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RESEARCH ARTICLE

Faux ami? Interrogating the normative coherence of 'digital constitutionalism'

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Abstract

This article interrogates the normative coherence of the label of 'digital constitutionalism'. In particular, I argue that the use of the label 'constitutionalism' in digital contexts often conflates the practical realities of existing contractual governance models with the superficial appeal of constitutional structures. As a result, the label is misleading in both normative and qualitative terms as it obscures the true nature of the governance architectures to which it is applied, which are more appropriately understood as implementing a distinct genre of 'private policy'.

Keywords: digital constitutionalism; normativity; private actors; public policy; self-regulation

I. Introduction

The internet and the actors who have proliferated within the digital spaces it has provided have long been subject to competing arguments about whether they should be subject to public or private regulation.[1] Against this background, the immediate attention of academics, practitioners and governments examining the regulation of digital spaces has focused on how private actors function as governors of the technical infrastructures of the digital environment. This scrutiny has recently expanded to look beyond regulatory approaches to infrastructure to consider how private actors in digital spaces affect public constitutional[2] values through their regulation of speech, privacy[3] and other values

[1]See Tim Wu and Jack Goldsmith, *Who Controls the Internet? Illusions of a Borderless World* (Oxford: Oxford University Press, 2006). An early example of the contested nature of digital infrastructures and the actors within those digital spaces is ICANN: see Jose MA Emmanuel and A Caral, 'Lessons from ICANN: Is Self-regulation of the Internet Fundamentally Flawed' (2004) 12 *International Journal of Law and Information Technology* 1.

[2]'Constitutional' (capitalized) is used throughout this piece to refer to allegiance to codified legal texts that occupy a position of supremacy within national or (as in the EU) transnational legal systems and the values such texts contain. In contrast, 'constitutional' (lower case) is used to refer to the broader socially defined norms or values that define the reach and content of those written documents and their moral force within the population.

[3]Róisín Á Costello, 'The Impacts of AdTech on Privacy Rights and the Rule of Law' (2020) 11 *TechReg* 11; Lilian Edwards, 'Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and

traditionally protected in Constitutional documents.[4] In response to this scrutiny, as well as the fragmentation of traditionally state-controlled functions, private actors have adopted increasingly formalised, private systems for adjudicating claims about constitutional issues as part of an attempt to maintain independent regulatory control of digital spaces, and in response to government demands that these spaces do not become wholly a-constitutional.

These attempts to 'constitutionalize' private self-regulation of digital spaces are particularly evident in Twitter's decisions to police political speech and remove content it deems to infringe individual privacy.[5] Facebook's Oversight Board though Google's internal system of adjudication in relation to 'right to be forgotten' claims presents a similar, albeit less transparent, model of private actors assuming quasi-judicial roles in assessing and enforcing constitutional values.[6] Elsewhere, the peer governance mechanisms employed by Wikipedia have been proffered as an example of the ambiguity and 'tyranny of structurelessness' that opaque, private governance efforts can generate even when they are modelled on disparate rather than centralized power structures governing digital spaces.[7] This capacity to shape constitutional values online, and the desire to do so, have been articulated by some scholars as representing 'digital constitutionalism'; as part

Profiling' in Lilian Edwards (ed), *Law, Policy and the Internet* (Oxford: Hart, 2018); Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2018) 1 *Information, Communication & Society* 1; Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 *Berkeley Business Law Journal* 39.

[4]Róisín Á Costello, 'Conflicts Between Intellectual and Consumer Property Rights in the Digital Market' (2020) 11 *European Journal of Law and Technology* 1; Joshua T Fairfield, *Owned: Property, Privacy and the New Digital Serfdom* (Cambridge: Cambridge University Press, 2017); Aaron Perzanowski and Chris Jay Hoofnagle, 'What We Buy When We "Buy Now"' (2017) 165 *University of Pennsylvania Law Review* 315; Aaron Perzanowski and Jason Schultz, 'Reconciling Intellectual Property and Personal Property' (2015) 90 *Notre Dame Law Review* 1211.

[5]See Twitter Safety, 'Expanding Our Privacy Information Policy to Include Media' (30 November 2021), available at <https://blog.twitter.com/en_us/topics/company/2021/private-information-policy-update>. Twitter Inc, 'Permanent Suspension of @realDonaldTrump', available at <https://blog.twitter.com/en_us/topics/company/2020/suspension>. On the governance of speech online more generally, see Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation and the Hidden Decisions that Shape Social Media* (Harvard, MA: Yale University Press, 2018).

[6]See Mark Leiser, 'Private Jurisprudence and the Right to be Forgotten Balancing Test' (2020) 39 *Computer Law & Security Review* 105458.

[7]Michael Bauwens, 'Is Something Fundamentally Wrong with Wikipedia Governance Processes?' (2008) P2P Foundation, available at <https://blog.p2pfoundation.net/is-something-fundamentally-wrong-with-wikipedia-governance-processes/2008/01/07>, using the language of Jo Freeman, 'The Tyranny of Structurelessness' (1973) 17 *Berkeley Journal of Sociology* 151. Indeed, several critics have characterised Wikipedia's governance structure as at best a mixed model of anarchy and dictatorship, and meritocratic and bureaucratic as the Wikimedia Board of Trustees (Wikimedia Foundation Board of Trustees, 2008) characterize it, and at worst a dictatorship disguised by structural ambiguity about where power is located and used. See Axel Bruns, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Produsage* (-New York: Peter Lang, 2008). More generally, see Vanesa Larco, Amy Bruckman and Andrea Forte, 'Decentralization in Wikipedia Governance, *Journal of Management Information Systems*' (2009) 26 *Journal of Management Information Systems* 49; Piotr Konieczny, 'Adhocratic Governance in the Internet Age: A Case of Wikipedia' (2010) 7 *Journal of Information Technology and Politics* 263; Piotr Konieczny, 'Governance, Organization and Democracy on the Internet: The Iron Law and the Evolution of Wikipedia' (2009) 24 *Sociological Forum* 162.

of this, private actors have internalized public Constitutional values and integrated them within the regulatory architectures of private digital spaces.[8]

These attempts to 'constitutionalize' private regulatory structures have not gone unopposed. In the face of private efforts at regulation which are perceived as insufficient or unpredictable in terms of enforcement, governments have pushed back – seeking to regulate or oversee the operation of such systems or requiring particular, parallel protections to those provided by traditional Constitutional protections to be put in place.[9] In the United Kingdom[10] and Ireland,[11] for example, governments have proposed the introduction of legislation imposing a broad range of obligations on companies in respect of how illegal and harmful content is treated online. The proposals in both jurisdictions effectively grant the designated regulator (Ofcom in the case of the United Kingdom and the proposed Media Commission in the case of Ireland) powers to oversee the policies designed and implemented by private actors to ensure they perpetuate the appropriate balancing of fundamental rights and interests in digital spaces. Similar legislative proposals have been progressed in Germany through the amendment of the existing Network Enforcement Act[12] and also in France.[13]

Much of the regulatory debate between private actors and states has thus focused on the capacity (or incapacity) of private actors to define and enforce public, constitutional values, either on their own terms or at the behest of state actors, but has ignored the more fundamental questions raised by the invocation of an idea of 'digital constitutionalism'. What precisely is meant by 'digital constitutionalism' and what normative, structural or qualitative characteristics must be present for privately led regulatory efforts to be considered to have become a 'constitutional' project? In this article, I interrogate the

[8]On digital constitutionalism, see Brian Fitzgerald, 'Software as Discourse? The Challenge for Information Law' (2000) 22 *European Intellectual Property Review* 47; Brian Fitzgerald, 'Software as Discourse: A Constitutionalism for Information Society' (1999) 24 *Alternative Law Journal* 144; Paul Schiff Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to Private Regulation' (2000) 71 *University of Colorado Law Review* 1263; Mark A Lemley, 'The Constitutionalisation of Technology Law' (2000) 15 *Berkeley Technology Law Journal* 529; Nicolas Suzor, '*Digital Constitutionalism and the Role of the Rule of Law in the Governance of Virtual Communities*' (Brisbane: Queensland University of Technology, 2010), 121; Lex Gill, Dennis Redeker and Urs Gasser *et al*, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights* (Cambridge, MA: Berkman Klein Centre, Harvard University, 2015). On the mapping of state regulatory structures onto private actors and structures, see James Scott, *Seeing Like a State* (New Haven, CT: Yale University Press, 1999).

[9]In this respect, it is interesting to contrast the position taken by liberal democracies (see proceeding paragraphs) with that taken by non-democratic or quasi-democratic governments. India, for example, has promulgated the Intermediary Guidelines and Digital Media Ethics Code, which requires 'significant social media intermediaries' to divulge the identities of those 'credibly accused' of wrongdoing or face criminal prosecution. Elsewhere, social media companies in China and Russia may, in fact, support government lead censorship in return for permission to operate within those jurisdictions. See Human Rights Watch, 'Russia: Social Media Pressured to Censor Posts', 5 February 2021, available at <https://www.hrw.org/news/2021/02/05/russia-social-media-pressured-censor-posts>; Runfeng He, '*How Does the Chinese Government Manage Social Media? The Case of Weibo*' (Oxford: Reuter's Institute, Oxford University, 2014); Clive Thompson, 'Google's China Problem (and China's Google Problem), *The New York Times*, 23 April 2006.

[10]See Department of Digital Culture, Media and Sport, 'Online Harms White Paper: Full Government Response to Consultation', 15 December 2020.

[11]See 'Online Safety and Media Regulation Bill', 1 June 2021.

[12]See Enforcement on Social Networks (NetzDG) Law 2020.

[13]Décision no 2020-801 DC du 18 June 2020.

meaning of 'digital constitutionalism' and seek to offer some preliminary thoughts on what 'digital constitutionalism' means – and what it does not.[14] In particular, I argue that the regulatory conduct of private actors in digital spaces does not evidence the characteristics that would justify the application of the label of 'constitutionalism'. While certain applications of the label are partly accurate, a preponderance of the measures to which the label is ascribed do not possess the normative or structural characteristics that would justify the label of 'constitutionalism' being applied to them.

The majority of the online governance structures that have adopted constitutionalist language to self-describe their efforts should be viewed not as constitutionalist, but rather as demonstrating the emergence of 'private policy' architectures. As part of these architectures, private actors rhetorically espouse a commitment to constitutional values that obscures the true contractual justification and function of the regulatory methods they employ, and in doing so benefit from the presumptive of normative legitimacy of constitutionalism without offering the equivalent protection that a constitutionalist system would ensure for those governed by it.

In this respect, the examples of the Facebook Oversight Board used in this article are illustrative of the broader mismatches between the normative claims of digital constitutionalism and its substantive form and function. Recognizing this disparity is important, I argue, on the basis of two factors. The first is its reorientation of the analytical focus in assessing the normative use of the term 'constitutionalism' towards a more fundamental interrogation of the ways in which current governance structures operate. The second is a more precise appreciation of whether these governance structures are indeed 'constitutional' in nature, which permits us not only to answer how online spaces are governed at present, but also how they ought to be governed in future. The analytical reorientation prompted by critically engaging with the coherence of digital constitutionalism as both a label and an idea thus leads us to a substantive engagement with the existence and quality of the protections that private regulation in digital spaces can provide to fundamental individual rights and constitutional values.

II. Defining digital constitutionalism

The first scholar to deploy the language of constitutionalism in relation to the digital environment was Brian Fitzgerald, who argued for the recognition of 'informational constitutionalism.'[15] In particular, FitzGerald's argument was that the decentralized and globalized design of the digital information society required a mixed regulatory model in which both private and public actors participated and through which a new constitutional order would be determined by 'a blend of intellectual property law, contract law, competition law, and privacy law'.[16] Lessig later picked up the threads of Fitzgerald's understanding of private actors as *de facto* regulators who should be regarded as such in

[14]In this respect, I agree with the position taken by Jørgensen that if we accept that private actors in digital spaces hold power as both enablers and infringers of individual rights, then it is of paramount importance to critically analyse the frameworks and narratives they adopt in exercising that power and impacting fundamental rights. Rikke Frank Jorgensen, 'When Private Actors Govern Human Rights' in Matthias C Kettemann and Kilian Veith Ben Wagner (ed), *Research Handbook on Human Rights and Digital Technology: Global Politics, Law and International Relations* (Cheltenham: Edward Elgar, 2019).

[15]Fitzgerald, 'Software as Discourse? The Challenge for Information Law' (n 8); Fitzgerald, 'Software as Discourse: A Constitutionalism for Information Society' (n 8).

[16]Fitzgerald, 'Software as Discourse: A Constitutionalism for Information Society' (n 8) 147.

his arguments about the four pillars of regulation in the digital environment.[17] It was Berman, however, who first engaged substantively with whether the 'code-based power' of private actors to regulate digital environments should justify the extension of constitutional principles to their activities.[18]

In particular, Berman argued for the extension of constitutional adjudication through traditional judicial review to a broader range of cases in order to foster constructive societal debate about difficult social and political issues, and permit courts to perform an 'educative function by articulating the values that help constitute our national identity.'[19] In particular, he argued that private law was insufficient as a regulatory mechanism and that by extending the application of constitutional values through judicial review, the state could ensure that the Constitution as a touchstone for articulating the constitutive values of the social and political lives of its citizens was not diminished by digital contexts.[20] These accounts do not claim that the nature of the governance of digital spaces is constitutional, but rather that constitutional values or Constitutional principles should be applied to these spaces and the activities that take place within them. More recently, in describing 'digital constitutionalism',[21] Suzor – similarly to Berman – has identified a need to extend the provisions of a 'constitutional' structure to the digital environment[22] as a result of the potential for privately imposed regulatory structures to infringe constitutional values and Constitutional principles.

Suzor's account echoes the model that Fitzgerald might ultimately have endorsed, arguing for the adoption of a more coherent law of contract that internalizes and thus extends the role of constitutional values.[23] Crucially, Suzor views this meshing as necessary, not on its own merits but a result of a system in which public law has lost its pre-eminence and in which attempts to reassert it have largely failed.[24] This view is, in many respects, aligned with the one presented by Teubner as part of his model of 'social

[17]Lawrence Lessig, *Code: Version 2.0* (Creative Commons, 1999).

[18]Berman (n 8). Berman's argument is that the US state action doctrine can be extended to catch certain activities of private actors in the digital environment, but that not all constitutional provisions, or indeed all activities, should benefit from such a horizontal direct effect.

[19]Ibid, 1269.

[20]Ibid. The potential and patterns of judicial review identified by Berman are, to some extent, reflected as already in process in the analysis offered by Lemley of the use by technology lawyers of constitutional law in cases involving intellectual property disputes in the digital sphere (Lemley (n 8)) and more generally by the horizontal extension of constitutional guarantees to private contracts in certain European jurisdictions: see, Joanna Krzemińska-Vamvaka and Teresa Russo Nuno Ferreira, 'The Horizontal Effect of Fundamental Rights and Freedoms in European Union Law' in Aurelia Colombi Ciacchi and Giovanni Comandé Gert Brüggemeier (ed), *Fundamental Rights and Private Law in the European Union*, Vol 1 (Cambridge: Cambridge University Press, 2010); Dawn Oliver and Jorge Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge, 2007); and Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford: Oxford University Press, 2019).

[21]Suzor (n 8), 121.

[22]Ibid 111–12.

[23]Ibid 22.

[24]Referring to Jack Balkin, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Virginia Law Review* 2043, although it is not clear that this can be viewed as entirely correct. Certainly, within a European context, public values are ascendant within the Constitutional order of the Union, albeit that the question of how to successfully secure their horizontal extension has not been entirely resolved. See generally, Frantziou (n 20).

constitutionalism'.[25] Teubner specifically argues that the idea of the constitution is now projected beyond the state and is no longer anchored to the national dimension from which it emanated. In that context, Teubner argues that a transnational, digital constitution is emerging through a series of 'civil constitutions' – sets of constitutional norms developed by non-state actors that are gradually transmuted into positive law through a process of mutual influence.[26]

While Teubner's account of societal constitutionalism challenges traditional state-centric definitions of the constitutional question and of constitutionalism itself,[27] his articulation of the precise mechanism by which disparate, private efforts can generate constitutional effects does not assume a capacity for self-designation as constitutional in the manner that other recent accounts do – notably those offered by Gasser et al.[28] Rather, Teubner argues that these non-state forces must be understood as one part of a pattern of globalized social redefinitions of constitutional content in which state and non-state actors are parties and that may generate an independent transnational constitutional regime.[29] In contrast, Gasser et al. use the term 'digital constitutionalism' as a descriptive label to refer to a diverse group of codified rights documents that seek to impose variously defined principles (broadly allegiant to general constitutional values) on private actors in the digital environment.[30] Gasser et al defend the use of the label of constitutionalism on the basis that the models and documents identified in their work 'undeniably' display the values, problems and principles of constitutionalism inasmuch as they afford primacy to constitutional rules within a 'hierarchy of legal norms'.[31]

While these accounts vary in both the manner in which they understand what constitutionalism is, and how a constitutionalization of digital spaces could (or should) be achieved, what does unite them is a clear recognition that private actors in the digital environment were (and are) generating a system of norms that variously reflects, modifies, reshapes and even over-rides existing Constitutional principles and constitutional values.[32] In this respect, all of the accounts examined (with the exception of that presented by Gasser et al, who use the label descriptively rather than in evaluative terms) are broadly concerned with seeking to transmute vertically enforceable Constitutional guarantees to private actors in a manner that mirrors debates over the relative merits of

[25]Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (Oxford: Oxford University Press, 2012). See also Gunther Teubner, 'Societal Constitutionalism; Alternatives to State-Centred Constitutional Theory?' in Inger-Johanne Sand Christian Joerges, and Gunther Teubner (ed), *Transnational Governance and Constitutionalism International Studies in the Theory of Private Law* (Oxford: Hart, 2004), 2–3.

[26]Teubner (n 25).

[27]Ibid, section 1 'The Constitutional Question'.

[28]Gill, Redeker and Gasser (n 8). The label is used in a similar manner by Kinfe Michael Yilma, 'Digital Privacy and Virtues of Multilateral Digital Constitutionalism: Preliminary Thoughts' (2017) 25 *International Journal of Law and Information Technology* 115.

[29]Teubner (n 25).

[30]Gill, Redeker and Gasser (n 8) 4. The label is used in a similar manner by Yilma (n 28).

[31]Gill, Redeker and Gasser (n 8) 4.

[32]On the capacity of such platforms to set such norms on a practical basis, and in a context independent of digital constitutionalism, see the cases of privacy and property rights considered respectively in Costello, 'The Impacts of AdTech' (n 3); Costello, 'Conflicts Between Intellectual and Consumer Property Rights' (n 4).

doctrines of direct and indirect horizontal effect with which various European appellate courts (among other constitutional orders) have long grappled.[33]

In these accounts, digital constitutionalism is driven by two distinct concerns. The first, evinced by critiques such as those offered by Teubner, is the fragmentation of the traditional sovereignty and associated social orders that once informed law. In this respect, digital constitutionalism is concerned with integrating private actors into a more broadly drawn conception of the sovereign or Republican constitutional project in order to ensure the values of that project emanate into areas in which the traditional state enjoys little – or certainly less – control.[34] The second concern, which perhaps underlies the accounts of Gasser et al most distinctly, is arguably tinged with cyberlibertarian themes inasmuch as it views digital spaces as distinct jurisdictional areas with sovereigns of their own, whose regulatory choices act as equivalent systems to traditional state-led constitutional models but may be influenced to echo the values and principles of traditional constitutionalism within the confines of their private spaces.[35]

Interestingly, what emerges from accounts driven by these distinct concerns is a range of markedly similar responses that view digital constitutionalism as effected by a range of privately defined standards that variously work independently of the state or displace state institutions and structures,[36] and adopt only the descriptive rhetoric of constitutionalism, seek to integrate constitutional values into private law regulatory mechanisms or adopt *a posteriori* constitutional models, which measure the activity of private actors in digital spaces against constitutional values through limited judicial review.[37] Precisely this diversity in the use of the label, but in particular the divergence between those using it as a rhetorical label (such as Gasser et al) and as a descriptive one, could be considered to cause the accounts to fall foul of Waldron's warning that constitutionalism can be used, too easily, as a flag of convenience. What is more problematic, however, is that these accounts

[33]For an overview of the approach of various jurisdictions to the concept of horizontal effect of fundamental rights, see Dawn Oliver, *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge, 2007). On the capacity and desire of the German courts to extend constitutional adjudication to private actors in a digital context, see Vagias Karavas, 'Governance of Virtual Worlds and the Quest for a Digital Constitution' in Christoph B Graber and Mira Burri-Nenova (eds), *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Cheltenham: Edward Elgar, 2010).

[34]Henry Perritt, 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance' (1998) 5 *Indiana Journal of Global Legal Studies* 423; Paul R Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What we Can do About It* (Cambridge: Cambridge University Press 2007); Goldsmith (n 1).

[35]See John Perry Barlow, *Declaration of the Independence of Cyberspace* (Electronic Frontiers Foundation, 1996), available from <https://www.eff.org/cyberspace-independence>; David Post and David Johnson, 'How Shall the Net be Governed' in Brian Kahin and James H Keller (eds), *Co-ordinating the Internet* (Cambridge, MA: MIT Press, 1997); David Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

[36]On the displacement of traditional state institutions and structures, see scholarship on YouTube's demonetisation framework, which seeks to displace national copyright law (by generating more restrictive rules governing reuse and fair use on its platforms) and to replace state-led judicial systems with mandated dispute-resolution mechanisms. See Robyn Caplan and Tartleton Gillespie, 'Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy' (2020) 6 *Social Media and Society* 1; Neerav Srivastava, 'Indie law for YouTubers: YouTube and the Legality of Demonetisation' (2021) 42 *The Adelaide Law Review* 503. The example of Facebook (now Meta) in section 6 is similarly concerned with removing speech issues from adjudication in national courts and placing them within structures and governance rules in a proprietary self-designed system.

[37]Berman (n 17), 1292.

largely fail to satisfy the substantive requirements for designation as 'constitutionalist' efforts. It is not necessarily the absence of a state-centred definition that is problematic in this respect – although they are at odds with traditional state-oriented accounts of constitutionalism that position the state as the source of constitutional development and governance. Yet in a digital landscape which is increasingly polycentric – or perhaps multipolar – in its governance, this is not the primary shortcoming of these accounts, which justifiably seek to capture how various, and sometimes competing, sources and objectives of regulatory power can be reconciled as part of a mutual determination of constitutional objectives by private and state actors. What these accounts do not necessarily unpick, however, is whether and to what extent the normative use of the label 'constitutionalism' accurately describes the character or practical impacts of the activities to which it is applied.

III. The normative core of constitutionalism

The normative appeal of constitutionalism is almost instinctive. It imports into the contexts in which it is used a vision of public goods and popular protections backed by state guarantee. This appeal is evident in the broad adoption of constitutional models across a range of legal systems and disciplines.[38] We need think only of the 'constitutionalization' of EU law,[39] international economic law[40] or contract law[41] to see evidence of this. More generally, constitutional democracy remains entrenched in public opinion as the aspirational form of governance, and while constitutions themselves are subject to frequent amendment and reinvention, their proliferation and endurance nevertheless indicate their majoritarian appeal as both political and legal structures around which public conceptions of legitimacy and the protection of individual rights can be

[38]Teubner (n 25). Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The American Political Science Review* 853; Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Amagi, 1975); Jean Bernard-Auby, 'Global Constitutionalism and Normative Hierarchies' in Martin Belov (ed), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (Oxford: Hart, 2018).

[39]Mark Bell, 'Constitutionalisation and EU Employment Law' in Hans Micklitz (ed), *The Constitutionalisation of European Private Law* (Oxford: Oxford University Press, 2014); Hans Micklitz, *The Constitutionalisation of European Private Law* (Oxford: Oxford University Press 2014); Tuomas Mylly, 'The Constitutionalisation of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU' in Christopher Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar 2015); Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action' in Serge Gutwirth *et al* (eds), *Reinventing Data Protection* (New York: Springer, 2009) 3.

[40]Deborah Z Cass, 'The Constitutionalisation of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 2 *European Journal of International Law* 39; Deborah Z Cass, *The Constitutionalisation of the WTO* (Oxford: Oxford University Press, 2005).

[41]Olha O Cherednychenko, 'Fundamental Rights, Contract Law and Transactional Justice' (2021) 17 *European Review of Contract Law* 130; Olha Cherednychenko, 'The Constitutionalisation of Contract Law: Something New Under the Sun?' (2004) 8 *Electronic Journal of Comparative Law* 1; Mark Freedland and Matthias Lehmann, 'Non-Discrimination and the Constitutionalisation of Contract Law' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context Interactions with English and German Law* (Oxford: Oxford University Press, 2013); J Smits, 'Private Law and Fundamental Rights: A Sceptical View' in T Barkhuysen and S Lindenbergh (eds), *Constitutionalisation of Private Law* (The Hague: Nijhoff, 2006) 43.

structured.[42] The normative appeal of digital constitutionalism is rooted to no small extent in its invocation of these popular conceptions, which connect constitutionalism with the protection of individual rights, the integration of public, constitutional values within regulatory structures and the restriction of unchecked, centralized power. Yet it is not clear that digital constitutionalism secures all that its label implies.

An analysis of whether the label of digital constitutionalism is substantively coherent in the sense in which it is being currently used must necessarily begin with an understanding of the content and meaning of constitutionalism *simpliciter*. The word 'constitution' itself is defined by McIlwain as referring to those laws of the state (whether that state is democratic or monarchical) that result from enactments rather than custom and that provide the national framework of the state and the public law of the realm. McIlwain traces this definition through Whitelock to Cicero[43] before advancing this basic definition a step further. Drawing on Bollingbrooke's understanding, McIlwain defines the constitution as the assembly of laws, institutions and customs derived from certain fixed principles of reason *directed to certain fixed objects of public good* that compose the general system according to which the community is governed.[44] While this state-centred origin of constitutionalism rather neglects the influence of private actors on the generation and recognition of Constitutional documents,[45] it does reflect the normative presumptions that rest at the heart of the constitutional project – that it is directed towards centralizing and structuring disparate sources of rules as part of a legal hierarchy that is used to govern for the benefit of that community to which it applies, restrains the central authorities who exercise those rules so they do not become tyrannical and affords the governed community a central role in assuring accountability of the rules hierarchy itself.

While this tells us what constitutions are, and to some extent what they seek to do, it does not tell us what constitutionalism is. This, of course, is the central issue in any interrogation of constitutionalism - the term itself is rarely substantively interrogated with the same enthusiasm that characterizes its deployment (at least by those not actively engaged solely in this pursuit).[46] Waldron is alert to this potential for constitutionalism to degenerate into an empty slogan, a tendency that he notes is evidenced by the word sometimes being used in a way that conveys 'no theoretical content at all'.[47] Moreover, even where constitutionalism is deployed in a substantively coherent manner, it is variously used as a description of the study of constitutions themselves, to indicate an area where normative rights concerns are now being considered,[48] or used as shorthand for a tendency to codify existing obligations or restraints into written documentary

[42]David S Law and Mila Versteeg, The Declining Influence of the US Constitution (2012) 87 *New York University Law Review* 762, 807.

[43]McIlwain (n 37), 23.

[44]Bollingbrooke, 'A Dissertation upon Parties (1733–34)' in *The Works of Lord Bollingbrooke* (1841) II, 88.

[45]In this respect, see the initially Oligarchic Whig constitution B Behrens, 'III. The Whig Theory of The Constitution in The Reign of Charles II' (2011) 7 *Cambridge Historical Journal* 42. On the subsequent impact of Whig constitutionalism, see David N Mayer, 'The English Radical Whig Origins of American Constitutionalism' (1992) 70 *Washington University Law Review* 131.

[46]NW Barber, 'Constitutionalism: Negative and Positive' (2015) 38 *Dublin University Law Journal* 249.

[47]Jeremy Waldron, *Constitutionalism: A Skeptical View*, Working Paper (New York: New York University School of Law, 2012) 1.

[48]This is demonstrable in, for example, the World Trade Organization's organizational structure. See Cass (n 39).

form.[49] To avoid the degeneration averred to by Waldron, the label of 'constitutionalism' must do more than merely indicate a superficial allegiance to something that could generally fall under one of these headings. Rather, constitutionalism should be understood as referring to these patterns as part of a broader tapestry that is characterized by fidelity to constitutional values (most often evidenced through fundamental rights guarantees) and Constitutional principles (most obviously exemplified in the structural requirements imposed by the rule of law and a traditional tripartite separation of powers model).[50]

Moving from McIlwain's ideas of the definition of a constitution, and thus of constitutionalism, through the later accounts (and indeed critiques) offered by the likes of Barber and Waldron, a substantive concept of constitutionalism begins to emerge. This concept views constitutionalism as descriptive of theories that broadly concern themselves with the congruence of a particular area or approach with constitutional values and Constitutional principles. Constitutionalism thus describes contexts in which a central authority (not confined to the state) that seeks to centralize, organize and exercise power:

- is fundamental, in the sense that it forms the axis around which the legal system of which it is constitutive turns, and
- is directed toward securing a conception of the public good through,
  - the restraint of State power (negative constitutionalism) where such restraint is accomplished either,
    - by normative means e.g. the imposition of rights-based restrictions, or
    - through the specific abrogation of powers e.g. the precise delimitation of the competences of discrete actors of categories of same, and
    - the creation of effective and competent institutions with the capacity to use their power to promote the public good (positive constitutionalism).

Constitutionalism thus does not just have a negative dimension – effected through the imposition of restrictions on the power of a central authority[51] – but also a positive dimension – requiring the presence of institutional capacity in order to pursue constitutional objectives.[52] In these broadest terms, constitutionalism can, as Barber conceptualizes, be tightly connected to the state.[53] However, it may also include those who act within and upon the structures of the state, to whom state powers are delegated or outsourced, or who exist outside the vertical constraints of traditional constitutional structures but are placed in the position of the state, as a *de facto* central authority, as suggested by accounts of modern constitutionalism, such as Teubner's.[54]

[49]The sense in which is used by Gasser et al: see Gill, Redeker and Gasser, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, No. 2015-15.

[50]McIlwain (n 37), 24; Sartori, 'Constitutionalism: A Preliminary Discussion', 855. Sunstein is an outlier in this respect arguing that constitutionalism includes more than mere government limitation see, Cass R Sunstein, 'Constitutionalism after the New Deal' (1987) 101 *Harvard Law Reivew* 421, 343-46.

[51]On negative constitutionalism and its relationship to positive models see Barber, 'Constitutionalism: Negative and Positive' (n 46).

[52]Barber, 'Constitutionalism: Negative and Positive' (n 46).

[53]Ibid 258.

[54]On positive constitutionalism, see, Adrian Vermeule, *The Constitution of Risk* (Cambridge: Cambridge University Press, 2014). On the extension of constitutionalism beyond the state, see Teubner, *Constitutional Fragments* (n 25); Teubner, 'Societal Constitutionalism (n 25).

It is not for this article, or indeed this author, to advance a new account of the meaning and content of constitutionalism. Rather, the account given above is necessarily a composite that offers a general picture of the characteristics of the theory and its normative content. Building on these foundations, however, it is possible to identify a normative core of constitutionalism (whether applied in traditional state-emanating models or more 'social' models such as those advanced by Teubner) that provides the mandatory minimum of a political community in the form of its customs, values and institutional ordering.[55] In seeking to extrapolate a universal normative core that might apply to constitutional efforts that are transnational (as digital constitutionalism necessarily is), the structural features of constitutionalism (the Constitutional principles) will be central not least because constitutional values in the form of fundamental rights to freedom of expression, for example, may enjoy meanings and scopes that differ significantly across jurisdictions.

Despite such divergences, I would suggest that the normative core of constitutionalism requires, at a minimum:

- structural restraints on the power of the central authority (whether this is the State or a private actor)
- binding rules that compel the central authority to abide by these restraints and that enforce compliance where necessary, ensuring minimal accountability
- a minimum requirement that the rules promulgated by the central authority are clear, accessible, prospective and enforced in a non-arbitrary manner, and
- that the subjects (citizens in a state-bound model, or users in a digital model) are entitled, as of right, to rely on the central authority's ongoing compliance with those rules in place, and to challenge the authority where such compliance is absent.

A final requirement for the normative core is that the central authority observe and respect certain minimal constitutional values, commonly in the form of foundational fundamental rights triggered in digital spaces, namely the right to privacy and the right to freedom of expression. This final requirement, while subject to fluctuation in terms of the meaning attributed to such rights between jurisdictions, is nevertheless explicitly averred to as a central feature of digital constitutionalism by a majority of the accounts to which the label has been applied. It has thus arguably assumed a position within the normative core of constitutionalism – certainly in a digital context – on the basis of the role attributed to it by those invoking the label and applying it to their efforts. Despite this invocation of constitutional values – in the form of fundamental rights standards – the accounts grouped under the heading of digital constitutionalism to date are notable for their failure to satisfy the other criteria that form the normative core of constitutionalism.[56] In this respect, the label 'digital constitutionalism', while it capitalizes on the perhaps reflexive normative appeal of the constitutional project, offers false reassurance.

[55]Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2006) 36.

[56]See generally, Loughlin, *Foundations of Public Law* (n 55) Ch 8.

IV. Digital constitutionalism: A *faux ami*?

In part, this false reassurance stems from the ambiguities in and conflicts between the descriptions and invocations of digital constitutionalism offered to date. In seeking to identify a single articulation of digital constitutionalism from among these accounts, Celeste has defined digital constitutionalism as a blanket term referring to an ideology that seeks to establish and guarantee the existence of a normative framework for the protection of fundamental rights and balancing of powers in the digital environment.[57] This is, of course, broadly correct. However, I would argue that this commonality is not sufficient to justify the use of the label 'constitutionalism' equally in respect of each of the models proffered in a manner indicating that they represent a coherent body of work speaking to the same intellectual endeavour.

Fitzgerald, for example, presents what is most accurately described as a model that views constitutionalism as referring to a new body of norms internally generated by private laws in the digital environment. Berman, meanwhile, presents a mechanism for securing greater social discourse about constitutional values in digital spaces as part of an account that is broadly aligned to digital constitutionalism as achieved through limited judicial review. Suzor comes closest to articulating a model that both seeks to secure digital constitutionalism and articulate those substantive values that are constitutive of it, viewing digital constitutionalism as resulting from a projection of fundamental rights and the rule of law onto actors in the digital environment through private law mechanisms and associated legislative processes. Against these accounts, Gasser et al use the term as a blanket descriptor for a diverse range of documents that describe rights-based standards that may be applied to the digital environment. The initiatives these authors variously seek to include under the umbrella of 'digital constitutionalism' thus, in reality, have little in common in terms of their core normative content. Inasmuch as a common theme can be discerned, it is limited to the fact that each of the approaches recognizes a need for the extension of certain fundamental rights standards to private actors and/or the state in the digital environment.[58] However, this alone does not satisfy the requirements of constitutionalism.

The use of the label by Berman is generally unobjectionable – albeit his model would more accurately be described as seeking to secure constitutional dialogue rather than being constitutive of constitutionalism itself. Fitzgerald's model is minimal and broadly drawn, articulated as descriptive of the emergence of a new set of values as determined by the interaction of private laws in digital spaces. This account problematizes the misleading nature of constitutionalism as a label. While private law may operate as a mechanism for constitutionalizing the digital space, it is cannot autonomously generate, by reference only to fundamental rights-inflected standards, a 'constitutionalized' landscape. In this respect, accounts such as Fitzgerald's fail to satisfy the normative core of constitutionalism because they focus on broadly drawn fundamental rights while neglecting the structural and institutional controls required by the minimum content of constitutionalism.

This failure runs through even the more traditional 'constitutionalist' type accounts. Berman, for example, displays a clear commitment to securing constitutional values (in the form of fundamental rights) not through an integrated *a priori* model based on

[57]Edoardo Celeste, *Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology's Challenges* (HIIG, 2018) 14.

[58]Claudia Padovani and Mauro Santaniello, 'Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Ecosystem' (2018) 80 *International Communication Gazette* 295, 297.

private law mechanisms, but rather through an *a posteriori* system of judicial review. While this, of course, implies an *a priori* extension of justiciable constitutional standards to private actors, it simultaneously leaves open the question of how rights balancing would operate in such a context, and what constitutional standards or principles would be considered justiciable. Moreover, it does not clarify how the structural requirements of the normative core are imposed on such settings. Indeed, it is implicit that they would not be. It is hard to foresee an occasion where, for example, a private actor would be deemed to be subject to the kinds of institutional restraints placed on the state to prevent it from accruing disproportionate power. While fundamental rights standards might fulfil this role to a degree, the requirements of legal certainty, accountability and non-arbitrariness are less easily accommodated (and are not foreseen) by Berman's account. Ultimately, Berman leaves unanswered the questions of what the constitutive content of constitutionalism is and what the structural design of a constitutionalist model requires, in favour of a model that would seek to debate and secure fundamental rights, however defined.

Of the accounts offered, Suzor's is the most substantively coherent, evincing a vision of digital constitutionalism that seeks to integrate the requirements of the rule of law into a model of digital constitutionalism that emanates from the state on an *a priori* basis and that can be enforced through the laws of contract in a way that is supportive of fundamental rights. Suzor's particular focus on securing legal certainty, prospectivity, due process and equal application of the laws grounds a vision that coheres with constitutionalism's normative core as part of a model of constitutionalism directed towards securing the public good. A critical examination of Suzor's model could inquire about the particular way in which his model is or should be differentiated from the standard practice of using constitutional values to frame legislation and statutory regulation.[59] A legal realist might, equally, note that the contract law mechanisms used to achieve Suzor's aim are not fit for the task, given their inherent tendency towards individualistic, rather than communal, goods.[60] The account given by Suzor is, nevertheless, the most substantively coherent, and the lack of novelty in focusing on the law of contract must be balanced against the specifically defined substance of the model and its objective in extending not simply fundamental rights protection but also the structural restraints of the rule of law to private actors, a feature that arguably carries the account over the line in meeting the requirements of the normative core of constitutionalism.

Or does it? The fundamental criticism of digital constitutionalism in its current form – that it is unable to articulate precisely how it is constitutional rather than constitutionally inflected – lingers at the heart of Suzor's account. The rhetoric of constitutionalism emphasizes the legitimacy of governance structures as the central justification for the

[59]In this respect, the argument echoes the prescient criticism of Judge Easterbrook that in seeking to analyse the law on the basis of thematic intersections rather than substantive areas of study, we risk neglecting or overlooking general principles and thus miss the unifying – and distinguishing – factors that exist beyond 'the law of the horse': Frank H Easterbrook, *Cyberspace and the Law of the Horse* (Chicago: University of Chicago Press, 1996) 207.

[60]On the tendency of contractual consent models to adopt the language of autonomy in a misleading way, see Elettra Bietti, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn' (2020) 40 *Pace Law Review* 310; Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121; Neil Richards and Woodrow Hartzog, 'The Pathologies of Digital Consent' (2019) 96(6) *Washington University Law Review*, available at <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6460&context=law_lawreview>.

exercise of power. Accounts of digital constitutionalism – including Suzor's – seek to capitalize on that association with legitimacy but without engaging in an in-depth analysis of precisely why such legitimacy is present within the proposed (or actual) governance structures. While adherence to broad fundamental rights standards or the requirements of the rule of law go a significant distance towards ensuring this, they do not impose broadly structural restraints on the power of the central authority, nor do they provide rules that compel the central authority to abide by these restraints into the future or that enforce compliance.

This final point begins to lead us to the heart of why constitutionalism is a normatively misleading descriptor of the activity of private actors in digital spaces. The label of 'constitutionalism' presumes a mutual accountability between the central authority (whether the state or a private actor) and the subject (whether citizen or user), which is not present in digital settings. The relationship between the central authority and subject in the contexts described by digital constitutionalism is governed not by mutual accountability but by contract. In this respect, while the governance model employed by private actors in the digital environment may incorporate constitutional values and Constitutional principles – may even, as in Suzor's account, incorporate a majority of the requirements of the normative core of constitutionalism – the basic structure and content of the relationship itself will not be characterized by the process of dialogic, mutual definition in which subjects are recognized as, *prima facie*, power holders who may enforce accountability and impose limitations upon the central authority. Rather, in a digital context, the central authority determines the extent and limits on its power without any formal (and with variable informal) reference to subjects. Moreover, its choice to depart from previous models and rules of self-regulation or to be bound by the rules it has previously established for itself is neither constrained nor controlled by the approval of the subjects, but instead by the requirements imposed by private law.

In this model, while a subject may object to a breach of contract, or may enforce a right afforded by consumer protection law, the foundational dynamic of the relationship between the parties is driven by a self-empowered and minimally constrained central authority and a consenting subject. That subject has certain minimal entitlements dictated by consumer protection law, but it cannot be said that these are 'constitutional'; rather, they are largely drawn in informational terms – providing limits on what must be communicated to the subject .[61] While private law (including consumer protection law) is thus minimally constitutional inasmuch as its provisions do not breach constitutional rights, it cannot be said to be presumptively aligned with, nor to further, the normative core of constitutionalism. Informing parties about the powers of the central authority is not, after all, the same as restraining that power. More broadly, where private law constraints intervene in the form of competition law or consumer protection law, they do not weave some broad supranational constitutional construct. The qualifications these laws impose can modify the manner in which power

[61]See generally on informational requirements in consumer protection and their sufficiency, Iris Benohr and H-W Micklitz, 'Consumer Protection and Human Rights' in I Ramsay, T Wilhelmsson and G Howells (eds), *Handbook of Research on International Consumer Law* (Cheltenham: Edward Elgar 2010); Mary Donnelly and Fidelma White, *Consumer Protection in the Digital Market and Trader Compliance: Information Provision and Redress* (Cork: School of Law, University College Cork, 2018); Geraint Howells, 'Europe's (Lack of) Vision on Consumer Protection: A Case of Rhetoric Hiding Substance' in Dorota Leczykiewicz *et al* (eds), *The Images of the Consumer in EU Law* (London: Bloomsbury, 2016).

is channelled within the contractual relationship, or they can ensure a greater number of actors can establish themselves as central authorities within a market, but they cannot, by some process of transubstantiation, transform a contractual relationship into a constitutional one.

This conceptual ambiguity over what can and cannot be characterized as part of a constitutionalist model is symptomatic of a broader misunderstanding about the nature of regulatory ordering and sources of power in the digital environment. While there is nothing to prevent the use of a fundamental rights-centred self-regulatory model – and such models are indeed to be encouraged where they ensure greater practical protection of fundamental rights in digital spaces – the nature of the label 'constitutionalism' is that it denotes a controlled expansion of constitutional structures as well as values. The requirements of the normative core of constitutionalism must be present within an architecture characterized by the mutual assent and interdependence of the central authority and subjects of that system.

Celeste has argued (echoing Fitzgerald) that digital constitutionalism represents a new era in the development of constitutionalism,[62] but shares the foundational values and the overall aims of constitutionalism writ large and represents merely an extension of those aims to the digital context.[63] Certainly, where digital constitutionalism is used as a descriptive moniker for one of several models through which states may extend the jurisdictional capacity of constitutional values to private actors in the digital environment, this could be correct. Indeed, it is also correct in a conceptual manner – the normative core of constitutionalism, after all, is just this – an attempt to identify the requirements of constitutionalism and apply them in a new digital context. But Celeste's description cannot accurately describe the relationship that subsists between a more broadly defined idea of a central authority and its subjects in digital spaces – and when we consider the normative core of constitutionalism in a context beyond traditional state-centred visions.

Exposing this allows us to refocus on why adopting the language of constitutionalism may be harmful. The most basic and abstract problem is, of course, conceptual – that the label of constitutionalism is not appropriate to the structures and relationships to which it is being applied in a digital context. This, in turn, leads to confusion over the source of power in digital spaces, and thus clouds our understanding about the legitimacy of such power, its justifications, the motivations that underlie it and the objectives it serves. This opacity in combination with the label 'constitutionalism' can cause users to assume they are subject to protections equivalent to those afforded to them in traditional, constitutionally governed settings. The label 'digital constitutionalism' can thus operate as a '*faux ami*' – a label that offers a superficial reassurance that is not borne out in practice. Indeed, I would argue that, given the failure of many accounts of digital constitutionalism to satisfy the requirements of the normative core, and the practical governance models used in digital spaces, it is more productive to think about the regulation of digital spaces in terms not of public and private law but private and public policy.

[62]Edoardo Celeste, 'Digital Constitutionalism: A New Systemic Theorisation' (2019) 33 *International Review of Law, Computers and Technology* 76, 88.

[63]Ibid 88. For an argument that mirrors Teubner's framing of societal constitutionalism as existing in multiple contextual iterations while simultaneously remaining a centrally unified whole, see Teubner, *Constitutional Fragments* (n 25).

V. From digital constitutionalism to private policy

Moving beyond the language of digital constitutionalism, but in accounts that are still coloured (to some extent) by a constitutionalist tone, both Jack Balkin[64] and Kate Klonick[65] argue that private actors, and specifically online platforms, have emerged as 'new governors' of rights. Rory von Loo also argues, in a more general account, that private actors in the digital environment now act as 'gatekeepers' for public policy enforcement – creating 'an expansive area of unaccountable authority' within modern regulatory states.[66] This shift away from the language of constitutionalism and towards a focus on governance deals more critically with the regulatory models adopted by private actors, and is a step towards recognizing that such actors, while they may indirectly influence constitutional values, are not doing so as part of a constitutional project but are instead engaged in regulating through independently – and privately – developed policies.

Goodin et al define public policy as the system through which officers of the state exercise authority[67] and by which the state seeks to contribute to the betterment of the life of its citizens.[68] It is notable that public policy in Goodin's account includes within its scope the informal, customary patterns of action and practice extant within the state and not only legal standards. Public policy thus looks beyond the purely legal architectures and *de jure* powers of a system and its architects, which are encompassed by constitutionalism, and includes the *de facto* power being exercised to secure certain objectives. Public policy thus includes not only the normatively driven question of what states *ought* to do, but also the practical reality of what they *do*. The other definitional feature of public policy in Goodin's account is its orientation towards the resolution of political problems in the service of the public good.[69] Lasswell and Kaplan, two of the founders of the field, have argued that public policy is dedicated toward the provision of 'intelligence pertinent to the integration of values realized by and embodied in interpersonal relations' as part of a model of governance that 'prizes not the glory of a depersonalized state and the

[64]Jack Balkin, 'Free Speech is a Triangle' (2018) 118 *Columbia Law Review* 1.

[65]Kate Klonick, 'The New Governors: The People, Rules and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598. Some have gone still further, alleging that social media actors in particular display the characteristics of state actors: see Orit Fischman-Afori, 'Online Rulers as Hybrid Bodies: The Case of Infringing Content Monitoring' (2020) 23 *University of Pennsylvania Journal of Constitutional Law* 3; David Kaye, *The Republic of Facebook* (2020), available at <https://www.justsecurity.org/70035/the-republic-of-facebook>.

[66]Rory Van Loo, 'The New Gatekeepers: Private Firms as Public Enforcers' (2020) 106 *Virginia Law Review* 467. More broadly, see Rory Van Loo, 'Rise of the Digital Regulator' (2017) 66 *Duke Law Journal* 1267 and on the private corporation as an administrator of justice, see Rory Van Loo, 'The Corporation as Courthouse' (2016) 33 *Yale Journal on Regulation* 547.

[67]Helen Ingram and Anne L Schneider, 'Policy Analysis for Democracy' in Martin Rein, Robert E Goodin and Michael Moran (eds), *The Oxford Handbook of Public Policy* (Oxford: Oxford University Press, 2006) 3–4.

[68]Ibid 5.

[69]On the relationship between these two schools, see William T Bluhm, Robert A Heineman, Steven A Peterson and Edward N Kearny, *The World of the Policy Analyst: Rationality, Values and Politics* (3rd ed) (London: Chatham House, 2002). On the differing accounts of the development in a North American context, see Beryl A Radin, *Beyond Machiavelli: Policy Analysis Comes of Age* (Washington, DC: Georgetown University Press, 2000) and Peter deLeon, 'Models of Policy Discourse: Insights vs Prediction' (1998) 26 *Policy Studies Journal* 147.

efficiency of a social mechanism, but human dignity and the realization of human capabilities'.[70]

In this respect, public policy can be understood as an integrated component of constitutionalism, in that it is explicitly value laden and prescriptive – recommending to those state actors to which it is directed a specific approach that dictates what the state should do and on what normative basis within the structures imposed by law as well as embracing what the state in fact does.[71] Thus, even where it pursues commercial or economic ends, public policy is intended to have as its ultimate aim securing the public good through integrating social values into the decision-making structures, rules and regulatory architectures imposed by and on the state.[72] In this understanding, as in theories of constitutionalism, private actors are appropriately enlisted to improve performance in the creation of public value but are so invoked to support rather than supplant the works of the state.

The project of digital constitutionalism claims that it has similar ends – striving to integrate public, constitutional values into its regulatory structures in a manner that promotes a generally defined empowerment and protection of users. Yet, in practice, the professed public aims of these private structures is less clear. Previous research has established that, despite expressing a desire to promote user privacy, private actors in digital spaces operate in ways that maximize profit rather than the fundamental rights of users.[73] Concerns have also been raised about the manner and efficacy with which speech is policed on online platforms and the extent to which market concerns rather than user rights drive concerns about permissibility.[74] Inasmuch as there is a policy that is being pursued in such contexts, it is more accurately described as one based on 'private policy'.

[70]Harold D Lasswell and Abraham Kaplan, *Power and Society* (New Haven, CT: Yale University Press 1950) xii, xxiv.

[71]Harold D Lasswell, 'The Policy Orientation' in Daniel Lerner and Harold D Lasswell (eds), *The Policy Sciences* (Stanford, CA: Stanford University Press, 1951); Martin Rein, *Social Sciences and Public Policy* (Harmondsworth: Penguin 1976).

[72]Patricia Day and Rudolf Klein, *Accountabilities: Five Public Services* (London: Tavistock, 1987); Robert E Goodin, 'Democratic Accountability: The Distinctiveness of the Third Sector' (2003) *Archives européennes de sociologie* 359.

[73]See, for example, Shoshanna Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs, 2019); Jonathan A Obar and Anne Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2018) *Information, Communication & Society* 1; Anita L Allen, 'Coercing Privacy' (1999) 40 *William and Mary Law Review* 723; Omer Tene, Evan Selinger and Jules Polonetsky, 'Consumer Privacy and the Future of Society' in *The Cambridge Handbook of Consumer Privacy* (Cambridge: Cambridge University Press, 2018); Forbruker Radet, *Deceived by Design: How Tech Companies Use Dark Patterns to Discourage Us from Exercising Our Rights to Privacy* (Oslo: Consumer Council of Norway, Forbrukerrådet, 2018); Michael LaForgia, Gabriel JX Dance and Nicholas Confessore, 'Facebook Failed to Police How Its Partners Handled User Data' *The New York Times*, 12 November 2018, available at <https://www.nytimes.com/2018/11/12/technology/facebook-data-privacy-users.html>; Orla Lynskey, 'Grappling with "Data Power": Normative Nudges from Data Protection and Privacy' (2019) 20 *Theoretical Inquiries in Law* 189; Jeffrey Han and Arvind Narayanan Steven Engelhardt, 'I Never Signed Up for This! Privacy Implications of Email Tracking' (2018) 1 *Proceedings on Privacy Enhancing Technologies* 109; Costello, 'The Impacts of AdTech' (n 3).

[74]See, Gillespie, *Custodians of the Internet: Platforms, Content Moderation and the Hidden Decisions that Shape Social Media;* Tarleton Gillespie, 'The Politics of "Platforms"' (2010) 12 *New Media and Society* 347; John Herrman, 'How Hate Groups Forced Online Platforms to Reveal Their True Nature' *The New York Times Magazine*, 21 August 2017, available at <https://www.nytimes.com/2017/08/21/magazine/how-hate-groups-forced-online-platforms-to-reveal-their-true-nature.html>; Jonas Andersson Schwarz, 'Platform

In this respect, it is worth emphasizing that, as with its public counterpart, private policy includes not only formal mechanisms – for example, contractual rules and corporate governance standards – but also the practical behaviour and operation of private actors in securing and enforcing such rules and standards. While formal expressions of private policy may thus be influenced by the regulatory demands of state actors and their public policies, and may be constructed in a way that integrates certain constitutional values, we must look beyond this to understand the character and composition of private policy in practice. Experience has shown that, at its most fundamental level, private policy is organized by the law of contract, which provides the practical mechanism for the implementation of the rules and standards governing digital spaces.[75] The relational character of this ordering mechanism, as well as the practical conduct of private actors in 'empowering' users, indicates that the character of the interests pursued in digital spaces is particularly private not only inasmuch as it is effected through private law mechanisms, but also as a result of the specifically private interests it seeks to attain.[76]

As such, private policy cannot be considered an integral component of constitutionalism in the same manner as its public counterpart. While adopting constitutionalist rhetoric or apparently constitutionalist features may form part of the design of private policy inasmuch as it is one of the mechanisms by which private actors may seek to secure consumer or user confidence in the furtherance of their objectives, it is separate from constitutionalism itself. These governance structures should thus be understood as a deliberately private endeavour with associated privately oriented objectives and interests. Unravelling the accounts offered by Gasser et al, and reading them in the light of this understanding, and the rearticulations of online governance models offered by Klonick and von Loo, thus begins to expose the false reassurance often generated by the label of digital constitutionalism – and the private interests it can obscure.

Private policy in practice

Perhaps the most explicit and ambitious project of digital constitutionalism to date has been evidenced by Meta's (previously Facebook) repeated attempts to impose a gloss of constitutional governance upon its self-regulatory efforts. Meta's rebranding of its terms of service as a 'Statement of Rights and Responsibilities',[77] which referred to the 'rights' and 'freedoms' of users, was an early indication of this desire to mimic the trappings of constitutionalism. In these terms, Meta was clearly using constitutional language to offer superficial legitimacy to the company's contractual terms. The Statement of Rights and Responsibilities was, in turn, structured to be drawn from the values embodied in the company's Facebook Principles, also drafted in the universal tone of Constitutional

Logic: An Interdisciplinary Approach to the Platform-Based Economy' (2017) 9 *Policy & Internet* 374; Frank Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power' (2016) 17 *Theoretical Inquiries in Law* 487.

[75]Kari Paul, 'Facebook Faces Advertiser Revolt Over Failure to Address Hate Speech', *The Guardian*, 22 June 2020, available at <https://www.theguardian.com/technology/2020/jun/22/facebook-hate-speech-advertisers-north-face?CMP=share_btn_tw>.

[76]See '"It's Empowering People" – Mark Zuckerberg Defends Facebook as Social Network Turns 15', *The Independent*, 5 February 2019, available at <https://www.independent.ie/business/its-empowering-people-mark-zuckerberg-defends-facebook-as-social-network-turns-15-37783681.html>.

[77]See 'Statement of Rights and Responsibilities', available at <https://www.facebook.com/legal/terms/previous>.

documents – swapping the individualistic contractual language of 'you' and 'user' with the more solidarity laden terms of 'people' and 'every person'.

The use of terms such as 'rights', 'responsibilities' and 'freedoms', but also the categorization of contractual provisions and entitlements in the language of constitutional obligation, as 'principles' and 'rules' premised on 'values' drawn from a hierarchical series of sources, allowed Meta to co-opt the gloss of constitutionalism but does not reflect the normative core of constitutionalism nor the relational structure of constitutional projects. It cannot be stated definitely on the basis of publicly available information whether this is the result of an opportunistic attempt to deliberately co-opt the language of constitutionalism in order to obscure the true nature of the power being exercised, or merely an unintentional by-product of the commercial ecosystem that seeks to assuage public scepticism through espousing a commitment to 'public' values. What is certain, however, is that the resulting attempt to echo constitutionalism's mesh of the language of rights and restraint and public law forms within a privatized system of enforcement does not display the substantive characteristics necessary to attach the label 'constitutionalism'. It does, however, confuse the practical capacity of that term to act as a signifier of certain protections on a popular, and normative, basis.

More recently, Meta has moved away from this linguistic affect and has reasserted its contractual provisions as 'Terms of Service'.[78] However, in its place the company has adopted a new model of 'constitutionalism' in the form of the 'Facebook Oversight Board'. The Board, which was at one point in its development referred to informally as a 'Supreme Court' for the company, has progressed Meta's rhetorical commitment to Constitutional principles further than its previous textual efforts, instituting an internalized appeal system for disputes over freedom of expression on the platform[79] and suggesting that, in future, the mechanism might also offer an appeals system for other platforms owned by Meta.[80] Comprehensive examinations of the Oversight Board's governance and operation (as provided for in its Charter) have been undertaken elsewhere.[81] The significant feature of the board from the perspective of this piece is its attempt to position itself as a constitutionalist mechanism that evinces a commitment to an ambiguously defined Constitutional principle of freedom of expression/free speech while simultaneously declining to be bound by those same principles as they are applied by state actors and democratically sanctioned Constitutions.

Inasmuch as the Oversight Board is committed to values or principles that overlap those provided in Constitutional documents, it is committed only as part of a model that implicitly endorses the idea that constitutionalism can be achieved by private actors, through selective commitments to certain values or principles defined, enforced and

[78]See 'Terms of Service', available at <https://www.facebook.com/legal/terms/update?ref=old_policy>.

[79]Leo Kelion, 'Facebook "Supreme Court" to Begin Work Before US Presidential Vote', *BBC News*, 24 September 2020, available at <https://www.amren.com/news/2020/09/facebook-supreme-court-to-begin-work-before-us-presidential-vote>; Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129 *Yale Law Journal* 2418, 2425.

[80]Taylor Hatmaker, 'Facebook Oversight Board Says Other Social Networks "Welcome to Join" if Project Succeeds' *Tech Crunch* 11 February 2021, available at <https://techcrunch.com/2021/02/11/facebook-oversight-board-other-social-networks-beyond-facebook/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAN1MzqtkO0S0koevkgTJVpHO50moPIkAyKWE9239OY-mSY5sSTTGdmg4SsSaARBB6ZmLAmYeXq4DJ7h-BW73Hyohw1xOVzYzZw3zXk-9rO0T9a4ZB2W5f85FnNDc9p5XWOLvInYRR24qFQIlvxp432es9MIw93lyDXLoAWo5DEQ8>.

[81]See generally, Klonick, 'The Facebook Oversight Board' (n 79).

overseen in a contractual system.[82] Far from evidencing a substantive commitment to the normative core of constitutionalism, the Board's adoption of constitutional language and a privatized judicial review structure functions as a 'legal talisman'[83] that conveniently appropriates signifiers of constitutional allegiance while failing to evidence the substantive features necessary to constitute a constitutionalist model and the values, and objectives that constitutionalism seeks to secure.[84]

It is a truism within public policy studies that the actor who defines a problem controls not only the perception of its contours but also the design, and thus the manner, of its resolution.[85] In this respect, constitutional governance is, as Levinson notes, the project of creating, allocating and constraining power[86] – or, as Mashaw puts it, identifying and bringing to bear the law in formulating policy problems and their solutions, and doing so before other actors can offer competing resolutionary claims.[87] Where constitutional models of governance are present, in other words, there is necessarily an understanding (indeed, a guarantee) that power is held and distributed in a particular manner.[88] Where the label 'constitutionalism' is invoked, it is an indication that similar decisions as to how and where power is concentrated – and how it will be used – are also taking place, although not that they are being made within the constraints the label implies.[89] Thus, when we look to Meta's creation of the Oversight Board and its attendant governance architecture, even if it cannot satisfy the requirements of constitutionalism, the Board's constitutionalist ambitions and the structures and language it has adopted dictate how power is exercised and by whom no less than in a truly constitutionalist model.

The much-touted paradox of constitutionalism is that the restrained central authority that it seeks to secure can, in fact, become more powerful that an unrestrained one.[90] This critique holds that the constitutionalist features that restrain power, when viewed in isolation, can also serve to expand power when viewed in broader temporal or topical

[82]On the Facebook Oversight Board see <https://oversightboard.com/meet-the-board>.

[83]Kendra Albert, '*Beyond Legal Talismans*' (Cambridge, MA: Berkman Klein Centre for Internet and Society, Harvard University, 2016).

[84]Ibid; Edoardo Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2018) 1 *International Review of Law, Computers and Technology* 1; Kurt Opsahl, '*A Bill of Privacy Rights for Social Network Users*' (Electronic Frontier Foundation, 2010); Globe Newswire, 'Ello Bill of Rights for Social Network Users' (2015), available at <https://www.globenewswire.com/news-release/2015/07/01/1297425/0/en/Ello-Bill-of-Rights-for-Social-Networks-Released-Today-Thousands-Sign-Document-Worldwide.html>.

[85]On the politics and practice of problem definition and policy design, see David A Rochefort and Roger W Cobb, *The Politics of Problem Definition: Shaping the Policy Agenda* (Kansas City, KA: University of Kansas Press, 1994); Frank R Baumgartner and Bryan D Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993); Eugene Bardach, 'Problems of Policy Definition in Policy Analysis', in JP Crecine (ed), *Research in Public Policy Analysis and Management*, Vol 1 (Stamford, CT: JAI Press, 1981). More recently, and writing from an explicitly public law perspective, see Daryl J Levinson, 'Looking for Power in Public Law' (2016) 130 *Harvard Law Review* 1.

[86]Levinson (n 85) 1.

[87]Jerry L Mashaw, 'Recovering American Administrative Law: Federalist Foundations 1787–1801' (2006) 11 *Yale Law Journal* 1137.

[88]Daryl J Levinson, 'Incapacitating the State' (2014) 6 *William and Mary Law Review* 181, 195; Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' (1984) 2 *European Journal of Society* 185, 189; Levinson (n 85) 15.

[89]As discussed in Section IV.

[90]Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995) xi.

frames.[91] In the case of digital constitutionalism, the risk is not only that no effective restrains parallel to those offered by traditional constitutionalism are present but also that the trappings of constitutionalism – which obscure the true justifications and concentrations of power within digital spaces – will permit the same outcome feared by critics of constitutionalism. Adopting the language of constitutionalism permits private actors such as the Oversight Board to determine what practices are permitted to them – just as much as, if not more than, those that are prohibited – and implies that such self-determination (which is, in fact, extra-constitutional) is infused with the legitimacy of a constitutionalist project.

The Oversight Board, for example, is empowered by its Charter to decide whether content posted on Meta's platforms constitutes of a violation of the company's terms of service and in light of its attendant contractual and corporate governance standards.[92] The Board is also delegated the authority by the Charter to provide general policy guidance on foot of one of these decisions or where Meta requests such guidance.[93] This appears to be a relatively narrow jurisdictional remit. However, the constraints the Charter imposes in fact permit the Board to commit itself to a legitimized process of adjudication of what are, in essence, rights claims that are otherwise beyond their reach – acting to 'generate credible commitments that induce others to behave' in the desired way.[94] The discrete jurisdiction established by the Charter endows the Board with a policy-making power justified and legitimized by its constitutional appearance and design. Crucially, and in addition, the independence of the Board[95] permits both it and Meta to each distance themselves from the activity of the other. Meta can thus disclaim the Board's decisions and responsibility for them where they are unpopular, while the Board can equally disclaim the activity of Meta that has generated the disputes before it.[96] The result is an architecture in which power is delegated to the Board, not with altruistic intent but in a manner that allows both actors to avoid the attachment of a full measure of accountability for the mechanisms and decisions they enforce and consider.

Of course, it may be argued that any central authority may advantageously use constitutionalist characteristics to concentrate their power and minimize or distance accountability. Indeed, there is a basic risk in any context in which a central authority creates standards that bind them that they will advantageously construct their *de jure* regulation to render the standards susceptible to waiver. The question is often framed in constitutional theory as one of ensuring that these internally defined standards — 'parchment barriers'[97] in Madison's telling – can function as effective systems not only of *de jure* but also *de facto* restraint.[98] In traditional constitutional settings, this is

[91]Daryl J Levinson, 'Framing Transactions in Constitutional Law' (2002) 111 *Yale Law Journal* 1311.

[92]Under Article 1(4) of the Charter: see <https://scontent-dub4-1.xx.fbcdn.net/v/t39.8562-6/93876939_220059982635652_1245737255406927872_n.pdf?_nc_cat=111&ccb=2&_nc_sid=ae5e01&_nc_ohc=e3tWSvTXhPIAX9FupDK&_nc_oc=AQnkVscqRdSmFsNrPhYcfRHqN7Co7pMm5-A8PJLZPjgLYT9_rqUKAMZOrQiHZl5_-oAyE1YSaGNrRRzjOGRA_wOG&_nc_ht=scontent-dub4-1.xx&oh=b353411bef60d68cade52b6bda0d7773&oe=60463A31>.

[93]Ibid.

[94]On the operation of such features in public law, see Levinson (n 84) 33.

[95]See Article 5 (n 92).

[96]Levinson (n 85) 39–40; Keith E Whittington, *The Political Foundations of Judicial Supremacy* (Princeton, NJ: Princeton University Press, 2007) 25–27, 143.

[97]Letter from James Madison to Thomas Jefferson, 17 October 1788, reprinted in Jack N Rakove, *Declaring Rights* (New York: Bedford Books, 1998) 160, 163; The Federalist No. 48, 305 (James Madison).

[98]Levinson (n 85), 47.

accomplished both through internal institutional mechanisms (such as the separation of powers) and through external pressure inherent in the relational structure of constitutionalism itself.

In a digital context, no such parallel check exists. Meta can, of course, create the Oversight Board, but it might equally choose to ignore the Board's decisions without breaching anything beyond an agreed contractual standard or a code of corporate governance. Users might, equally, choose to leave a platform or service (as a corollary to a democratic mechanism in traditional constitutional settings). Yet, in practice, it has repeatedly been shown that the possibility of such choice on the part of users is largely theoretical.[99] The result is not a transposition of traditional constitutional restraints to digital settings but a false reassurance that this has occurred unsubstantiated by practical mechanisms or guarantees.

It is not that private actors are, in definitional terms, incapable of identifying or securing the kinds of public goods that lie at the heart of constitutionalism and public policy; however, the 'constitutional' model presented by the Oversight Board, as well as many of the models to which the label is more generally applied, does not serve this end. The Oversight Board, for example, addresses only those 'hard cases' referred to it for consideration[100] and not only solves these cases on the basis of public good objective (however coherently defined), but directs its efforts towards ameliorating speech conflicts generated by popular criticism and consumer dissatisfaction to maintain financial stability and corporate growth. Inasmuch as private actors are 'constitutionally' oriented towards the development and maintenance of a particular set of values, it is those contained in their own corporate frameworks that serve shareholder-driven and defined goods, not public ones.

In this respect, it must be acknowledged that public goods can be defined in numerous ways. From a minimal libertarian or neoliberal perspective, the maximization of market freedoms is sufficient for securing the public good.[101] More expansive understandings of the public good move from ordoliberal views[102] through to social democratic or social market[103] views, which understand the public good as including market freedom but also a supplementary (and perhaps overriding) social character. Even within these ideological groupings, there is debate about what the precise content of the public good is and how it should be achieved. As such, these understandings of the public good are neither uncontested nor stable. However, even from a minimalist neoliberal view in which the public good is achieved through maximal market freedom, there is reason to doubt the capacity of private actors (specifically in the digital context) to secure it.[104]

[99]Kashmir Hill, 'I Tried to Live Without the Tech Giants. It Was Impossible', *The New York Times*, 31 July 2020, available at <https://www.nytimes.com/2020/07/31/technology/blocking-the-tech-giants.html?>.

[100]See 'Appealing Content Decisions on Facebook or Instagram', available at <https://oversightboard.com/appeals-process>.

[101]Raymond Plant, *The Neoliberal State* (Oxford: Oxford University Press, 2012) 5–12.

[102]Josef Hien and Christian Joerges, *Dead Man Walking: Current European Interest in the Ordoliberal Tradition* (Brussels: European University Institute, 2018).

[103]Jotte Mulder, 'Re-conceptualising a Social Markket Economy for the EU Internal Market' (2019) 15 *Utrecht Law Review* 1.

[104]Privacy International, Competition and Data (2019), available at <https://privacyinternational.org/learn/competition-and-data>; Kevin Coates, *Competition Law and Regulation of Technology Markets* (Oxford: Oxford University Press, 2011); Yves-Alexandre de Montjoye, Heike Schweitzer and Jacques Crémer, *Competition Policy for the Digital Era* (Brussels: European Commission, 2019), available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; Francisco Costa-Cabari and Orla Lynskey, 'Family

Even if we accept that the Board enjoys an institutionally independent character,[105] and that its composition reflects a broad range of views,[106] it lacks the capacity and jurisdiction to identify and enforce constitutional values in the form of fundamental rights standards in a coherent manner. Moreover, the nature of the contractual relationship between central authorities in the digital environment, and the users subject to the rules they impose (including those that create bodies like the Oversight Board), as well as the lack of structural limitations on power and accountability mechanisms, mean that these efforts cannot be described as constitutionalist. What they represent is an at best fragmentary idea of privatized governance and appeals systems guided by adherence to rights standards drawn in terms that are reconcilable with the commercial objectives of the private actors themselves. This is without an inquiry into the consistency with which these fundamental rights standards are defined or enforced, or their coherence when measured against their equivalent provisions in 'traditional' constitutional contexts. In this respect, the activities that are being undertaken by private actors are neither *de jure* nor *de facto* constitutive of 'digital constitutionalism', but are more appropriately described as activities that form part of a broader pattern of 'private policy' formation.

VI. Conclusion

The label of digital constitutionalism can, of course, be both useful and meaningful. For this to be the case, however, we must adopt an analytical lens that inquires beyond its use as a flag of convenience, and engages with its requirements. In the absence of a precise, coherent and consistent understanding of the normative and practical characteristics of digital constitutionalism, its features have become the ideal mechanism for obfuscating the activity of private actors as they concentrate power and conceal the location of institutional accountability. The result is that digital constitutionalism conceals more than it reveals, using a normatively reassuring label to signal an allegiance to uncertain standards.

Thomas Paine, reflecting on the newly drafted American Constitution, remarked that the document was 'to liberty what grammar is to language'.[107] Shortly afterwards, Arthur Young, commenting on the French Constitution of 1792 – which had drawn heavily on the North American example – noted that it had been constructed as 'if a Constitution was a pudding to be made by a recipe'.[108] The observations of both men are apposite in the

Ties: The Intersection Between Data Protection and Competition in EU Law' (2017) 54 *Common Market Law Review* 11; Maria C Wasastjerna, 'The Implications of Big Data and Privacy on Competition Analysis in Merger Control and the Controversial Competition-Data Protection Interface' (2019) 30 *European Business Law Review* 337; Privacy International, *Submission to the Competition and Markets Authority's Call for Information on Digital Mergers* (2019), available at <https://privacyinternational.org/node/3097>; Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Cambridge, MA: Harvard University Press, 2016); Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710; Srinivasan, 'The Antitrust Case Against Facebook (n 3); Giovanni Buttarelli, *Antitrust, Privacy and Big Data* (Brussels: European Commission, 2015), availabe at <https://edps.europa.eu/sites/edp/files/publication/15-02-03_competition_big_data_speech_gb_en.pdf>; Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia University Press, 2018).

[105]Klonick, 'The New Governors' (n 65), 2451 *et seq.*

[106]Klonick, 'The Facebook Oversight Board (n 79) 2458.

[107]Thomas Paine, *The Rights of Man* (1791), vol 1.

[108]Quoted in McIlwain (n 37), 1.

case of digital constitutionalism and the struggle to assess both its substantive coherence and capacity to meet the requirements of the label to which it aspires. Too many of the instances in which the label has been used to date, however, fail to situate their description within an understanding of the structural and normative requirements of constitutionalism – treating it as a label that can be justified by grammatical manoeuvring or the addition of only a selection of ingredients. In doing so, these uses of the label 'constitutionalism' fall victim to the trap identified by Waldron: deploying constitutionalism as an empty slogan rather than a substantive concept. More fundamentally, the result is that these efforts are less a matter of constitutionalism and can more accurately be described by reference to, and understood through the lens of, private policy. This can expose not only the true character of the governance structures in place within these digital spaces, but also what constitutional values and principles are – and are not – protected within them.

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