

21st Century Digital Democracy Needs a New Contract

[Abstract]

Since its inception, democracy has been inextricably linked with questions regarding the legitimate source and exercise of political authority. Yet these same questions have, to date, only played a limited role in our evaluation of digital democracy. Social media platforms increasingly act as a venue for open, civil discourse—one of the most vital features of a democracy—where civilians create, access, share and discuss information (Loader et al., 2014). While social media platforms and their executive leaders may not have been originally intended to play such an essential political role, they now claim to champion 21st century digital democracy by both providing a means for, and influencing the structure of, civic engagement and social infrastructure (Bialik and Matsa, 2017). Platform regulation is often scrutinized through the lens of algorithmic decision making and free speech, but there's another often overlooked form of governance influencing digital democracy: digital contracts.

Terms of service (TOS) contracts determine the relations between users and social media companies, outlining the powers inherent to both and how those powers may be used. In order to assess the state of digital democracy, we must avoid the dangerously narrow view—often promulgated by internet executives echoing John Perry Barlow's cyberlibertarianism—that sees democracy as little more than the right to free expression and equal access. Reducing Internet governance to solely discussing elements of free expression obfuscates the core of liberal political thought—and limits debate to how embedded algorithms on platforms enable such things as fake news without questioning fundamental incentives. To this end, we focus our analysis on how social media platforms assert and formalize power via terms of service agreements and their accompanying privacy and use policies. Modern democratic governance is based upon a social contract, and if we are to design modern digital democracy and governance, we must interrogate digital contracts as well.

Methodology, Literature, and Preliminary Findings

Pulling from key tenants of the liberal theory of government (LTG) and social contract theory (SCT)—the foundational theories of modern democratic governance—in this paper we systematically analyze TOS in order to illustrate how social media platforms determine/solidify their relationship with users. As the foundational theories for contemporary democracy, SCT and LTG together have a number of implications for the relationship between power and democratic institutions that are markedly different from what we see in TOS. SCT holds that political structures arise out of, and are legitimized by, the collective assent of a people. As a theory of the origin and legitimacy of governmental power, SCT doesn't necessarily imply a democratic form of government (for instance, Hobbes argued for the legitimization of a monarchy). Nevertheless, the theory was taken up by Locke, Rousseau, and other philosophers keen to establish a foundation for democratic governance. According to SCT, a government's power is nothing other than the powers granted it by the collective will of the people. LTG, as a complementary theory of the proper use of that power, holds that government structures exist to guarantee the natural rights of people—i.e., for Locke, the rights to life, liberty, health, and property, understood as the ultimate ends of human existence. We use these theories to inform a mixed methods analysis of over 100 social network services (SNS) TOS in order to make empirical claims about what specific provisions regulate user behavior, how many provisions are included, what rights are being given or taken away, and more.

If social media are indeed democracy-enabling platforms, their TOS should reflect power relations similar to those expressed in SCT and LTG. But preliminary findings suggest that they do not, and in fact suggest a net decrease in user rights and powers. While users may have

digital access and free speech to a degree, the way in which TOS are deployed and the rights that they address undermines democracy and, thus, creates a current state of digital authoritarianism. Not only does the unilateral delivery of these contracts (disclosures, really) make them authoritarian in nature, but, as legal scholars suggest, we see the systematic removal of rights that signal, as Margaret Radin describes, massively-distributed boilerplate (Radin, 2013).

Most users don't read TOS and if they do, that doesn't mean that they understand the risks, regulations and value that they are supposedly consenting to (Fiesler et al., 2016). Beyond implied consent due to their coercive nature, as others have noted, TOS not only bind and regulate users' online speech, but they also remove rights to due process through mandatory arbitration provisions, and privacy policies relinquish rights to privacy—removing avenues for shared ownership and governance (Belli and Venturini, 2016). Furthermore, the loss of privacy rights undermine, for example, US citizens' rights to prevent illegal search and seizure through the third party doctrine—further contributing to democratic erosion (Belli and Venturini, 2016).

Towards Digital Contractarianism

The aspects of democratic degradation found in TOS lead us to believe that the power relations they outline support a digital authoritarian system, not a democratic one. But this critical lens—highlighting the authoritarian nature of corporate platforms that attempt to bind us to (nearly) non-negotiable surveillance and rights-removal provisions—provides a framework and a series of innovative options toward digital democracy. We conclude by proposing several researched and nuanced ways to integrate democratic principles into the social, political and technological design, delivery, and enforcement of these contracts. Indeed, regulators should demand transparency and informed consent—and we detail certain provisions and reasons why transparency can work—but we must also look at innovative ways to not only leverage regulatory frameworks, but work with platforms. For example, creating avenues for shared ownership and governance through a variety of tactics employed via platform cooperativism can allow for new types of digital contracts that support 21st century digital democracy. We explore these creative tactics—building on regulatory suggestions and different types of inclusive financial contracts and user bill of rights—that can bring more transparent, democratic digital environments.