Digital constitutionalism as an online speech governance framework: A critical approach

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Abstract: This chapter advances a critical approach to the theories of "digital constitutionalism", in particular as a theoretical framework for recent initiatives targeting online speech governance. We build on previous work where we demonstrated overarching risks of borrowing from the symbolic load of the constitutionalist tradition to name and explain transnational normative phenomena that take place in private digitalised environments. We apply these critiques to the case of online speech governance by looking at two policy initiatives: the Meta Oversight Board, a private sector self-regulatory initiative implemented by the company Meta; and the European Digital Services Act. Our goal is to shed light on contradictions and misperceptions embedded in labelling online speech governance mechanisms as manifestations of digital constitutionalism.

A. Introduction

Intermediation by global private actors cuts through various socio-political challenges associated with the digital world. Digital platforms exert power over what and how we communicate, also determining access to information and all sorts of cultural goods. They have preponderant access to users' personal data, thereby leveraging one's ethnicity, gender, sexual orientation, religion, and political ideologies. They concentrate possibilities for market inclusion, as their infrastructure allows for several commercial transactions – all while steering these different spheres of social, political, and economic organisation according to their own governance mechanisms. Ultimately, there is an inherent democratic deficit to the private ordering of these virtual spaces, which "refers to the fact that private companies make the choices that set norms and directly influence the behavior of billions of users", raising concerns about the "interests behind these choices, the pro-

cesses that led to them and their binding nature"[1]. While this deficit does affect the exercise of fundamental rights in general, digital platforms' role as communications infrastructure raises the stakes especially for freedom of expression, because "decisions about what we can do and say online being made behind closed doors by private companies is the opposite of what we expect of legitimate decision-making in a democratic society"[2]. The democratic deficit in speech governance is embodied by the lack of transparency and predictability of platform's interventions in user-generated content, notably because such interventions are based on unilaterally and asymmetrically set terms of use.

Modern liberal democracies rest broadly on a right to freedom of expression, as a precondition for both individual self-development and partaking in collective institutional and meaning-making processes. Media and communications fora are key dimensions of political participation, as they co-shape forms and possibilities for engaging in and influencing political processes. For this reason, guaranteeing a fair public sphere – with equal access to information and freedom of expression prerogatives – has long inspired theoretical and regulatory approaches aimed at the maintenance and development of democracies.

As a continuation of this movement, the expansion of digital communications has inspired interdisciplinary literature to understand the transformations in the public sphere that accrue from this intermediation of private and collective communications, as well as their implications for freedom of expression and political participation[3]. This includes theoretical and governance approaches for the insertion of public values – be it by state regulation, multi-stakeholder, or private governance – in an environment

1 Blayne Haggart and Clara Iglesias Keller, "Democratic Legitimacy in Global Platform Governance," *Telecommunications Policy* 45, no. 6 (July 1, 2021): 102–52, https://doi.org/10.1016/j.telpol.2021.102152.

2 Nicolas P. Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2019), 8.

3 Andreas Jungherr and Ralph Schroeder, "Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy," *Social Media + Society* 7, no. 1 (January 2021), https://doi.org/10.1177/2056305121988928; Jack M. Balkin, "Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation," *SSRN Electronic Journal*, 2017, https://doi.org/10.2139/ssrn.3038939; Amélie Heldt, "Merging the Social and the Public: How Social Media Platforms Could Be a New Public Forum," *Mitchell Hamline Law Review* 46, no. 5 (January 1, 2020), https://open.mitchellhamline.edu/mhlr/vol46/iss5/1.

where information and attention fluxes are determined by commercial practices.

This is the background against which digital constitutionalism has gained momentum, notably in political and legal sciences, as a framework for making online interactions conform to constitutional requirements[4]. The term is broadly applied to distinct situations that relate to the protection of constitutional rights in the context of digital technologies, and it often conveys mitigation of power over technological infrastructure as a response to the above-mentioned democratic deficit. However, its many applications express theoretical and institutional perceptions of the constitutional phenomenon that often diverge from the meanings and ends that inform modern constitutionalism itself.

In previous work, we advanced a critical analysis of "digital constitutionalism" theories, where we focused on the risks involved in taking up and taking over the symbolical load of the constitutionalist tradition to name and explain transnational normative phenomena and events that take place in private digitalised environments[5]. In the present contribution, we apply these critiques to the case of online speech governance by looking at two policy initiatives aimed at improving legitimacy standards in online freedom of expression enforcement: the Meta Oversight Board, a private sector self-regulatory initiative implemented by the company Meta, in contrast to the European Digital Services Act (DSA), a supranational regulation enacted by the European Parliament[6]. While they both originated in distinct institutional settings – private and public – each of these experiences can

4 Edoardo Celeste, "Digital Constitutionalism: A New Systematic Theorisation," *International Review of Law, Computers & Technology* 33, no. 1 (January 2, 2019): 76–99, https://doi.org/10.1080/13600869.2019.1562604; Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, 1st ed. (Cambridge University Press, 2022), https://doi.org/10.1017/9781009071215.

5 Jane Reis G Pereira and Clara Iglesias Keller, "Digital Constitutionalism: Contradictions of a Loose Concept," *Revista Direito e Praxis* 13, no. 4 (2022): 2648–2689, https://doi.org/10.1590/2179-8966/2022/70887.

6 The Digital Services Act focuses on content regulation across different digital platforms and is aimed at "a safer digital space in which the fundamental rights of all users of digital services are protected". The Digital Markets Act regulates the consumerist and competition dimension of online exchanges, with the declared purpose of establishing "a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally" European Commission, "The Digital Services Act Package," September 25, 2023, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

be framed as institutional innovations aimed at implementing legitimacy standards for online speech governance. Moreover, each of them has been related to "digital constitutionalism"[7], even though their features are mostly inconsistent with the premises of modern constitutionalism. Beyond the fact that each of these cases represent imprecise notions of constitutionalism encompassed by "digital constitutionalism", comparing the two leads to further misunderstanding. This is because current digital constitutionalism theories include them in the same category, despite each having distinctive features and entailing different degrees of power (im)balance.

Our goal is to tease out the contradictions and misperceptions embedded in labelling online speech governance mechanisms as manifestations of digital constitutionalism. Ultimately, a fair assessment of such initiatives – of which the Meta Oversight Board and the European DSA are two examples – also depends on unravelling what the choice of constitutional metaphors reveals (in terms of the intended narratives) and what it hides.

Our reflection takes place in two parts. In the first one, we organise our set of critiques according to current uses of the expression "digital constitutionalism", while highlighting relevant risks and inconsistencies in applying the term to explain recent online speech governance initiatives. In the second part, we apply this critique to our exemplary cases of Meta's Oversight Board and the European Digital Services Act. The chapter concludes with a summary of the arguments we cover.

B. Digital constitutionalism: a critical approach

In previous work[8], we have proposed a discussion on the risks involved in borrowing from the symbolical value of the constitutionalist tradition to name and explain transnational normative phenomena and events that take place in private digitalised environments. This critical approach stems from the tradition of modern political theory, where the idea of constitutionalism refers to a specific political and legal movement that emerged amidst the

7 Luciano Floridi, "The European Legislation on AI: A Brief Analysis of Its Philosophical Approach," *Philosophy & Technology* 34, no. 2 (June 2021): 215–22, https://doi.org/10.1007/s13347-021-00460-9; De Gregorio, *Digital Constitutionalism in Europe*; Angelo Jr Golia, "Beyond Oversight: Advancing Societal Constitutionalism in the Age of Surveillance Capitalism," *SSRN Electronic Journal*, 2021, https://doi.org/10.2139/ssrn.3793219.

8 Pereira and Iglesias Keller, "Digital Constitutionalism: Contradictions of a Loose Concept."

XVIII century liberal revolutions. In this realm, constitutionalism emerges as a particular doctrine of political organisation centred on a legal constitution, which is understood as a normative instrument that institutes and regulates government and is designed to limit the exercise of state power and protect individuals.

However, both changes in the exercise of state power – influenced by transnational forces – and the expansion of private power on a global scale have given constitutionalism new applications and conceptualisations. There is a group of theories that uses the terms constitution and constitutionalism to define normative and institutionalising efforts in the international sphere and in private spaces, notably constitutional pluralism, societal constitutionalism, and global constitutionalism[9]. Differences aside, these approaches share the use of constitutionalism to define processes of institutionalisation of powers and legal structures that emerge outside and beyond the nation-state. Contrary to the meaning attributed to constitutionalism in the modern state, these uses employ the concept of constitution as a label that gives non-state normative processes the stability and legitimacy normally associated with liberal constitutions. Despite their value in identifying normative spaces beyond state authority, this strain of literature has been criticised for approaching constitutions as "a metaphor"[10]. We understand digital constitutionalism as a continuation of these theories; in fact, they are utilized as their theoretical framework. Therefore, we will return to this and other sets of criticism of this theoretical matrix shortly, when debating the risks and limitations in current approaches to digital constitutionalism.

Against a backdrop of shifting state powers and expanding private powers, the concept of constitutionalisation has recently been used to describe legal practices and the protection of rights in the realm of digital technologies. In fact, this set of theories that underpins digital constitutionalism – the theoretical matrix above – has often referred to the digital sphere as an experimental paradigm of norm enforcement that exceeds the capacities of the state[11]. Although the concept of constitutionalisation has appeared in

9 Pereira and Iglesias Keller.

10 Marcelo Neves, "(Não) Solucionando Problemas Constitucionais: Transconstitucionalismo Além de Colisões," *Lua Nova: Revista de Cultura e Política*, no. 93 (December 2014): 201–32, https://doi.org/10.1590/S0102-64452014000300008.

11 Pereira and Iglesias Keller, "Digital Constitutionalism: Contradictions of a Loose Concept," 2656.

debates about digital technologies conforming to the rule of law since the early 2000s, the term has recently gained further currency. Recent calls for digital constitutionalism have emerged in a political, social, and economic context largely shaped by the idea of the "platform society", a concept that. captures the pervasive technological mediation through private digital platforms that have "penetrated the heart of societies"[12], affecting institutions, economic transactions, and social and cultural practices.

In this context, digital constitutionalism is generally presented as an interpretative framework to theorise the emergence of measures that mitigate the concentration of economic and political power by such platforms, be such measures public, private, or hybrid. In the face of private companies that run their own infrastructure and make decisions that affect billions of people, regulatory and academic debates seek solutions to protect rights and ensure individual and collective self-determination in those environments. They often appeal to ideas like the rule of law[13], sovereignty[14], representative democracy, and constitutionalism[15] as means of (re)introducing, into the digital realm, the values that inspired democratic and liberal political arrangements in the first place. This means that constitutional metaphors pervade public and theoretical debates on the role digital platforms play in our societies. For the case of digital constitutionalism, we find that – beyond being applied in a sometimes contradictory, sometimes redundant manner – the expression functions as a veil of legitimacy for policy initiatives that are not necessarily in tune with the ideals or the essence that distinguish the constitutionalist movement. Ultimately, these uses might function as a mere rhetorical device that legitimates normative systems whose operation and effects deviate vastly from the values that inform liberal constitutional systems. Thus, we argue that digital constitutionalism is ultimately (i) a term of low epistemic value and (ii) one that can often be instrumentalised to legitimise the concentration of private power.

12 Jose van Dijck, Thomas Poell, and Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford: Oxford University Press, 2018), 2, https://doi.org/10.1093/oso/9780190889760.001.0001.

13 Nicolas Suzor, "Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms," *Social Media + Society* 4, no. 3 (July 2018), https://doi.org/10.1177/2056305118787812.

14 Julia Pohle, "Digitale Souveränität," in *Handbuch Digitalisierung in Staat und Verwaltung*, ed. Tanja Klenk, Frank Nullmeier, and Göttrik Wewer (Wiesbaden: Springer VS, 2020), 241–53, https://doi.org/10.1007/978-3-658-23669-4_21-1.

15 Celeste, "Digital Constitutionalism.".

The first argument accrues from conceptual inconsistency. Digital constitutionalism is used as a label for several approaches to the protection of fundamental rights on digital platforms, which entails various theoretical and empirical implications. We have identified at least three different approaches to the term. The first one is descriptive: "a constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet"[16]. This set of normative instruments is varied and includes those of public, private, or hybrid origin. They mostly aim to consolidate principles of public interest applicable to the digital realm and repackage these as a constitution: from charters that express agreements between non-profit associations or other sectors to official statements by private companies or hybrid institutions, guidelines, terms of service, and even legislative acts (for which the Brazilian Internet Civil Rights Framework is a paradigmatic example). In other words, these approaches are concerned with imparting "constitutional elements"[17] to the content of regulatory norms aimed at the digital environment. Encompassing movements that go beyond the state's official actions, this current of thought amounts to a bolder attempt than what traditional constitutionalism would pursue[18]. Criticisms of this form of digital constitutionalism have revolved around its rhetorical use, calling it a possible marketing strategy[19] due to the lack of binding force that potential "Internet Bills of Rights" impose on digital companies[20]. In other words, the symbolic value exceeds its tangible effectiveness by far.

16 Lex Gill, Dennis Redeker, and Urs Gasser, "Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights," *Berkman Center Research Publication* 2015, no. 15 (November 9, 2015): 2, https://doi.org/10.2139/ssrn.2687120.

17 Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures," *Leiden Journal of International Law* 19, no. 3 (October 2006): 582, https://doi.org/10.1017/S0922156506003487.

18 Luiz Fernando Marrey Moncau and Diego Werneck Arguelhes, "The Marco Civil Da Internet and Digital Constitutionalism," in *Oxford Handbook of Online Intermediary Liability*, ed. Giancarlo Frosio (Oxford University Press, 2020), 189–213, https://doi.org/10.1093/oxfordhb/9780198837138.013.10.

19 Edoardo Celeste, "Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?," *International Review of Law, Computers & Technology* 33, no. 2 (May 4, 2019): 124, https://doi.org/10.1080/13600869.2018.1475898.

20 Kinfe Micheal Yilma, "Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts," *International Journal of Law and Information Technology* 25, no. 2 (2017): 115–38, https://doi.org/10.1093/ijlit/eax001.

A second group of theories addresses digital constitutionalism as the rearrangement of constitutional protections in the wake of techno-social shifts related to digitalisation processes. It encompasses processes of and calls for improvement in the protection of rights threatened by the structures and practices that define digital environments. The transformations and challenges brought by technology would justify new rights and the extension of constitutional protection in the face of a new paradigm. It is the case, for instance, of understanding a constitutional right to data protection as an imperative of privacy protections in the current technological paradigm (Mendes and Oliveira 2020, 3); or even of a possible "right to encryption"[21]. It is worth noting that these versions of digital constitutionalism do not contradict classical views of constitutionalism, which showcases its dynamic reality. In a way, they acknowledge a demand for expansion of constitutional protections by adding a new topic and normative content to the traditional constitutionalist agenda, similar to the way other historical phenomena have led to the emergence of social constitutionalism, economic constitutionalism, and environmental constitutionalism.

In the third group are the theories that address digital constitutionalism as a theoretical framework for both state and non-state means of potentially enforcing constitutional rights in digital environments. Between the ineffectiveness of existing regulatory frameworks to mitigate the concentration of power of digital platforms and the absence of legal provisions aimed at innovative practices, digital platforms are assumed to have developed with no concern for legal and social responsibilities about the constitution of virtual spaces and how the exercise of power may be limited inside them[22]. In this sense, the label of digital constitutionalism encompasses a variety of mechanisms aiming to transfer the values of liberal constitutionalism to relations in the digital world. Ultimately, digital constitutionalism is used as a lens to explain what actually regulatory measures are initiated by different agents. In this realm, we find the digital constitutionalism framework referred to in terms of "the principles of the rule of law"[23] and applied to recent European regulatory trends[24] or even to self-regulatory institutions,

21 Miriam Wimmer and Thiago Guimarães Moraes, "Quantum Computing, Digital Constitutionalism, and the Right to Encryption: Perspectives from Brazil," *Digital Society* 1, no. 2 (September 2022): 12, https://doi.org/10.1007/s44206-022-00012-4.

22 Suzor, "Digital Constitutionalism," 2.

23 Suzor, 2.

24 Floridi, "The European Legislation on AI"; De Gregorio, *Digital Constitutionalism in Europe*.

of which the Oversight Board would be an example. The inconsistencies in these uses of the expression will be further approached in our analysis of the latter and of the European DSA.

It may be argued that the above-mentioned theoretical approaches all share the same concern about digital platforms' compliance with the values and purposes of constitutional protections. However, their implications are quite distinct. Each one is relevant to a specific type of (public or private) agent and thus inspires different sets of democratic legitimacy criteria. They create two groups of problems, which are intertwined and overlapping: (i) the discussion concerning the explanatory and normative value of expanding the constitutional concept to include legal forms that differ from those shaped by modern political theory and (ii) the risks and impacts entailed by such a conceptual expansion and by recent uses of digital constitutionalism as a heading.

This leads to our second argument: in the face of conceptual inconsistencies and detachment from constitutionalism's substantive load, digital constitutionalism can serve to endorse, rather than mitigate, concentration of power in the digital sphere. There is a conversation to be had on whether the symbolic credentials of modern constitutionalism can be appropriated to describe and analyse political and social phenomena that take place outside the context of nation-states. Here, we return to the criticism of digital constitutionalism's theoretical matrix, as this discussion already takes place within constitutional pluralism, global constitutionalism, and societal constitutionalism. Let us take, for instance, critical approaches to constitutional pluralism in the context of the European Union. From a perspective grounded in modern tradition, non-state agents are structurally unfit for constitutionalisation, because they are devoid of the essential elements that would enable them to operate constitutionally, both from a functional and a symbolic point of view. In this sense, Martin Loughlin argues that "constitutional pluralism is an oxymoron"[25], because the idea of constitutionalism itself assumes a single system that emanates authority and organises power in a society. In the case of societal constitutionalism, the meaning of "constitution" is expanded in an inordinate way to encompass the "rationality of global systems that are quite independent of democracy for their reproduction"[26]. Furthermore, invoking constitutionalism outside the state

25 Martin Loughlin, "Constitutional Pluralism: An Oxymoron?," *Global Constitutionalism* 3, no. 1 (March 2014): 23, https://doi.org/10.1017/S2045381713000166.

26 Marcelo Neves, *Transconstitucionalismo* (Sao Paulo: WMF Martins Fontes, 2009), 3.

also entails a debate on the deficit of democratic legitimacy, which has already been acknowledged as the Achilles' heel of transnational regimes[27]. In this sense, new models being proposed would be devoid of foundational elements inseparable from the constitutionalist ideal, manifested in the dichotomy of constituent power versus constituted powers.

The multiple applications of digital constitutionalism can undermine the idea of constitutionalism itself, especially when they are conflated to encompass industry regulation and self-regulation. Moreover, the current definitions contain conflicting ideas. However, even if the founding principles of those initiatives were substantively the same, their lack of democratic legitimacy would still contradict the very notion of constitutionalism. This is because the balance of powers embedded in those arrangements would remain asymmetric, forged by private agents operating pervasive infrastructures and unilaterally imposing rules that apply to billions of users.

It is not a matter, then, of calling for a semantic purism or ignoring the existence of new phenomena that traditional concepts cannot accurately describe. The problem is to show what the terminology hides and what it reveals. In attempting to minimise the concentration of private power in digital spaces, most uses of the term "digital constitutionalism" ultimately function as theories that place a cloak of legitimacy over asymmetric power dynamics. Except for those usages that simply indicate the fact that constitutional law must now deal with the topic, both the subsystems of principles that operate outside the state and the regulatory mechanisms currently associated with digital constitutionalism can potentially produce effects that run counter to their promise, namely preventing the concentration of power. Thus, they subvert the original goals of constitutionalism because they conceive of the "constitution" as a mere institutionalisation of the given order of things, validating the activity of actors that already have effective power with no democratic participation. This is quite different from the goals of democratic freedom: to reshape power correlations and found new social and political orders that are at the core of the normative sense of constitutions.

27 Gunther Teubner, "Quod Omnes Tangit: Transnational Constitutions Without Democracy?," *Journal of Law and Society* 45, no. 1 (July 2018): 7, https://doi.org/10.1111/jols.12102.

C. Digital constitutionalism and online speech governance

Theoretical debates and policy initiatives aimed at remedying the democratic deficit in online freedom of expression make for a fine example of the inconsistencies described above. In this section, we analyse two policy initiatives aimed at improving legitimacy standards in online speech governance related to the framework of digital constitutionalism: the Meta (Facebook) Oversight Board, a private sector self-regulatory initiative implemented by the company Meta, and the DSA, a supranational regulation enacted by the European Parliament and in force since 2022. Our goal is to show how conceptual inconsistencies – i.e., a misunderstanding of constitutionalism's defining traits; or how the label is used to refer to institutional initiatives that entail different power imbalances – can ultimately lead to a legitimisation, rather than mitigation, of platform power.

I. The Meta Oversight Board

The Meta Oversight Board (MOB) was developed and implemented by the company Facebook in 2020, before becoming Meta in 2021. It was created as a self-regulatory body meant to serve as an appeals instance to (its headliner platform) Facebook's content moderation practices (a concept that we will expand on shortly). The MOB took the shape of a board of experts responsible for enforcing Facebook's Community Standards when revising its decisions on what sort of user-generated content should be removed or not. The board's declared goal is to protect "free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies"[28]. The board has since been financed through a trust fund set up by Meta and designed as an independent entity as regards management.

Constitutional metaphors have accompanied the Oversight Board since its early development. Before its institutional model was officially announced, in a 2018 interview, Meta's CEO Mark Zuckerberg was questioned about democratic accountability of Facebook's content moderation decisions, to which he replied, envisioning

28 Facebook, "Oversight Board Charter," September 2019, 5, https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf.

> some sort of structure, almost *like a Supreme Court*, that is made up of independent folks who don't work for Facebook, who ultimately make the final judgment call on what should be acceptable speech in a community that reflects the social norms and values of people all around the world. [29]

Despite there already being sound academic criticism of the use of this metaphor[30], the association of the Oversight Board with constitutional phenomena pervaded the narrative around it. Besides the frequent reference to "Facebook's Supreme Court"[31], the Oversight Board has also been linked to the digital constitutionalism framework as part of an "expansive quest for reversing the complicity of the law in the development of an informational capitalism"[32]. However, the many references to digital constitutionalism have not necessarily reversed this complicity. Quite to the contrary, the misappropriation of the symbolic value of constitutionalism by initiatives managed and operated by the digital private platforms themselves may have worked towards legitimising such structures, despite of how effectively they might have contributed to building a public-values sphere of debate. In the next paragraphs, we will discuss the (im)pertinence of associating the MOB with constitutionalism, considering: (i) its limited potential to mitigate Facebook's power over defining the scope of freedom of expression, and (ii) its focus on improving internal procedural legitimacy, while overlooking democratic participation and the board's operations' actual results.

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29 Ezra Klein, "Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next," *Vox* (blog), April 2, 2018, https://www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge our emphasis.

30 Josh Cowls et al., "Constitutional Metaphors: Facebook's 'Supreme Court' and the Legitimation of Platform Governance," *New Media & Society*, April 5, 2022, https://doi.org/10.1177/14614448221085559; Anna Sophia Tiedeke and Martin Fertmann, "A Love Triangle? Mapping Interactions between International Human Rights Institutions, Meta, and Its Oversight Board," *European Journal of International Law*, Forthcoming.

31 Lorenzo Gradoni, "Constitutional Review via Facebook's Oversight Board: How Platform Governance Had Its Marbury v Madison," *Verfassungsblog* (blog), February 10, 2021, https://verfassungsblog.de/fob-marbury-v-madison/; Golia, "Beyond Oversight.".

32 Matija Miloš and Toni Pelić, "Constitutional Reasoning There and Back Again: The Facebook Oversight Board as a Source of Transnational Constitutional Advice," in *European Yearbook of Constitutional Law 2021*, ed. Jurgen De Poorter et al., vol. 3, European Yearbook of Constitutional Law (The Hague: Springer & T.M.C. Asser Press, 2022), 198, https://doi.org/10.1007/978-94-6265-535-5_9.

First, we argue that the MOB has not had much potential to mitigate Facebook's power over online speech, notably due to its self-regulatory nature and its limited scope. Implemented over a decade after the social network Facebook was launched, the MOB could be interpreted as privately-led response to years of criticism, notably from civil society and academia, of Facebook's, and other digital platforms', "unchecked system" for users' speech governance[33]. This "unchecked system" is epitomised by the practice of content moderation, itself an inherently vague notion. Minimalist approaches argue that content moderation happens merely when platforms review user-generated content and decide whether to keep it up or take it down[34]. This is in line with the board's competences since it is meant to review Facebook's decisions to remove or keep users' publications online upon flagging. This specific decision-making process is, nevertheless, far from representing the widespread influence that content moderation exerts on the broader realm of online freedom of expression, or indeed on different layers of social interaction both on- and offline. Timeline algorithmic curation, automated tools, shadow banning, and labour practices (which affect human content moderators) are only some of the different ways through which digital platforms' standards for freedom of expression are enforced in a broader sense. Thus, Gillespie et al. define content moderation as

> the detection of, assessment of, and interventions taken on content or behaviour deemed unacceptable by platforms or other information intermediaries, including the rules they impose, the human labour and technologies required, and the institutional mechanisms of adjudication, enforcement, and appeal that support it.[35]

While these broader aspects of content moderation remain mostly outside the board's scope, during its tenure, the MOB has also shown little potential to act as a check on Facebook's actions even within its (already restricted)

33 Kate Klonick, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression," *The Yale Law Journal* 129, no. 8 (2020): 2476; Evelyn Douek, "Facebook's 'Oversight Board': Move Fast with Stable Infrastructure and Humility," *North Carolina Journal of Law and Technology* 1, no. 21 (2019): 46.

34 Klonick, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression," 2427.

35 Tarleton Gillespie et al., "Expanding the Debate about Content Moderation: Scholarly Research Agendas for the Coming Policy Debates," *Internet Policy Review* 9, no. 4 (October 21, 2020), https://doi.org/10.14763/2020.4.1512.

competences. In previous work co-authored with Haggart, Iglesias Keller[36] noted obstacles to the board's ability to contribute to a public-value-based online content governance, including its narrow scope. The MOB is meant to only decide on *appeals* regarding content that had been removed for infringing Facebook's Community Standards. This means removals based on illegality would not be up for appeal and do not fall within the MOB competencies.

One could argue that this association of the MOB with constitutional phenomena ought to be justified by its role as a second instance adjudicator whose operations are guided by the principles of the rule of law – in particular, the procedural ones, like transparency and due process. Indeed, in terms of its legitimacy claims, the board clearly does invoke and emphasise procedural legitimacy – understood here as the sphere of legitimacy that refers to the quality of governance process, i.e., transparency, efficacy, accountability, and inclusiveness as well as openness to civil society participation[37]. This shows, for instance, in its promotion of procedural and

36 "Democratic Legitimacy in Global Platform Governance," 7.

37 This approach to procedural legitimacy reflects Vivian Schmidt's concept of "throughput legitimacy", which is "process-oriented, and based on the interactions – institutional and constructive – of all actors engaged in (…) governance" (Schmidt 2013, 5). It "demands institutional and constructive governance processes that work with efficacy, accountability, transparency, inclusiveness and openness" Vivien A. Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput,'" *Political Studies* 61, no. 1 (March 2013): 7–8, https://doi.org/10.1111/j.1467-9248.2012.00962.x. Schmidt developed a democratic legitimacy theory for the European Union by building on "Fritz Scharpf's (1970) typology of input and output legitimacy. Input legitimacy refers to the 'EU's responsiveness to citizen concerns as a result of participation by the people,' while output legitimacy refers to the 'effectiveness of the EU's policy outcomes for the people', input legitimacy refers to the 'EU's responsiveness to citizen concerns as a result of participation by the people" Schmidt, 2. To this, Schmidt adds a third category, 'throughput legitimacy,' which highlights the quality of the governance process and 'is judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation with the people' Schmidt, 2." Haggart and Iglesias Keller, "Democratic Legitimacy in Global Platform Governance," 5.

governance transparency[3839] and in concerns regarding due process[40]. At the same time, the board's design understates other legitimacy standards, like facilitating control of content moderation by democratic oversight or implementing significant participation instruments in Facebook's decision-making and norm-setting processes[41].

In this sense, even the asserted procedural legitimacy is non-existent with respect to its origin and is limited in scope. With respect to origin, the moderation rules, procedures, and case selection criteria are not designed to allow for meaningful participation by those affected by Meta's content moderation rules. Thus, from a procedural standpoint, the chosen model reinforces the democratic deficit already inherent in the private regulatory system. At best, the architecture of the board serves to give the outcome greater internal legitimacy, qualifying it as a self-regulatory decision that has gone through a special procedure. These features do not correspond to the democratic constitutional architecture that would justify describing them in terms of "court" and "constitution".

Another element that distinguishes democratic constitutional processes from private self-regulation is an essential element of constitutionalism: the political concept of self-constraint. It is entirely inapplicable to the MOB. The idea of self-constraint, understood as the commitment of a political community to entrench certain decisions and limit future actions, presupposes a collective commitment involving both the citizens affected by the normative commands and those who circumstantially exercise the

38 Klonick, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression," 2479–80.

39 Including publication of the applicable rules; notification of infringement and review procedure; explanation of what this process entails; and notification of the ultimate decision Klonick, 2479–80. Also, the by-laws commit the board to making all case decisions publicly available, archiving them in a database and publishing annual reports with metrics on the cases reviewed, cases submissions by region, and timelines of decisions Haggart and Iglesias Keller, "Democratic Legitimacy in Global Platform Governance," 8.

40 The Meta Oversight Board "can make a strong claim for legitimacy with respect to due process. Due process is in fact perceived as one of the Oversight Board's defining characteristics" Douek, "Facebook's 'Oversight Board': Move Fast with Stable Infrastructure and Humility," 6. The central goal of the board is to grant Facebook users the possibility of having their content controversies examined by a selection of experts from different world regions who are allegedly independent from Facebook Haggart and Iglesias Keller, "Democratic Legitimacy in Global Platform Governance," 8.

41 Haggart and Iglesias Keller, "Democratic Legitimacy in Global Platform Governance," 8–9.

powers to enforce those commands. It therefore does not apply to private self-regulation initiatives, which merely involve a promise to self-limit by those who hold de facto power. By its very origin and nature, it does not entail alternation in its ownership and exercise. At this stage, it is important to highlight that, even though the board is structured to be institutionally independent from the Meta corporation, funding does come from Facebook's owner[42] and ultimately depends on the company's willingness to maintain its operation.

As such, the board's design shows weak compliance with three defining features of constitutional legal structures: (i) stability, (ii) mechanisms of separation of powers and checks and balances, and (iii) mechanisms for enforced compliance with decisions. Regarding stability, the board's normative structure is precarious due to its private nature, ultimately dependent on Meta's financial and institutional support. There is always the possibility that these structures will be unilaterally and suddenly dismantled. For this very reason, the idea of separation of powers, essential to the concepts of rule of law and constitutionalism, simply does not apply to private structures writ large. If the corporation's leaders have the mechanisms to reverse the division of tasks it has established, there is no way to see in such a review board a genuine mechanism of checks and balances.

II. The European Digital Services Act (DSA)

The European Digital Services Act is a European regulation that provides a comprehensive regulatory framework for online content governance, by creating a "wide-ranging set of standards for how technology companies operating user-generated content platforms in Europe would need to report upon, audit, and design their content moderation frameworks"[43]. As a continuation of European digital policy initiatives – notably, the 2000/31/EC E-Commerce Directive –, the DSA represents a paradigmatic shift towards binding rules directed at many of the practices through which digital platforms exert influence on online content, and thus, on freedom of speech and access to information. It adds to the liability rule provided in the E-Commerce Directive, according to which digital platforms are liable

42 Facebook, "Oversight Board Charter" section 3.

43 Robert Gorwa, *The Politics of Platform Regulation: Trust and Safety, Content Moderation, and the State* (Oxford: Oxford University Press, Forthcoming).

for infringing user-generated content once they are aware of its existence. Through a broader set of mechanisms, the DSA aims to hold platforms accountable for content moderation beyond the removal or maintenance of infringing content. Concerns with remedying information asymmetry, as well as for due process standards, cut through many of the different obligations provided in the DSA[44]. Suzor has already referred to this simply as "certain procedural safeguards" whose abidance by digital platforms would guarantee that their governance is "legitimate according to the rule of law"[45]. Among the mechanisms implemented by the DSA are a series of transparency obligations regarding user-generated content visibility; the implementation of complaints processing and abidance by due process-like standards; and the prohibition of misleading and opaque decision making, such as shadow banning and dark-patterns.

The DSA is presented in the literature as a piece of "European constitutionalism", more specifically, a form of digital constitutionalism that serves as a "reaction to new digital powers" after a period in which the EU had neglected and forgot "the role of constitutionalism, and then constitutional law, in protecting fundamental rights and limiting the rise and consolidation of unaccountable powers abusing constitutional values"[46]. In this vein, digital constitutionalism has gained momentum as an explanatory label of not only the DSA but a whole group of recent European digital policy initiatives. In what can be interpreted as an image of "the EU's digital constitution"[47], Luciano Floridi speaks of a "hexagram of EU digital constitutionalism", where the DSA figures along with other European regulatory

44 See, for instance: digital platforms obligations to designate points of contact with which users may communicate directly, while also making public the information necessary for users to identify and communicate with such points of contact (Article 12); the obligation to include all information on content moderation policy and procedures in their Terms of Service "in clear, plain, intelligible, user-friendly and unambiguous language" (Article 14); to make clear, easily comprehensible reports publicly available in a machine-readable format and in an easily accessible manner about content moderation that they engaged in the period of one year (Article 15); material and formal requirements for the implementation of mechanisms through which users can report on supposedly illegal content (Article 16); and to provide justification for content removal (Article 17).

45 "Digital Constitutionalism," 2.

46 De Gregorio, *Digital Constitutionalism in Europe*, 3.

47 Alexandru Circiumaro, "EU Digital Constitutionalism, Digital Sovereignty and the Artificial Intelligence Act - A Network Perspective," *European Law Blog* (blog), December 23, 2021, https://europeanlawblog.eu/2021/12/23/eu-digital-constitutionalism-digital-sovereignty-and-the-artificial-intelligence-act-a-network-perspective/.

initiatives dedicated to conforming digital technologies to the European legal framework, i.e. the General Data Protection Regulation (GDPR), the Digital Markets Act, the Data Governance Act, the Artificial Intelligence Act, and the bill for regulating the European Health Data Space[48].

The DSA currently stands as an *avant-garde* initiative, a regulatory framework that attempts to reign in digital platforms' opaque and steamroller business practices, after years of debate (and why not, public outrage) that occupied governments around the globe[49]. It promotes regulatory innovations with potential to enhance our understanding and mitigation of the mechanisms through which these platforms accumulate and exercise power over data and public communications (like the systemic risk assessments provided by Article 26). However, applying the constitutionalism tag to this framework without further reflection might overlook conceptual and normative inconsistencies, as well as potential shortcomings of the regulation's results.

First, we highlight that the concepts of the rule of law and constitutionalism should not be understood as equivalent and interchangeable. The idea of the rule of law is broader, more controversial, and more indeterminate than that of constitutionalism. There is no single definition of the "rule of law", let alone agreement on the formal, procedural, and substantive principles it entails. In a formal sense, the rule of law refers to the formal aspects of governing according to law[50]. The principles that this notion requires concern the generality, clarity, publicity, stability, and prospectivity of the law that rules a society[51]. The concept of the rule of law also includes some procedural requirements, such as the right to be heard by an independent court and the guarantee of due process[52]. In substantive terms, the concept of the rule of law involves principles of justice. From this perspective, citizens have moral rights and duties towards each other

48 "The European Legislation on AI," 220.

49 In fact, some of these governments have also attempted to improve digital platforms' accountability by approving further liability regulations that speak to the DSA's principles in different extent. See, for instance, the German NetzDG.

50 Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in *Getting to the Rule of Law*, ed. James Fleming, vol. 50, Yearbook of the American Society for Political and Legal Philosophy (New York: New York University Press, 2011), 3–31, https://www.jstor.org/stable/24220105.

51 Lon Luvois Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

52 Waldron, "The Rule of Law and the Importance of Procedure."

and political rights against the state as a whole[53]. While the formal, procedural, and substantive contents of the rule of law are usually secured by a constitution, the idea behind it is not the same as that of constitutionalism. The notions of the rule of law and constitutionalism are closely linked, even if they do not encompass the same structures or refer to the same processes. As a political ideology and movement, constitutionalism requires democracy, checks and balances, and, in its late model that has spread around the world, constitutional supremacy and judicial control of laws. For this reason, constitutionalism is not the same as applying the principles of the rule of law to regulatory systems. In this sense, securing abidance by the principles of the rule of law is not enough to mitigate these private agents' concentration of power. In fact, binding digital platforms to such a framework of principles implies, to a certain extent, a recognition and validation of their influence over online speech governance. When doing so without challenging the technical and institutional mechanisms that enable this influence, "regulatory attempts to introduce public values into the structure of powerful private agents end up formalising and reinforcing their role as 'rulers' of online discourse, and may, as such, reinforce their political power"[54].

The question of what would, indeed, challenge this concentration of power, is one that cuts across global debates on how to regulate digital platforms. The DSA represents a milestone in the European debate (and some will argue, globally), as the first piece of legislation directed at digital platforms that transcends a legal paradigm where platforms were seen as mere intermediaries of communication, to recognise their influence in content, speech, and behaviour while attempting to hold them accountable for such influence. As other policy proposals and initiatives do – e.g. in Brazil, India, North America –, the DSA pursues a policy agenda that is reactive to contemporary socio-political phenomena expressed and supported by digital technologies. This includes the spread of hate speech and terrorist content, threats to child safety, and the expansion of digital disinformation practices around elections. While different political contexts hold their specificities, there is an overall feeling that recent regulatory trends tagged as digital constitutionalism are meant to fill a decades-long regulatory void

53 Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass: Harvard Univ. Press, 1985).

54 Natali Helberger, "The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power," *Digital Journalism* 8, no. 6 (July 2, 2020): 848, https://doi.org/10.1080/21670811.2020.1773888.

that allowed big tech companies to become extremely powerful economic and political actors. In this context, the use of constitutional metaphors also serves as a rhetorical appeal to constitutional law in a field where administrative and regulatory law have failed us. As we intended to show in this chapter, however, as appealing as it may sound, this semantic resource does not come without a price.

D. Final remarks

This chapter presented a critique on the use of "digital constitutionalism" theoretical frameworks to approach recent policy initiatives aimed at improving democratic legitimacy standards in online content governance. Our argument is centred on the inadequacy of transposing the vocabulary of constitutionalism into the realm of (public and private) regulatory initiatives that do not necessarily share the features that define constitutionalism as a theory and a political movement. In fact, as we intended to show, the use of the "digital constitutionalism" label can, in some cases, imprint legitimacy where institutional design heads, in fact, towards concentration of private power.