglobalization involves the unfettered cross-border flows of data and content.) Hyperglobalized cross-border flows require a single set of global rules, with minor national variations. Different countries and societies hold divergent and potentially irreconcilable norms and preferences regarding how data and content should be regulated. While messy, focusing on how the rules are made, and the extent to which they meet a democratic standard, rather than the extent to which they satisfy some necessarily partial (in the sense of partisan) measure of freedom, offers us a more productive way to evaluate proposed platform-regulation regimes, allowing us to move past near-intractable differences regarding what ‘free speech’, for example, should mean.
Global platform governance and the internet-governance impossibility theorem

1. Germany’s Network Enforcement Act, or NetzDG, is a similar attempt at state regulation of content. The UK one was selected because (as will be discussed below) its proposal to regulate ‘legal but harmful’ content represents a ‘hard’ case of content regulation.

Phrased another way, outcome-focused analyses, such as a platform’s rules’ free-speech effects, are concerned with questions of output legitimacy, what Risse calls ‘effective problem solving’ (2006: 180). However, legitimate governance depends not only on output legitimacy but also on input legitimacy – ‘the participatory quality of the decision-making process leading to rules and laws’ (Lindgren and Persson 2010: 451). In a democratic society, input legitimacy is based on the principle that ‘[t]hose who have to comply with the rules ought to have an input in rule-making processes’ (Risse 2006: 217; for the seminal discussion of input and output legitimacy, see Scharpf [1999]). While both forms of legitimacy are important, input legitimacy is central in situations – such as global-platform content regulation – where societies have legitimate, honest disagreements about what the policy outcome should be.

This article adopts Rodrik’s global economic governance trilemma, recast as a ‘global internet-governance impossibility theorem’, as a means to analyse the desirability of the various proposed platform- (and content-) regulation schemes. It adopts as its evaluative benchmark democratic accountability. This framework prompts us to focus explicitly on the question of who will exercise power in the global political economy, allowing us to classify various internet-governance schemes according to which side of the trilemma a specific proposal occupies: hyperglobalization and democracy; hyperglobalization and the nation state; or democracy and the nation state. In doing so, it offers us a way to analyse and evaluate online content-regulation proposals based on who sets the rules, and the accountability mechanisms they face (or do not face) in a world in which states and corporations continue to be the dominant rule-setting actors, and where opinions differ strongly on what the rules should be.

This article demonstrates the utility of this trilemma by evaluating four prominent content-governance proposals: Facebook’s proposal for a global ‘Oversight Board for Content Decisions’ (Facebook 2019b; Harris 2019a, 2019b; Zuckerberg 2018); United Nations (UN) Special Rapporteur David Kaye’s human rights-focused book Speech Police: The Global Struggle to Govern the Internet (2019); the United Kingdom’s Online Harms White Paper (2019); and French president Emmanuel Macron’s speech to the 2018 Internet Governance Forum in Paris (Macron 2018). These cases were selected because each represents a distinct approach to platform governance: platform-centric (Facebook), state-centric (the United Kingdom), human rights-focused (Kaye) and multilateral (Macron).

A trilemma-based analysis reveals important aspects of each proposal, most importantly showing how each occupies (or attempts to occupy) a different side of the trilemma triangle. It focuses on the fundamental issue, from which all normative discussions spring: who will set and interpret rules and regulations related to platform governance. This article finds that Facebook’s plan offers a global approach to platform governance that does not meet the standards of democratic governance, effectively forcing nation states to be passive rule-takers. Kaye’s international human rights law approach attempts to reconcile a global regime with democratic impulses, but without fully considering or resolving tensions among global platform governance, democracy and sovereignty. For its part, the United Kingdom’s approach chooses democracy and national sovereignty over global platform governance.

Finally, Macron’s (2018) speech’s proposal for a multilateral agreement on basic democratic, human rights standards regarding platform governance offers a way to respect the importance of democratic governance within
the context of the internet-governance trilemma. It embraces the promise of embedded liberalism that underwrote the enormously successful post-Second World War order by reconciling domestic policy differences and needs with the benefits from multilateral and global, but not unfettered, cooperation. As such, it can be seen as a promising path forward, since it prioritizes the interoperability of diverse domestic (and democratically accountable) frameworks.

This article first makes the case for the importance of focusing on who makes the rules when evaluating platform-governance proposals and offers a justification for the focus on rule-making and democratic norms as the main criteria for evaluating these proposals. It then sets out in detail Rodrik’s trilemma as it applies to online platform governance. The fourth section analyses the four proposals using our trilemma framework. The article concludes with some thoughts on what this analysis suggests for the scope of our ambitions for global platform, and internet, governance.

**RULE-SETTING, LEGITIMACY AND DEMOCRATIC ACCOUNTABILITY**

The ability to make the rules is a fundamental power in politics and economics, as in life (Strange 1994). When dealing with global-governance issues, such as global platform regulation, two key issues stand out: ‘whether to proceed on the basis of national boundaries or to think more broadly’ (Mac Sithigh 2019: 20), and which actors should be allowed to set the underlying frameworks.\(^2\)

On the key question of who should govern when it comes to regulating global platforms, one finds a lack of clarity in several recent platform-governance analyses. For example, Gillespie (2018) focuses primarily on the normative effects of platforms’ moderation decisions, rather than the question of who should be the rule-setter. His heavily US-centred account (which limits its utility for thinking about how to regulate global platforms) downplays governments’ role in regulating platforms. The book nods towards possible reform of Section 230 of the US Communications Decency Act, which grants platforms limited immunity from liability so that (generally speaking) they cannot be held responsible for hosting or removing most types of content posted by their customers. It effectively allows social media platforms to set moderation rules as they see fit (barring some exceptions such as for child pornography) (Gillespie 2018: 43). Gillespie’s proposed reforms involve a combination of individual-focused responsibilization and market-based measures (increasing greater transparency and consumer/user responsibility for their platform use) and heal-thyself bromides (companies should adopt more diverse hiring practices). That states – individually or collectively – could regulate these platforms is pithily dismissed as being too complex (‘[t]he biggest platforms are more vast, dispersed and technologically sophisticated than the institutions that could possibly regulate them’ [2018: 211]) and too global (2018: 35–36), as if the global domination of a few (American) platforms were an unchallengable and (in the context of competition from Chinese platforms) even desirable (Wu 2018)\(^3\) fact of life. One is thankful that Gillespie’s fatalism is not evident in global finance, whose complexity, global reach and importance are unmatched by what remain, effectively, online bulletin boards.

Governments feature more prominently in a recent article by Helberger et al. (2018), which argues for a governance framework that involves three stakeholders: users, platforms and governments. Governments in their view are not rule-makers (or, in their phrasing, ‘omnipresent regulators’), but rather guarantors of a neutral user–business negotiation framework ‘providing the
framework for sharing responsibility by all key societal stakeholders’ (2018: 10). This approach is touted as ideal because:

As history shows over and over again, unilateral government regulation of public communication tends to sit in tension with freedom of speech. Furthermore, since social media corporations are primarily driven by commercial interests, they cannot be trusted to always act in the interest of the public good either. Nor can we count on the self-monitoring capacities of the crowd, as long as users do not have the knowledge and/or ability to take up such a role.

(Helberger et al. 2018: 10)

This formulation of state interests and users’ roles is simultaneously oversimplified and overly complicated. It ignores that the state itself comprises multiple conflicting interests and is not wholly autonomous from society (Cox 1987). It also ignores that the form of state (democracy or authoritarian, e.g.) will influence strongly state attitudes towards free speech. In other words, when it comes to freedom of speech, Canada is not China. Even more problematically, equating users to the state and companies is a category error. ’Users’ are secondary actors in policy-making. They cannot make rules on their own; rather, they influence actual rule-makers – states and companies – in their roles as voters, consumers and activists. This error, combined with the treatment of the state merely as a referee, ignores the reality that the state is a rule-maker; the extent to which it listens to its citizens is a measure of its democratic bona fides, just as the extent to which companies listen to consumer protest is a measure of consumer power.

Significantly, in both works, global platforms are taken as a fact of life.

Finally, Suzor (2018) proposes a ‘digital constitutionalism’ approach to evaluating platform-governance proposals. Digital constitutionalism focuses on the question of governance legitimacy and accountability: ‘[a]t a minimum, for a system of governance to be legitimate, decisions must be made according to a set of clear and well-understood rules, in ways that are equal and consistent, with fair opportunities for due process and independent review’ (Suzor 2018: 9). Suzor also usefully recognizes that actual governance is conducted by both state and non-state actors (2018: 2).

This article (and its longer elaboration in Suzor [2019]) is concerned with issues of the procedure – ‘if a government is going to introduce new internet regulation, how should it operate to ensure that the rules are legitimately enforced?’ (Suzor 2019: 235). However, legitimacy for Suzor, as with Kaye (2019; discussed below), seems to be primarily about how government content regulation aligns with human rights law, particularly regarding freedom of speech, as opposed to democratic legitimacy (Suzor 2019: 238).

**Dealing with difference**

The debate over how to regulate platforms, who should regulate them and which values should be championed is a classic battle over what Susan Strange, one of the founders of the discipline of international political economy, called ‘structural power’. Strange argued that all human societies, no matter their size, must decide how to prioritize and realize certain fundamental needs: wealth (material), order (security), justice and liberty (individual) (Strange 1994). Given that differences of opinion on how to achieve these
goals will invariably arise, the ability to implement one set of norms over another requires the exertion of ‘structural power’: ‘the power to shape and determine the structures of the global political economy within which other states, their political institutions, their economic enterprises and (not least) their scientists and other professional people have to operate’ (Strange 1994).

In the contest to exert control over the rules and norms governing the global political economy (or any society), Strange identifies the ‘knowledge structure’ – the set of rules and norms governing what knowledge is considered to be legitimate, as well as its creation, dissemination and use – as one of four fundamental structures through which structural power is exercised, the others being finance, production and security. Internet governance and certainly content regulation fall squarely within Strange’s notion of the knowledge structure (Haggart 2018, 2019).

Two key insights arise from a structural-power perspective. First, we can expect societies to differ in how they prioritize issues such as free speech and internet openness. Such differences occur both between and within societies; as Franks (2019) notes, the current dominant US discourse on ‘free speech’ reflects a particular interpretation of the US First Amendment, rather than the only possible view. That there exist fundamentally different interpretations of basic concepts, means that it is often unhelpful to start from an assumption that ‘openness’ or ‘free speech’ should be prioritized, since the real issue is never ‘free speech or not’, but what limitations, and in whose favour.

Second, advocating specific normative stances in favour of free speech means little if one does not possess the structural power to interpret and implement them. In other words, the key political debate is not between what norms should be implemented, but who should be allowed to decide how society’s fundamental needs – in this case, related to speech and communication – should be fulfilled. Who is in control, and how governance happens are the fundamental political questions.

The existence of competing views on how societies should be run and the importance of structural power indicate that we should evaluate competing online content-regulatory frameworks by the quality of their decision-making processes. The non-existence of an objectively superior content-regulation regime suggests that we should use democratic accountability as our benchmark. Adopting democratic accountability as our benchmark has the benefit of being globally recognized as a dominant, freedom-increasing (Braithwaite 2017) norm. It also imposes upon us a measure of humility, forcing us to consider that our own biases and assumptions may not be shared by others. Rather than seek to dominate others with our own (obviously correct) positions, we should recognize the legitimacy of our differences, arrived at democratically.

THE INTERNET-GOVERNANCE IMPOSSIBILITY TRILEMMA

Adopting democratic accountability as our evaluative benchmark brings us face to face with the dominant global-governance problem, what Rodrik calls the ‘fundamental political trilemma of the world economy’: ‘we cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three’ (Rodrik 2010: 200) (see Figure 1). This outcome is a consequence of the fundamental character of a hyperglobalized political economy. A hyperglobalized world requires that ‘national borders do not interfere with the exchange of goods, services or capital’. In such a
world, restrictions on the movement of these economic assets are treated as inefficiencies to be stamped out; it is the role of the nation state to adjust its economic policies to ensure ‘that they pose the least amount of hindrance to international economic integration’ (Rodrik 2010: 201).

In internet governance, a hyperglobalized world is one in which the same set of rules apply, with minor variations, to all societies, often implemented by a single, global platform. Because data and content must flow freely across borders to maintain a hyperglobal internet, state-based restrictions on content and data flows are necessarily treated as a threat.

A hyperglobalized internet suffers from two main drawbacks. First, it does not adequately recognize the reality that different societies and countries have different norms regarding content regulation, ranging from the extremist free-speech position of American First Amendment activists (Franks 2019) to the authoritarian state censorship of dictatorships like China, with the European Union’s more privacy-focused ideal laying somewhere in between. Second, it does not meet the democratic ideal: rule-setting in this context lacks accountability and representation.

Assuming an interest in preserving democratic accountability, there are two possible solutions to this impasse: either preserve internet hyperglobalization by embracing some form of global democracy or give up on hyperglobalization (i.e. a world of global platforms) and embed internet/platform governance in domestic, democratically accountable regimes.

Of the two solutions, the latter is more realistic than the former. A truly democratic and sustainable hyperglobalized economic regime, notes Rodrik, requires ‘a “global body politic” with common norms, a transnational political community, and new mechanisms of accountability suited to the global arena’ (Rodrik 2010: 203). While none of these three criteria is easy to fulfil, it is the ‘lack of clear accountability relationships’ that represents the ‘Achilles’ heel of global governance’ (Rodrik 2010: 212), since ‘the world is too diverse to be shoehorned into a single political community’ (Rodrik 2010: 228). In contrast to the clear lines of authority between the electorate and governors in a democracy via elections, global legitimacy would have to come from another
source. These alternate forms of legitimacy, notably legitimacy via expertise, however, will continue to be stymied in the absence of a global political identity or community. For example, while global standards are a possible solution to this global legitimacy problem, ‘[w]hat is “safe” for the United States may not be “safe enough” for France or Germany. […] Nations have different views because they have different preferences and circumstances’ (Rodrik 2010: 223).

Rodrik here is talking about financial regulations, but he could just as easily be talking about restrictions on speech.

Transparency and certification by non-state actors (such as NGOs or a business–NGO structure) offer a market-based solution to these legitimacy and accountability problems. However, the accountability of certifiers, be they credit-rating agencies or multi-stakeholder content-moderation councils, would remain suspect, as private corporations and NGOs have their own self-interested agendas (Rodrik 2010: 226; for similar analyses regarding internet multi-stakeholder governance, see Powers and Jablonski [2015] and Carr [2015]). Placing one’s faith in increased transparency to deliver legitimate outcomes, meanwhile, assumes that individuals are able to make socially beneficial decisions in situations in which consumers often lack the skill or ability to evaluate their options (Obar and Oeldorf-Hirsch 2018), that there are no negative externalities to these decisions and that something akin to perfect competition is in play (i.e. the possibility for meaningful choices exists).

Choosing the democracy–nation state side of the trilemma would respect the need for democratic accountability and the diversity of views on how platforms should be regulated, but potentially by creating an autarkic situation. This is not the only possible option, however. Rather than autarky, one could embrace a global system that respects international diversity while respecting the limits this diversity places on cross-border governance regimes. Recognizing that countries’ have different and legitimate views of content regulation, that they ‘have the right to protect their own social arrangements, regulations, and institutions’ and that they ‘do not have the right to impose their institutions on others’ (Rodrik 2010: 240–42) points a way forward for global economic and internet governance. It requires abandoning the quixotic search for a true universal system with a less-ambitious set of international institutional arrangements that ‘lay down the traffic rules for managing the interface among national institutions’ (Rodrik 2010: 243). Democratic accountability becomes the guiding principle for shaping global economic governance. The corollary to this point is that non-democratic countries should not be allowed ‘the same rights and privileges in the international […] order’, since their decision-making processes are by definition illegitimate (Rodrik 2010: 244).

**From global economic governance to global internet governance**

Societies are deeply divided ‘in terms of preferences, circumstances and capabilities’ when it comes to content regulation. The temptation is to either impose a single set of values on a pluralistic world, or to worry about the breakdown of the global internet. Against this background, the internet-governance impossibility trilemma offers a straightforward set of criteria we can use to evaluate proposed online content-regulation regimes without prejudging the content of these regulations.

This evaluation begins with the understanding that (democratic) societies can have legitimately different views on what constitutes appropriate content
regulation and legitimate censorship. This legitimacy should not be measured against a ‘free-speech’ ideal, since it is the boundaries of this concept that are being contested, and there exist legitimate disagreements about where these lines should be drawn: there is no optimal form of content regulation. The legitimacy of content-regulation frameworks is bound primarily to the democratic legitimacy of the processes that produced them.

This principle established that we must identify who, or what organizations make the rules governing content regulation – who decides, in other words. Once this piece of information is identified, we can place the regime in its particular trilemma corner.

FOUR PROPOSALS

Having identified in a proposal which actors are engaging in regulation, we can then identify a proposal’s sources of legitimacy and accountability – that is the processes by which the rules are made. The remainder of this article applies this framework to four leading content-regulation schemes.

Undemocratic hyperglobalization: Facebook’s ‘Independent Oversight Board’

Facebook’s proposal to create a form of appeals board for specific content decisions is an attempt to maintain hyperglobalization without democratic accountability. Although it remains a work in progress as of this writing (May 2020), with Facebook having just announced several initial board members (Clegg 2020), the contours of its ‘Independent Oversight Board’ are clear enough to allow us to draw some conclusions. In terms of rule- and norm-setting, structural power will remain exclusively with Facebook. The Board – whose four co-chairs were selected solely by Facebook – will only be able to issue recommendations (‘provide policy guidance’ [Harris 2019a]). Second, its small size (40 people from around the world) means that it will only deal with a relatively infinitesimally small number of specific cases per year.

Facebook’s approach would maintain a single set of global regulations, with some variations at the domestic level. In terms of accountability, the Board represents an attempt to build legitimacy for its hyperglobalization via the selection of experts (‘a diverse and qualified group of 40 board members’ [Harris 2019a: n.pag.]): they must ‘have familiarity with matters relating to digital content and governance, including free expression, civic discourse, safety, privacy and technology’ (Facebook 2019a: Art. 1.2).

Reliance on experts is an example of an attempt of legitimation via scientific standards. However, as Rodrik noted above, global standards fail to account for societies’ ‘different preferences and circumstances’ (Rodrik 2010: 223): it would be folly to expect 40 people to be able to take into account these differences. Most damningly, the people in the societies over which these 40 individuals will have power will not have a say in who will be ruling over them. And of course, we would still have no recourse to remove Mark Zuckerberg, the person who rules Facebook, from his position of ultimate power.

Muddled hyperglobalization, or confused nation state democracy: David Kaye’s rule by international human rights law

Much more interesting than Facebook’s transparently naked attempt to pre-empt state regulation is David Kaye’s proposal that governments and
Kaye may be overstating this power, particularly with respect to democracies. To take one example, in the run-up to the 2019 Canadian federal election, Facebook said it would not remove false or misleading content (Boutilier 2019). Companies adopt international human rights law – specifically, Article 19 of the Universal Declaration on Human Rights, as their benchmark in regulating these companies and in companies setting their terms of service. When viewed through the lens of Rodrik’s trilemma, Kaye’s proposal gets a bit messy. At first glance, it seems to represent an attempt to build a global polity, centred around global human rights norms, to legitimate a global system. However, Kaye, an American legal scholar and the then-UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, also seems to embrace the need for domestic control over social media platforms:

Today, a few private companies, driven to expand shareholder value, control social media. And yet the rules of speech for public space, in theory, should be made by relevant political communities, not private companies that lack democratic accountability and oversight.

(Kaye 2019: Conclusion)

On the importance of domestic control, Kaye’s message is muddled: Governments should take a minimalist regulatory role, except when they should be more engaged. They should avoid ‘heavy-handed content regulation’ while working to ‘protect the space for individual expression, reinforce the need for transparency by the companies and themselves, and invest in the infrastructure necessary for freedom of expression in their countries’ (2019: Conclusion). However, they should also not delegate content decisions to companies without government oversight. Meanwhile, there should also be a role for public institutions, ensuring that ‘any efforts to take down content are channeled through independent courts or agencies, which themselves are subject to challenge and appeal’ (2019: Conclusion).

While Kaye argues that governments ‘already have the tools to pressure the companies to take action against content that, in their view, violates local law’, his government-focused recommendations run much closer towards the free-market ideal of government promoting transparency in service of enabling ‘user agency’ (2019: Conclusion).

Kaye also recommends that local ‘civil society activists and users should have an explicit role in company policymaking’ (2019: Conclusion). They would be engaged by the platforms as multi-stakeholder councils ‘to help them evaluate the hardest kinds of content problems, to evaluate emerging issues, and to dissent to the highest levels of company leadership’ (2019: Conclusion).

In a telling turn of phrase that hints at global platforms’ colonialist position, in which global rules are slightly tweaked for domestic subjects, Kaye also suggests that these (American) companies also have ‘desk officers’ for each country, ‘ideally nationals from that country’ (2019: Conclusion).

It would be the nationals’ job to represent themselves and their society to the foreign company/rulers. These desk officers would be able to make their concerns heard, but with power remaining firmly entrenched with the company itself. Both the multi-stakeholder council idea and the market-based solutionism of a transparency-driven approach reflect and are vulnerable to the same critiques discussed above: Simply invoking ‘civil society’ does nothing to eliminate accountability issues, while the pursuit of transparency assumes both a well-functioning, competitive market, that individuals are capable of making informed choices about very complex issues, and that some choices
should not be left to the market, such as choosing to use a product made of asbestos, or choosing to let Nazis spread their poison online.

The fundamental governance question is: who is responsible for interpreting international human rights law? Kaye seems to leave this responsibility primarily up to the global platforms, assuming that it is enough for them to incorporate international human rights law into their terms of service. He thus dodges the fundamental question of interpretation. His proposal would impose on platforms a weak accountability, akin to the Facebook Oversight Board, while leaving effective rule-setting power in their hands.

Kaye’s discomfort with the state as a regulator comes across most clearly in his concern that a company’s advisory multi-stakeholder councils could be captured ‘by ill-intentioned governments or groups’ (2019: Conclusion). However, whether someone is ‘ill-intentioned’ is in the eye of the beholder, and requires a judgement call – that is, it requires actions and rules to be interpreted by somebody. The right to judge when a government or company or individual’s actions are ‘ill-intentioned’ is the central issue of content and platform regulation: Who should it be? Kaye’s remarks about the importance of local civil society suggest an awareness of the need to respect local differences. However, by limiting state involvement in platform regulation, his proposal fails to come to terms fully with what such respect would actually require, namely the empowerment of domestic governments to regulate global platforms as they see fit, according to their own (local) interpretations of international human rights law.

This conundrum, ironically, would not have emerged if Kaye had taken democratic accountability, rather than Article 19, as his guiding norm. In the democratic-norm approach, judging whether a policy was ‘ill-intentioned’ would involve assessing whether policies had been arrived at through democratic processes, rather than whether international law – which is open to interpretation by design – had been appropriately followed.

**Democracy and the nation state: The United Kingdom’s Online Harms White Paper**

As of this writing (March 2020), the United Kingdom’s *Online Harms White Paper* remains a proposal. With this caveat, this controversial document (e.g. Smith [2019] and Soo [2019] citing the US legal scholar Daphne Keller) proposes to comprehensively regulate online content in the United Kingdom. It proposes that a regulator would have enforcement powers to ‘implement, oversee and enforce’ a ‘new regulatory framework’ to deal with problematic online speech (*Online Harms White Paper* 2019: 9). With respect to illegal harms related to speech and ‘those harms which may be legal but harmful, depending on the context’, regulations would be ‘more specific and stringent’ for the former than the latter (2019: 42). Such ‘harms’ would not be criminalized, but platforms would be required to demonstrate that they are doing something to deal with them.

The United Kingdom’s proposal would place much of the rule-setting authority regarding platforms’ terms of service and appeals process in the hands of the state (more precisely, with an arm’s length regulator), thus placing it clearly on the nation state–democracy side of the impossibility theorem triangle. The legitimacy of this move is based on the democratic accountability of the Westminster system.
Much of the commentary about the white paper has focused on two aspects, particularly as they might affect speech regulation (Goodman 2019; Nash 2019; Smith 2019)5:

1. That a regulator be responsible for regulating both unambiguously illegal activity as well as online ‘harmful content or activity that may not cross the criminal threshold but can be particularly damaging to children or other vulnerable users’ (Online Harms White Paper 2019: 6) (see Table 1).
2. That the government ‘establish a new statutory duty of care to make companies take more responsibility for the safety of their users and tackle the harm caused by content or activity on their services’, to be ‘overseen and enforced by an independent regulator’ (Online Harms White Paper 2019: 7).

These critiques have focused on the potential for the regulation of ‘legal but harmful’ practices to chill free speech, and on the questionable legitimacy of a regulator setting rules for practices that are not explicitly illegal. Such comments raise an important qualifier with respect to the internet-governance trilemma, namely that within democratic states, some practices may be more democratic than others. We should, thus, take seriously concerns about leaving these decisions to a regulator.

However, the fact that a regulator is tasked with making regulatory decisions is not inherently anti-democratic. The delegation, via regulation, of rule-making to government agencies is commonplace in democracies. Even tasking a regulator with the power to informally influence a company or sector is not necessarily an illegitimate or undemocratic practice. In Canada, central bankers wishing to influence the small number of large charter banks that dominate Canada’s banking sector has long relied on ‘moral suasion’ to convince the banks to implement publicly beneficial (in the eyes of the central bank) policies – that is policies forbidding practices that may be ‘legal but harmful’ without going through the legislative process (Breton and Wintrobe 1978). Even voluntary guidelines and codes of practice are commonplace within democratic countries like Canada on issues that are at least as important as speech regulation, such as access to finance. Such practices may be particularly well suited to situations to deal with situations that are socially problematic but may not fit within a black-and-white legal framework, or where the private sector has the particular technical expertise to address an issue.

The financial sector offers another example of a quasi-independent agency that makes decisions largely isolated from ongoing political influence in the form of central banks, which are responsible for managing the monetary side of the economy. The idea behind central bank independence is that interest rates and the ability to print money are so tempting as policy tools that they

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Table 1: List of online harms.
should be left to technocrats to manage, rather than be subject to day-to-day political control. One sees a similar logic in the white paper. An oft-expressed fear is that politicians may overreact and ban too much speech, a situation further complicated by the fact that what looks like sound regulation to one person may appear to another as reckless policy. Too much political oversight may be as problematic as too little. Leaving margin calls to an independent regulator that remains generally accountable to the government of the day could be seen as a recognition of this delicate situation, in which accountability is needed, but where there may be some wisdom in isolating the regulator from direct political pressure.

The democratic bona fides of any specific regulatory regime can be a matter for debate, with a key consideration being how the rules are created and (even more importantly) amended. Whatever emerges from the white paper should be judged on those grounds. However, the white paper as currently constituted fits squarely within a normal framework of democratic accountability. To their credit, the white paper’s authors did not shy away from recognizing that someone, at the end of the day, must exert structural power over these platforms. Faced with a choice between unaccountable platforms and a democratic (if flawed) state, they chose the democratic state.

**Multilateral, democratic, but not hyperglobal: Macron’s proposal**

The UK proposal, while clearly embracing democratic accountability, has little to say directly about global internet governance. If adopted globally, it could lead to a world of discrete content-regulation jurisdictions. While such an outcome would bring the global platform behemoths to heel, it would likely have the negative effect of discouraging cross-border communication.

This problem has an economic analogue in the immediate post-Second World War period. The capitalist–democratic countries wanted the advantages that came from cross-border economic exchange, while realizing that cross-border economic flows (capital and goods) can sometimes destabilize an economy and society. In short, they wanted to retain the ability to implement domestic rules in their nation state, reflecting their specific circumstances while avoiding the perils of hyperglobalization.

A solution, embodied in the Bretton Woods institutions and reflected in French president Emmanuel Macron’s 2018 speech to the Internet Governance Forum, was what political scientist John Ruggie calls ‘embedded liberalism’: ‘unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism’ (Ruggie 1982: 393; see also Rodrik 2010).

Embedded liberalism embraces democratic accountability within the nation state while encouraging greater openness (see Figure 2). When faced with destabilizing international economic forces, countries should be allowed to adjust their policies to resist these pressures, rather than change their policies to accommodate them. Over the past four decades, this global economic *modus operandi* has been reversed, with countries expected to adjust their policies to fit the needs of the global economy, be it with respect to wages, interest rates or fiscal policy: hyperglobalization minus democratic accountability.

One of the reasons why Macron’s speech was perceived as controversial in internet-governance circles was because it explicitly took as its starting point the notion that democratic accountability and the preservation of democracy,
rather than free speech and net neutrality, should drive the internet-governance discussion:

We cannot simply say: we are the defenders of absolute freedom everywhere, because the content is necessarily good and the services recognized by all. That is no longer true. […] Our governments, our populations will not tolerate much longer the torrents of hate coming over the Internet from authors protected by anonymity which is now proving problematic.

Importantly, Macron, unlike Kaye, distinguishes between democratic and authoritarian governments, arguing that this distinction should be the basis for state regulation:

Not all governments are equal: there are democratic governments and undemocratic governments; some governments are driven by liberal democracy, while there are also illiberal democracies; and lastly, there are non-democracies. In relations with governments, we cannot accept a certain lack of differentiation.

This assertion echoes Rodrik’s proposal regarding global economic governance. It holds that democratic accountability is (or should be) the source of legitimacy in global economic governance. Given a pluralist international society and the absence of a global polity, this accountability is lodged firmly within the nation state. In contrast to Kaye but in agreement with Rodrik, Macron argues that this lack of democratic legitimacy justifies a differential approach to authoritarian countries, which should play ‘by different, less permissive rules […] particularly when they have costly ramifications […] in other countries’ (Rodrik 2010: 245).
Macron’s speech helpfully moves beyond both Kaye’s framework, which attempts a global normative approach that fails to fully appreciate the implications of the existence of local preferences, and that of the UK white paper, which is largely silent on the United Kingdom should fit into the wider world. It clearly addresses the question of who should make the rules governing the internet – democratic nation states – drawing their legitimacy from the global norm of democratic accountability. However, it also acknowledges the benefits of cross-border communications flows. In doing so, it offers us a way forward that avoids both Facebook-style unaccountable hyperglobalization and potentially autarkic state-centric internet policy.

CONCLUSION: REDISCOVERING EMBEDDED LIBERALISM

One of the key questions facing those interested in questions of global internet governance is: what should ‘global’ mean? One insight that emerges from examining the reality of the global political economy is that ‘global’ need not necessarily mean ‘uniform rules’. Finance, for example, may be global, but states retain the ability and desire to set their own banking rules.

In terms of the global economy, Rodrik frames the issue as such:

Instead of asking, ‘What kind of multilateral regime would maximize the flow of goods and capital around the world?’ we would ask ‘What kind of multilateral regime would best enable nations around the world to pursue their own values and developmental objectives and prosper within their own social arrangements?’

(Rodrik 2010: 244)

Recognizing the legitimacy of local differences and the fundamental norm of democratic accountability requires a global framework designed to ensure the interoperability of different regimes. It requires a rediscovery of the virtues of embedded liberalism, which acknowledges democratic norms as the legitimizers of content-governance policies while respecting the ability for (democratic) nation-states to set their own policies in accordance with their own values and needs. It emphasizes the need to make distinctive systems interoperable, rather than embracing a hyperglobalized monoculture.

Such a world is quite different from the one in which we currently live. In our hyperglobalized world, global platforms are the dominant norm- and rule-setters (Klonick 2017), making country-specific adjustments often only when confronted with significant political or economic challenges. Small (democratic) countries are largely ignored in global internet-governance debates, which are framed as titanic great-power struggles between the United States and China. The European Union, meanwhile, fancies itself as a ‘regulatory superpower’ (e.g. Leonard 2016), which amounts to an assertion of neo-colonial domination, an attempt to unilaterally set global standards. This great-power posturing respects neither democratic norms nor legitimate domestic differences.

Against this backdrop, Macron’s speech emphasizes respect for local differences while also encouraging cross-border cooperation when possible. Such a system would work ‘as a collection of diverse nations whose interactions are regulated by a thin layer of simple, transparent, and common-sense traffic rules’, to take Rodrik’s words from a slightly different context (2010: 280). Such an approach necessarily changes our focus from ensuring that
free-speech protections are enjoyed worldwide to respecting democratically realized domestic preferences while managing adverse cross-border effects.

In contrast, when a company like Facebook sets communication policy for over 2 billion people, it is effectively dominating these people, and their societies. It fails the test of input legitimacy, our ability to set the rules – however wise or foolish – under which we live. It is hard to see how the existence of such global (rule-setting) platforms is compatible with the advancement of democratic norms in a pluralist world. This analysis strongly suggests that these companies should be broken up, not just along product lines, but globally as well: Facebook Canada, for example, should be independent from Facebook Europe, subject to local laws and supervision.

Focusing on democratic accountability can also lead to productive engagements within countries. Because a democratic system does not guarantee non-domination (Braithwaite 2017), a complete analysis of internet-governance proposals must consider the quality of democracy within a state and the extent to which it practices non-domination. This perspective would be particularly useful in evaluating policies such as the regulation of ‘legal but harmful’ speech, allowing for a focus on how these rules affect marginalized individuals’ and groups’ ability to experience non-domination, rather than just how these rules might stifle speech.

The ability to shape foundational rules and norms is central to the exercise of power. Refocusing the platform-regulation debate towards platform-regulation proposals’ democratic bona fides, both within and across countries, offers a useful way to engage with these issues. Macron’s emphasis on the existence of difference and the importance of democratic accountability within a like-minded community of democratic states suggests a promising way to address the internet-governance trilemma.

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SUGGESTED CITATION

CONTRIBUTOR DETAILS
Blayne Haggart is an associate professor of political science at Brock University in St. Catharines, Ontario, Canada. He is the author of Copyright: The Global Politics of Digital Copyright Reform (University of Toronto Press, 2014), and the co-editor (with Natasha Tusikov and Kathryn Henne) of Information, Technology and Control in a Changing World: Understanding Power Structures in the 21st Century (Palgrave, 2019) and of an upcoming volume on state involvement in internet governance (Routledge). A former reporter and economist, his current research focuses on the international political economy of knowledge governance.

Contact: Department of Political Science, Brock University, 1812 Sir Isaac Brock Way, St. Catharines, ON, L2S 3A1, Canada.
E-mail: bhaggart@brocku.ca

https://orcid.org/0000-0003-2866-264X

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