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RESEARCH ARTICLE

Reimagining digital constitutionalism

Kinfe Yilma

School of Law, University of Leeds, Leeds, UK
Email: k.yilma@leeds.ac.uk

Abstract

Digital constitutionalism has been in vogue in recent years. A series of journal articles, edited collections and monographs that front the catch term have mushroomed. This has, in turn, inspired a growing body of critical scholarship that questions the normative and theoretical coherence as well as epistemic value of digital constitutionalism. Critics deplore the use of the age-old notion of constitutionalism to describe what they consider to be mere regulatory and self-regulatory initiatives which do not meet its well-established core normative minimums. In casting digital constitutionalism in this light, critics present it as a project driven primarily or hijacked by private sector actors, namely big digital platforms. This article seeks to challenge and bring some nuance to such recent sharp criticisms of digital constitutionalism. By positioning its origins and evolution in the digital bill of rights movement, it makes the case for reimagining digital constitutionalism as a discourse. The article thus hopes to rehabilitate and clarify the role and epistemic value of digital constitutionalism as a discourse that is an inchoate, gradualist and fundamentally hortatory. In a novel approach, it argues that framing digital constitutionalism as a discourse depicts accurately its ontological and normative dimensions but also attends to the concerns of its detractors.

Keywords: constitutionalism; digital bills of rights; digital constitutionalism; digital human rights; discourse; Internet bills of rights; law and technology

Introduction

Digital constitutionalism has become fashionable in certain academic circles in the past few years. Academics researching in the field of law and technology, digital rights and the governance of new and emerging technologies have, in this respect, played a central role in popularising the concept. The essence of what is now carried under the rubric of 'digital constitutionalism' dates back to the early days of the public Internet. But it gained some form of conceptual formulation in the past decade. In the wake of the Snowden revelations in the summer of 2013, and the attendant recurrence of initiatives for Internet bills of rights, digital constitutionalism has come to gain considerable prominence in the

The author is a founding member of the Digital Constitutionalism Network <https://digitalconstitutionalism.org/>.

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literature. It is used as a unifying label for the series of Internet bills of rights initiatives launched by various stakeholders, particularly civil society groups.

In less than a decade, dozens of articles, monographs and edited collections that expressly adopt the label digital constitutionalism have been published. But this has recently generated scholarship that questions its conceptual and normative coherence as well as the ease with which the rather niche concept of constitutionalism has been used with little conceptual clarity. Going further, critics argue that the deployment of the rather well-settled notion of 'constitutionalism' in a digital domain dominated by technology companies risks offering legitimacy to the corporate objectives of the companies. This article joins the conversation started by scholars critical of the digital constitutionalism project, but with a primary objective of bringing some nuance to recent criticisms. In particular, it seeks to address the question of whether, and to what extent, recent criticisms are grounded in or based on accurate and complete understanding of multilevel and multi-actor initiatives that make up digital constitutionalism. In the process, the article offers a novel alternative conceptualisation of digital constitutionalism as a discourse.

I argue that much of the recent criticism drives from a partial understanding of the origins, structure and form of initiatives that form the basis of digital constitutionalism. Internet bills of rights, a series of initiatives advanced by multiple stakeholders at various levels, are critical to make sense of digital constitutionalism. Digital constitutionalism is the umbrella term used to refer to these initiatives, which are part of a disjointed and evolutive discourse with constitutional aspirations. Contrary to the suggestion that digital constitutionalism is essentially camouflage for private contractual policies, the article shows the differing objectives pursued by various actors who advanced Internet bill of rights initiatives. The article, in so doing, reimagines digital constitutionalism as a discourse that is inchoate, gradualist in resulting in outcome and fundamentally hortatory in its objective. In a novel approach, it argues that framing digital constitutionalism as a discourse depicts accurately its ontological and normative dimensions.

For purposes of this article, the term 'discourse' simply means – consistent with its dictionary meaning – a 'discussion or debate' on matters of serious concern, in this case, protection of rights, governance and limitation of State as well as nonstate power in the digital age.[1] As a discourse, digital constitutionalism thus represents a common label for a series of iterative multi-level initiatives launched by various actors, including States, civil society groups and private actors with a view to claiming, reaffirming or declaring rights, principles and governance norms. The act of launching such initiatives, albeit momentary, should be seen as engagement in iterative conversations among stakeholders seeking to attend to the new realities of the digital environment. The article thus concludes that digital constitutionalism is best conceptualised as a discourse, rather than as an 'ideology', as some researchers suggest.

The rest of the article moves in four sections. The second section provides an overview of the four phases in which the use of the term digital constitutionalism has evolved over the years in the literature. This offers a context to the discussion in third section where key aspects of the critiques are laid out and examined. The fourth section concludes the article. A few caveats are in order. Pieces of scholarship dealing with digital constitutionalism have been published in a number of languages, but this article engages with only those published in English due to my own linguistic limitations. The phrase 'Internet bills of rights' readily

[1]See definition of 'discourse' in Cambridge English Dictionary <https://dictionary.cambridge.org/dictionary/english/discourse> Last accessed 12 April 2025.

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signifies the focus on the part of its proponents on the protection of rights on the 'Internet'. However, on account of the considerable convergence of data-driven technologies that has been taking place since, I use the more neutral and inclusive phrase 'digital bills of rights' hereafter.

Phases of digital constitutionalism

While the term attracted considerable traction in recent years, the essence of digital constitutionalism has been discussed in different contexts and under different labels since the early days of the Internet. But its use in the literature has evolved over the years. For purposes of this article, this evolution is categorised into four major phases. In the first phase, the term 'digital constitutionalism' was not explicitly used in the literature, but the essence of what later phases subsumed under the aegis of digital constitutionalism formed part of the discussion. The second phase is where scholars coined the words digital constitutionalism, albeit in a manner that only captures parts of the meanings that the terms came to assume in later phases, particularly in phase three. As shall be discussed in what follows, it is in the third phase that digital constitutionalism found a relatively comprehensive and coherent articulation in the literature. But there is a palpable tendency in recent years where this articulation is taken overboard with digital constitutionalism applied to legal issues beyond its original ontological and normative boundaries. That is the fourth phase. I consider each phase in turn in this section.

In categorising the literature, the key criterion used in this section is the chronological order of pieces of scholarship. That means key sources discussed from the first to the fourth phases were published in a generally successive order. But the chronological order is not absolute. For example, articles on digital constitutionalism that are informed by the post-Snowden momentum, i.e., phase III, are published as recently as 2025.[2] Yet a phased approach still offers the best possible alternative in systematically grouping an increasingly growing body of scholarship, and one that is not often in conversation. Importantly, a phased approach is helpful to capture the evolution, albeit disjointed, of digital constitutionalism as a concept over the past two decades.

Phase I

This phase of the digital constitutionalism project dates back to the early days of the Internet. That is a period where scholars scrambled to understand the best ways in which cyberspace should be governed. Digital constitutionalism scholars of this generation were preoccupied with the question of how emergent sites of power in cyberspace, particularly technology companies, should be viewed through the prison of constitutionalism. The concern then was on the importance of anchoring and orienting the discourse on cyberlaw and regulation on constitutionalism. Chief among such scholars was Fitzgerald who argued that principles that mediate power are needed to govern the new power dynamics created by the advent of digital technologies such as the Internet. In his own words, Fitzgerald maintained that:

[2]See, e.g., Edoardo Celeste, 'Conceptual Approaches to Digital Constitutionalism: A Counter-Critique' in Indra Döhmann et al (eds) *Digital Constitutionalism* (Baden-Baden: Nomos, 2025) 15–46.

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> If a software engineer has the tools to fully or partially construct discourse and identity in the digital world then the principles of law that mediate power need to mediate such an occurrence […] Laws that will play an important role in this process are laws that will govern the construction of this new discourse known as software.[3]

What Fitzgerald then called 'informational constitutionalism' or the 'new constitutionalism' – as opposed to 'digital constitutionalism' – does not quite refer to principles drawn from national constitutional texts such as the Australian Constitution. Instead, his version of constitutionalism embodies principles and rules of governance that would gradually evolve out of pieces of private law such as the law of contracts, competition law and intellectual property law. As he puts it, 'it is the development of the principles of these areas of law in their relation to software that will determine much about the way we live in the future'.[4]

Fitzgerald's primary focus has thus been in highlighting the importance of constitutionalism, which he defines as 'regulation of power',[5] in constraining the emergent power of private actors, software engineers to be precise, in the information society. In that sense, his focus was not constitutional principles in the traditional sense of the word, and as used in later phases of the digital constitutionalism project. Notably, Fitzgerald did not account for State power, partly because the exercise of such power would be duly constrained by extant constitutional law. In that sense, his account is the first to fashion digital constitutionalism as a mechanism of limiting private power. This framing continued to influence scholars of digital constitutionalism who emerged in the second phase, as I shall consider below.

Around the same time, Berman offered one of the earliest formulations of digital constitutionalism. Similar to Fitzgerald, Berman highlighted the virtues of orienting discussions around cyberspace regulation with constitutionalism.[6] This would, he argued, lead to what he termed 'constitutive constitutionalism', which might gradually bring about cultural benefits such as creating public awareness about abstract constitutional principles.[7] What makes Berman's approach different from Fitzgerald's is that it sought to bring constitutional texts – in his case, the US Constitution – as a tool of constitutionalising the discourse about the regulation of private actors in cyberspace.

A common thread in this phase of digital constitutionalist discourse has been the emphasis on grounding cyberspace governance on constitutional law. Scholars foresaw the impact of emergent private power and broached the discourse on the need to find ways in which it should be limited. In that sense, this phase laid the foundation for the subsequent scholarship that considered the role of constitutional law in cyberspace rather directly.

Phase II

Suzor's PhD thesis is a major piece of work in this phase. But it is interesting to note that Phase II in the conceptual evolution of digital constitutionalism is a continuation of the

[3]Brian Fitzgerald (1999) 'Software as Discourse? A Constitutionalism for Information Society', 24 *Alternative Law Journal* 144, 146; see also Brian Fitzgerald (2000) 'Software as Discourse: The Power of Intellectual Property in Digital Architecture', 18 *Cardozo Arts and Entertainment Law Review* 337, 338.

[4]Fitzgerald (n 3) 338.

[5]Ibid, 382.

[6]Paul Schiff Berman (2000) 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private'', 71 *The University of Colorado Law Review* 1223.

[7]Ibid, 1290, 1302–1305.

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conversation sparked by Fitzgerald. Supervised by Fitzgerald, Suzor's thesis is the first to coin the term 'digital constitutionalism', which is defined as follows:

> [A] project which seeks to articulate a set of limits on private power that will best encourage innovation and autonomy and simultaneously protect the legitimate interests of participants in these increasingly important spaces.[8]

Suzor's framing of digital constitutionalism noticeably adopts a narrower analytical focus. At one level, he sees it as a means of constraining private power, that is the newly found power of technology companies. His account, as such, does not account for the equally significant power that States hold in the digital space in different ways, an example being mass digital surveillance of the sort unveiled by the Snowden revelations. This is indeed modified in his later works, where he emphasises that digital constitutionalism requires limiting the power not just of States and corporations but also other actors such as civil society organisations who exert some form of power in the digital space.[9] Suzor's central focus on the principle of the rule of law is where one finds his account to be conceptually narrow. He argues that the principle of the rule of law would bring about non-arbitrariness, uphold legality and legitimacy in 'virtual communities', thereby constraining the power of technology companies.[10] In that sense, the rule of law appears to have been presented as the sole or at least the most central principle of digital constitutionalism.

Rule of law certainly provides an overarching and broader framework when it comes to governance of private conduct in the digital domain. But later phases of the digital constitutionalism project present rule of law only as one of the bundles of constitutional principles needed to enhance constitutionalism in the digital space. This is also reinforced in Suzor's more recent rendition of his approach, where he stress-tests the principle of the rule of law on a range of social media platforms.[11] But it might be useful to note that the term digital constitutionalism appears only four times, and mostly in the non-substantive parts of the PhD thesis. Written after digital constitutionalism attained some prominence in the literature, Suzor's article comparatively employs the terms more widely. This is worth highlighting because it goes to show the evolution in the overall use of the term digital constitutionalism in the discourse.

Phase III

Phase III of digital constitutionalism's conceptual evolution is closely related to the Snowden revelations. The revelations, which brought into the spotlight mass digital surveillance practices of the Five Eyes States, have indeed been a watershed moment in the digital constitutionalism project.[12] In the wake of the revelations, initiatives that call

[8]Nicholas Suzor, Digital Constitutionalism and the Role of the Rule of Law in the Governance of Virtual Communities, PhD Thesis (Queensland University of Technology, 2010) 13.

[9]See, e.g., Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge: Cambridge University Press, 2019) 173.

[10]Suzor (n 8) 15–16.

[11]Nicholas Suzor (2018) 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms', 4 *Social Media + Society* 1.

[12]On the Snowden revelations, see Luke Harding, *The Snowden Files: The Inside Story of the World's Most Wanted Man* (London: Faber, 2014).

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respect for and protection of (constitutional) human rights proliferated.[13] From civil society groups, governments, intergovernmental organisations and even corporations, a series of initiatives for digital bills of rights were launched. While such initiatives date back to the early days of the Internet – one recalls here John Perry Barlow's 1996 Declaration,[14] post-Snowden initiatives marked a significant departure. It did so in at least three ways.

At one level, digital bills of rights came to be multi-level initiatives. Unlike its earlier iterations, post-Snowden initiatives were no longer the occasional exhortations of activists and 'digital rights' groups. A number of countries, such as Brazil and Italy, introduced legislation that essentially are digital bills of rights.[15] With the release of initiatives such as the African Declaration on Internet Rights and Freedoms, the geographic and cultural scope of post-Snowden digital bills of rights initiatives expanded.[16] Certain technology companies likewise proposed some form of digital bills of rights or have responded to such initiatives (and the Snowden revelations) with human rights protective features in their products and services.[17]

Noticeable clarity and specificity in the constitutional claims is the second aspect of the post-Snowden digital constitutionalist momentum. Going beyond listing 'digital rights' that should be upheld in cyberspace and exhortations, some initiatives offered an elaborate catalogue of rights, principles and governance norms. An illustrative example is the elaborate way in which rights such as the right to privacy are specified into a set of what I call a subset of rights, namely the 'right to use encryption technologies' and 'freedom from surveillance'.[18] What makes this particularly remarkable is that policy processes at various levels spurred by the Snowden debacle, considered further below, drew considerably from this aspect of digital bills of rights.

The third departure lies in how digital bills of rights were able to exert some influence in policymaking. Partly propelled by the multi-level initiatives, regional and global intergovernmental bodies have charted policy processes that clearly exhibit marks of post-Snowden digital bill of rights initiatives. A good case in point is the discourse at the United Nations (UN), which has been running under the label 'right to privacy in the digital age'.[19] The discourse, which is still ongoing, consists of a series of resolutions of the United Nations General Assembly (UNGA) and the Human Rights Council. The resolutions increasingly carry themes that gained wide prominence in the wake of the Snowden revelations, such as encryption technologies.[20] The Snowden debacle has likewise galvanised

[13]See Kinfe Yilma, *Privacy and the Role of International Law in the Digital Age* (Oxford: Oxford University Press, 2023) Ch 4.

[14]John Perry Barlow, A Declaration of the Independence of Cyberspace (Electronic Frontier Foundation, 1996) <https://www.eff.org/cyberspace-independence> Last accessed 12 April 2025.

[15]See Marco Civil Law of the Internet in Brazil, Law No. 12.965 (April 2014) <https://www.cgi.br/pagina/marco-civil-law-of-the-internet-in-brazil/180>; Italian Declaration of Internet Rights (2015) <https://shorturl.at/xcxTB> Last accessed 12 April 2025.

[16]See African Declaration on Internet Rights and Freedoms (2024) <https://africaninternetrights.org/> Last accessed 12 April 2025.

[17]See, e.g., Google to Encrypt Searches Globally in Reaction to Edward Snowden Revelations (The Independent, 14 March 2014) <https://shorturl.at/Y0dEs> Last accessed 12 April 2025.

[18]See, e.g., The Charter of Human Rights and Principles for the Internet (2014) Art 8 <https://internetrightsandprinciples.org/charter/> Last accessed 12 April 2025.

[19]See The Right to Privacy in the Digital Age, UNGA Res 68/167 (21 January 2014). For more on this, Kinfe Yilma (2018) 'The Right to Privacy in the Digital Age: Boundaries of the 'New' UN Discourse', 87 *Nordic Journal of International Law* 485–528.

[20]See, e.g., The Right to Privacy in the Digital Age, HRC Res 54/21 (12 October 2023) Para 12 cum Preamble.

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policy processes at the European Union (EU) and the African Union (AU). At the EU, for example, the post-Snowden discussion animated the legislative process on the General Data Protection Regulation (GDPR). As Rossi notes, the direction of the GDPR legislative process – which began shortly before the revelations – was inverted in favour of data privacy due to the discussion spurred by the revelations.[21]

Albeit to a limited degree, the African Human Rights System, particularly the agenda of the African Commission on Human and Peoples' Rights (African Human Rights Commission) has also been influenced by the post-Snowden digital bill of rights movement. Not only did the Commission 'noted' in a resolution the African Declaration on Internet Rights and Freedoms,[22] but also that its own Declaration of Principles on Freedom of Expression and Access to Information, adopted a few years later, is ostensibly influenced by digital bill of rights themes such as the use of encryption technologies to protect digital privacy.[23]

The impact was not limited to the policy domain, but also animated industry practices. A number of technology companies have pledged to make their products in line with human rights standards. Apple, for example, introduced enhanced data encryption into its devices shortly after the Snowden debacle.[24] A version of this development was that companies that claim to offer better protections than those technology companies implicated in the Snowden revelations had emerged. A memorable example is MeWe, which launched a 'Privacy Bill of Rights' where it makes a series of pledges to users.[25] The extent to which such entrepreneurial effects of the digital bill of rights lasted or offered tangible alternatives is unclear, but it illustrates the influence of the post-Snowden momentum.

Finally, it is also at this phase of the concept's evolution that digital constitutionalism acquired some coherent theoretical formulations. Scholars, mainly legal scholars, led the charge in this regard. In a Harvard Berkman Klein Center's 'mapping' paper, Gill et al offered a fairly elaborate definition of digital constitutionalism. For Gill et al, digital constitutionalism is a suitable 'umbrella' term for the flurry of digital bill of rights initiatives that have emerged since the early days of the Internet.[26] Their definition reads as follows:

> "[d]igital constitutionalism" [represents an umbrella term for] 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.[27]

[21]See, e.g., Agustin Rossi (2018) 'How the Snowden Revelations Saved the EU General Data Protection Regulation', 53 *The International Inspector: Italian Journal of International Affairs*, 95–111; see also Hallie Coyne (2019) 'The Untold Story of Edward Snowden's Impact on the GDPR', 4 *The Cyber Defense Review* 65.

[22]Resolution on the Right to Freedom of Information and Expression on the Internet in Africa, ACHPR/Res.362(LIX) 2016 (November 2016) Preamble.

[23]Declaration of Principles of Freedom of Expression and Access to Information in Africa, African Commission on Human and Peoples' Rights (November 2019) Principles 40–41.

[24]See, e.g., Signalling Post-Snowden Era, New iPhone Locks Out N.S.A. (The New York Times, 26 September 2024) <https://shorturl.at/ue3Vg> Last accessed 12 April 2025.

[25]See Me We Privacy Policy—Privacy Bill of Rights (2014) <https://mewe.com/cms/privacy> 12 April 2025.

[26]Lex Gill et al, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights'. Berkman Klein Center for Internet & Society Research Publication 2015–15 (2015) 2; see also a rendition of the same definition in Dennis Redeker et al (2018) 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights', 80 *The International Communication Gazette* 302, 302–303.

[27]Ibid.

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The authors argue that digital constitutionalism as a concept best captures a series of multi-level initiatives that carry a constitutional tone, are targeted at particular political communities and are reasonably comprehensive in coverage and aspiration towards formal recognition or legitimacy.[28] Three points are notable about this conceptualisation of digital constitutionalism. One is that digital constitutionalism constrains the power of both States and technology companies. This moves beyond formulations in earlier phases where the focus has been on limiting the newfound powers of technology companies. By envisioning a horizontal application of constitutional principles, this also moves beyond the established dictum in constitutional law, where only State power is subject to limitations.[29] In Gill et al.'s conceptualisation, the normative structure of a typical digital bill of rights instrument is also laid out. Not only are (constitutional) rights enumerated, but also norms that govern relations between users/individuals on the one hand, and other actors, mainly States and corporations on the other, form part of digital bills of rights.

This conception of digital constitutionalism has since been either followed or adapted in a series of academic publications on digital constitutionalism. Celeste's series of publications has refined this definition based on a thorough review of the literature on the subject. According to Celeste, digital constitutionalism is an 'ideology that adapts the values of contemporary constitutionalism to the digital society […] through a set of principles and values that informs, guides and determines the generation of [normative] responses to [the advent of digital technologies]'.[30]

This account of digital constitutionalism does not however, offer much clarity on either why ideology is the pertinent moniker or the attendant implications of dubbing a flurry of multi-stakeholder initiatives an 'ideology'. Apart from the question of *whose* ideology, it is not clear, for instance, whether digital constitutionalism, as an ideology, is a mere political and theoretical construct and hence not directed at bringing about practicable change in the behaviour of States as well as corporations. If the ideology's goal is adapting existing norms, one might further point to the inevitable question of whether digital constitutionalism is merely a derivative ideological framework. But importantly, calling it an ideology would lend weight to the argument by critics that digital constitutionalism is a moniker of ideologically driven policies of technology companies who wield considerable influence in the digital space. Arguably, the term ideology also signifies a level of permanence, inner cohesion and entrenchment of the initiatives or the project that underpin the supposed ideology, that is digital constitutionalism. As I shall show in the third section, digital bills of rights have largely been a fragmented, sporadic and hence essentially an inchoate discourse. It has not thus matured well enough to earn the title of ideology. Digital constitutionalism has simply been a discourse.

That said, this framing of digital constitutionalism offers a fairly comprehensive framing that captures the evolutive and adaptive nature of initiatives for digital bills of rights. That is perhaps the reason why much of the recent scholarship in digital constitutionalism builds

[28]Ibid, 3–5.

[29]See, e.g., Nicholas Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) Ch 1.

[30]Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation', 33 *International Review of Law, Computers & Technology* 76, 77, 88–89; see also Edoardo Celeste, 'Internet Bills of Rights: Generalisation and Re-Specification Towards a Digital Constitution', 30 *Indiana Journal of Global Studies* 25, 40; Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (Abingdon: Routledge, 2023) 76–87.

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on this framing.[31] However, there is a tendency in recent years to expand the remit of digital constitutionalism beyond the above framing of the concept. While such intellectual exercises are desirable in principle, scholarship that is emerging in the fourth phase of digital constitutionalism's evolution goes overboard and makes the whole project vulnerable to sharp criticisms. What follows considers this phase of digital constitutionalism.

Phase IV

Phase four is the current, and still evolving, stage of digital constitutionalism's conceptual evolution. This is the phase where one sees the uptick in analysis that comes with the rubric of digital constitutionalism topical legal issues in the digital domain, particularly those in Europe and self-regulatory initiatives of digital platforms. Post-GDPR 'digital codes' in the EU, such as the AI, data governance, digital market and services acts, are increasingly presented as a reflection of the 'rise of digital constitutionalism' in Europe.[32] By pointing to the stated legislative objective of these 'acts' to uphold human rights guaranteed in supranational instruments, authors who emerged in this phase emphasise the 'constitutional' role and nature of these instruments. This conception of digital constitutionalism moves past the centrality of digital bills of rights, which served, as alluded to above, as the foundation for the notion. To be sure, some critics of digital constitutionalism have also fallen victim to the traps of this line of framing the concept, where national and regulatory initiatives in the US and EU are billed as digital constitutionalism efforts.[33]

Other scholars of this phase, whom I call neo-digital constitutionalists, attribute this perceived rise of digital constitutionalism to the advent of judicial activism of European courts through decisions against digital platforms that read beyond the black letters of the law.[34] Put differently, this viewpoint suggests that a new round of constitutionalism, that is digital constitutionalism, is emerging in the absence of law. In adjudicating cases, European courts read into existing rules, the argument goes, to frame a series of constitutional principles that fulfil the function of constitutionalism. This view of digital constitutionalism not only overlooks the role of digital bills of rights but also deploys the concept to explain away progressive judicial decisions of European courts.

Self-regulatory measures such as the creation of Meta's Oversight Board are likewise discussed under the rubric of digital constitutionalism.[35] As a body mandated to examine Meta's disputed content moderation decisions in light of the company's human rights

[31]See, e.g., Miriam Wimmer and Thiago Guimarães Moraes (2023) 'Quantum Computing, Digital Constitutionalism, and the Right to Encryption: Perspectives from Brazil', 1 *Digital Society* 1, 2–3; Outi Puukko (2023) 'Productive Power in Digital Constitutionalism: Analysing Civil Society Actors' Definitions of Digital Rights', 17 *International Journal of Communication* 6655.

[32]Giovanni De Gregorio (2021) 'The Rise of Digital Constitutionalism in the European Union', 19 *International Journal of Constitutional Law* 41, 59–66; Giovanni De Gregorio, *Digital Constitutionalism in Europe Reframing Rights and Powers in the Algorithmic Society* (Cambridge: Cambridge University Press, 2022) 253–255, 211, 274, 310.

[33]See Monika Zalnieriute (2023) 'Against Procedural Fetishism: A Call for a New Digital Constitution', 30 *Indiana Journal of Global Legal Studies* 227, 231–232.

[34]See, e.g., Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Oxford: Hart, 2021) 1, 8, 11, 184–207.

[35]Angelo Golia (2023) 'Testing the Transformative Potential of Facebook Oversight Board: Strategic Litigation within the Digital Constitution?' 30 *Indiana Journal of Global Legal Studies* 325.

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commitments as well as universal human rights, the Oversight Board is far from the notion of digital constitutionalism as articulated in phase three. Indeed, private actors are, as alluded to above, among stakeholders who – their motives regardless – advocated for or proposed some form of bill of rights for the Internet. Meta's Statement of Rights and Responsibilities is an example where some rights of users as well as responsibilities of the company are envisaged.[36] The Statement is one of the policies against which the Oversight Board reviews Meta's content moderation decisions, under the Charter of the Board.[37] That means the Oversight Board is not a manifestation of digital constitutionalism in the true sense of the word.

A particular shortcoming of this framing of digital constitutionalism is that it mistakes the outcome for the means. Legislative initiatives, progressive case law or the creation of the Oversight Board are more an outcome of the digital constitutionalism project than evidence of the rise of digital constitutionalism. As flagged above and considered further in the third section, digital bills of rights have largely been tools of advocacy, often deployed by civil society groups, to shape law, public and private policies as well as industry practices. Buoyed by the post-Snowden momentum, the digital bill of rights movement has galvanised legislative initiatives, judicial decisions and human rights protective industry practices. In that sense, scholars in phase IV appear to mistake the result for the means. The establishment of the Oversight Board should also be seen in that light.

Overall, the approach of neo-digital constitutionalists is problematic. By overstretching the meaning of digital constitutionalism, they risk making it devoid of a clear and coherent conceptual core. The adverse implications of this approach have started to show in recent years. As I shall discuss in what follows, this framing of digital constitutionalism has been a central focus of the recent sharp criticisms from different scholars who questioned its normative coherence, flagged its perceived contradictions or even its epistemic value. What follows seeks to push back against some of these critiques by offering some nuance to the notion of digital constitutionalism. By reimagining it – rather modestly as a discourse, I seek to rehabilitate, redefine and strengthen the approach pursued in phase three of digital constitutionalism.

Reimagining digital constitutionalism as a discourse

Digital constitutionalism has attracted a series of criticisms in the past few years. Articles that question the conceptual and normative coherence as well as the epistemic value of digital constitutionalism have been published.[38] This is on top of prior sharp criticisms of the digital bills of rights movement, which formed the basis for digital constitutionalism.[39] This section examines some of the recent criticisms, focusing mainly on the critique offered by Costello, Terzis, and Pereira and Keller. Because some of the criticism levelled

[36]Statement of Rights and Principles (Meta Platforms, 2018) <https://shorturl.at/o08Us> Last accessed 12 April 2025.

[37]See Charter of the Oversight Board (2019) Art 2(2).

[38]See, e.g., Petros Terzis (2024) 'Against Digital Constitutionalism', *European Law Open* 1; Róisín Costello (2023) 'Faux Ami? Interrogating the Normative Coherence of 'Digital Constitutionalism', 12 *Global Constitutionalism* 326; Jane Pereira and Clara Iglesias Keller (2022) 'Digital Constitutionalism: Contradictions of a Loose Concept', 13 *Rev. Direito e Práx* 2649.

[39]See, e.g., Kinfe Yilma (2022) 'Bill of Rights for the 21st Century: Some Lessons from the Internet Bill of Rights Movement', 26 *The International Journal of Human Rights* 701.

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by these authors is directed at specific pieces of writing rather than digital constitutionalism as a project or concept, this section does not engage with those forms of critiques.

By engaging with those critiques, the aim is not to offer a response but nuance where inaccurate assumptions are clarified in light of the context provided in the preceding section. I, accordingly, seek to offer an alternative account of digital constitutionalism as a discourse as opposed to an ideology or even a concept. By reimagining it as a discourse, the aim is to paint a picture of digital constitutionalism that accurately reflects its origin and role as a means of upholding rights as well as entrenching principles of constitutionalism in the digital space. Not only does reimagining digital constitutionalism as a discourse accurately depict its objectives and aspirations but it also shows where critics fell short in basing their criticisms on a partial understanding of digital constitutionalism.

Digital constitutionalism as a discourse has four essential manifestations. First, it represents a discourse that is still in a state of flux, evolving and hence inchoate. Contrary to the depiction in the literature as well as in the account of its critics, digital constitutionalism, despite its fairly long tenure in the literature, has not attained maturity conceptually or has been a sustained discursive project. Second, it has been a discourse involving multiple actors, including States, technology companies and civil society organisations. Unlike the tendency to present it as a project or policy of profit and digital power chasing corporations, digital constitutionalism has been a multi-stakeholder discourse. Third, digital constitutionalism initiatives have largely been aspirational with an underlying hortatory approach. The customary invocation of constitutional principles has not been a claim of a status of constitutionalism but rather an expression of aspiration and mere evocation. Finally, gradualism best captures the digital constitutionalist discourse. While it still is a fragmented inchoate discourse, its aspirations have taken hold in practice in some cases which often takes place over an extended period of time. In this section, I explore each element of digital constitutionalism as a discourse in turn while at the same time addressing criticisms levelled by its critics.

Inchoate discourse

One of the major criticisms levelled against the digital constitutionalist project pivots on its conceptual foundation and framing. At one level, critics argue that the project fails to offer a coherent and internally consistent definition of digital constitutionalism. Pereira and Keller argue that the term has been used and applied in different contexts with little common thread that ties the conceptual core of digital constitutionalism.[40] Alluding to differing – and at times contradictory descriptions offered in the literature, they argue that there is an apparent 'conceptual discord and disorder' that robs digital constitutionalism of any epistemic value.[41] As shown in the preceding section, the ways in which digital constitutionalism has been conceptualised have evolved over the past two decades. Rarely has scholarship in the four phases been part of a sustained conversation that would have aided in developing a coherent framing of digital constitutionalism. To that extent, the argument advanced by the authors is not invalid.

A related criticism relates to the use of the suffix 'constitutionalism' to describe initiatives of the private sector. Outlining a set of core normative minimums of constitutionalism,

[40]Pereira and Keller (n 38) 2665–2673.
[41]Ibid, 2649, 251–252. 266, 2676.

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Costello argues that only one of the criteria is met by initiatives subsumed under the rubric of digital constitutionalism.[42] The four minimum normative core of constitutionalism are: structural constraints of power; binding rules; clear, accessible and non-arbitrary enforcement of rules; and observance of fundamental rights.[43] Costello argues that, except for the last criterion, norms, rights and principles articulated by private actors, namely technology companies, do not fulfil the above core minimums of constitutionalism. By adding the suffix to what are otherwise contract-based, self-regulatory private policies of digital platforms, the argument goes, digital constitutionalists offer a false reassurance that private policies provide guarantees present only in traditional constitutional settings.[44]

Ordinarily, the foregoing criticisms are sensible. Digital constitutionalism has been, as already submitted, an evolving project. But much of the scholarly literature on the topic has been largely disjointed, with little conversation that would have otherwise aided in the formation of a conceptual core to what is now collectively referred to as digital constitutionalism. Some of the scholarship in phase III, particularly Celeste, sought to find common ground between the disparate uses of the word constitutionalism in dealing with questions around human rights, the rule of law and democracy in the digital context. But this remains an ongoing, unfinished endeavour. That means the effort to properly frame and conceptualise digital constitutionalism is a work in progress, but one – as I shall consider below – is also being frustrated by recent tendencies in the scholarship to deploy the terms in relation to almost every question at the intersection of law and technology.

Undeniably, the fragmentation in the scholarly conversation on the topic is also a result of the processes and initiatives that underpin digital constitutionalism. The digital bill of rights movement, which formed the basis for the current conceptualisation of digital constitutionalism, has largely been a momentary and sporadic project. Oftentimes, initiatives emerged in response to a particular scandal or legislative proposals that are thought to undermine human rights, the rule of law or democratic principles.[45] Barlow's popular Declaration, for instance, was launched in the wake of the adoption of the Communications Decency Act, which, in its earlier versions, curtailed free speech rights. This later led to the partial repeal of the Act by the famous *Reno v ACLU* judgement of the US Supreme Court.[46]

The Snowden debacle is another juncture where calls for and proposals on digital bills of rights reemerged. Shortly after the revelations, calls for and initiatives of bills of rights proliferated.[47] A memorable example is the call for a digital Magna Carta proposed by the inventor of the web, Tim Berners-Lee.[48] This proposal was shortly followed by a campaign to draft the Magna Carta through a crowdsourcing mechanism, and resulted in the launch of a 'contract the web' on 25 November 2019 on the occasion of the UN Internet Governance Forum in Berlin.[49] Not only was the Contract a set of nine high-level

[42]Costello (n 38) 336–338.

[43]Ibid.

[44]Ibid.

[45]For a critique on these aspects of digital bills of rights, see Kinfe Yilma (2017) 'Digital Privacy and Virtues of Digital Constitutionalism—Preliminary Thoughts', 25 *International Journal of Law and Technology* 115, 125–128.

[46]*Reno v ACLU et al* (96–511) (26 June 1997).

[47]For more on the post-Snowden resurgence of digital bills of rights, see Yilma (n 45) 118–125.

[48]See An Online Magna Carta: Berners-Lee Calls for Bill of Rights for Web (The Guardian, 12 March 2014) <https://shorturl.at/aHS32> Last accessed 12 April 2025.

[49]See Contract for the Web (2019) available at <https://contractfortheweb.org/> Last accessed 12 April 2025.

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principles addressed to governments, technology companies and citizens, but it appears to have faded into the background since.

In the wake of the recent advances in Artificial Intelligence (AI) research and the prominence of the Large Language Models (LLMs) such as ChatGPT, one sees a version of the bill of rights project emerging in the form of AI principles.[50] A series of initiatives that set forth principles for the ethical conception, design, operation and use of AI has proliferated in the past few years. AI principles can be taken to be the latest iterations of the digital bill of rights project, pursued by intergovernmental organisations, governments, technology companies and civil society groups.[51]

The foregoing examples illustrate the sporadic and momentary nature of the digital bill of rights movement. This state of affairs is bound to shape the ways in which the academic conversation around this movement develops. As highlighted above, the conversation over the past two decades evolved in a rather isolated and disjointed fashion, with almost every author approaching the 'movement' from her own conceptual and temporal silo. What connects scholarship on the topic is largely the label digital constitutionalism. This is the context that is missing in recent attacks on the conceptual coherence of digital constitutionalism. By attacking a rather fragmented debate which is yet to mature into some conceptual or ideological form, critics base their commentaries on the assumption that digital constitutionalism is a settled and well-established doctrine, concept or project. Critiques expected more from a project that is still in a state of flux. What best describes the current state of the digital constitutionalism project is an attempt to make sense of the rather fragmented, momentary and disparate effort to articulate constitutional rights, principles and governance norms in the form of mainly bills of rights.

It is, however, vital to point out that attempts have recently been made to systematically conceptualise and offer a unified elucidation of digital constitutionalism.[52] Such efforts are the first steps in addressing some of the valid points made by critics. Part of this attempt is through the formation of a research collective called the Digital Constitutionalism Network.[53] While the Network was established only a few years ago, it stands to offer a platform where a common conceptual ground on divergent articulations of digital constitutionalism can be laid. Through workshops and conferences, the Network could bring digital constitutionalists of all phases, and their critics, to facilitate informed and sustained conversation. But as it currently stands, digital constitutionalism is essentially simply a nomenclature for an ongoing and inchoate discourse.

Such an inchoate state of the digital constitutionalism discourse is, however, lending weight to what one might term a tendency to turn it into what it is not, and perhaps should

[50]Jessica Fjeld et al, 'Principled AI; Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI', Research Publication No. 2020–1 (2020); Luciano Floridi, *The Ethics of Artificial Intelligence: Principles, Challenges, and Opportunities* (Oxford: Oxford University Press, 2023).

[51]See, e.g., Beijing AI Principles (25 May 2019) <https://shorturl.at/iLNQ1>; The Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People (White House, October 2022) <https://shorturl.at/abjn1>; Ethics Guidelines for Trustworthy Artificial Intelligence (High-Level Expert Group on AI, 8 April 2019) <https://shorturl.at/ipsQ4>; Six Principles for Developing and Deploying Facial Recognition Technology (Microsoft, December 2018) <https://shorturl.at/bcjvJ>; The Toronto Declaration: Protecting the Right to Equality and Non-discrimination in Machine Learning Systems (Access Now and Amnesty International, 16 May 2018) <https://shorturl.at/mnEGQ> Last accessed 12 April 2025. For more on this, see Kinfe Yilma (2025) 'From Principles to Process: The Principlist Approach to AI Ethics and Lessons from Internet Bills of Rights', 5 *AI and Ethics* 1–13.

[52]See, e.g., Celeste (n 30).

[53]See <https://digitalconstitutionalism.org/> Last accessed 12 April 2025.

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not end up being. As one commentator rightly points out, there is a propensity to frame digital constitutionalism as the 'theory of everything'.[54] This takes the form of using the label to explain the proliferation of legislative and regulatory initiatives in Europe. As shown in the preceding section, some authors declare the rise of 'European digital constitutionalism' with the adoption of or the launching of new European 'acts' on AI, data governance, and digital markets. Likewise, the creation of Meta's Oversight Board is discussed under this framing of digital constitutionalism.

To be sure, while such regulatory measures are not digital constitutionalism initiatives, the EU has launched its own distinct digital constitutionalism initiative. Signed by heads of all three EU bodies, it issued a Declaration that lays down digital rights, principles and governance norms with significant resemblance to, let us say, civil society bill of rights initiatives.[55] While the EU's Declaration of Digital Rights and Principles is a digital bill of rights, the recent acts are pieces of legislation whose origins trace back to the bill of rights movement. The acts are products of the Declaration or resultant effects of other bills of rights. A more concrete example is EU's AI ethics guidelines, which, as shall be considered further below, preceded the AI Act.

By describing what essentially are products of the digital constitutionalism project as the rise of digital constitutionalism, this overly broadens the conceptual frame of constitutionalism. In the process, this frustrates the effort to lay the conceptual foundations of digital constitutionalism. But importantly, this elasticity in using the constitutionalism label validates the criticisms discussed above. The term's intuitive appeal is sometimes mentioned to explain the recent tendency to subsume socio-legal issues in the digital domain under digital constitutionalism. Arguably, this risks perpetuating the palpable pluralism in the framing of digital constitutionalism and throws into doubt the prospect of a coherent and internally consistent conceptualisation of digital constitutionalism.

More than private discourse

A common starting point in almost all critiques of digital constitutionalism is that it represents a misplaced moniker for human rights-laced governance initiatives of technology companies. No explicit references to or acknowledgment of initiatives pursued by actors outside the private sector are made. Costello, for instance, bases much of her critical account through the lens of Meta's Statement of Rights and Responsibilities and the Oversight Board.[56] She argues that while these initiatives are billed as constitutional and do use constitutional language, they fail to meet the core normative minimums of constitutionalism.[57] Far from a constitutional structure, Costello argues that such initiatives are best referred to as private policies. That way, the author appears to interpret digital constitutionalism primarily, if not exclusively, as a psudoconstiutionalist project of technology companies who deploy constitutional language to enhance legitimacy as well as profits.

This reading of digital constitutionalism is shared either explicitly or implicitly by other detractors of digital constitutionalism. Terzis's rather harsh criticism revolves

[54]Terzis (n 38) 8.

[55]European Declaration of Digital Rights and Principles for the Digital Decade, COM(2022) 28 final (26 January 2022) <https://shorturl.at/n6iF6> Last accessed 12 April 2025.

[56]Costello (n 38) 343–348; see also Angelo Golia (2024) 'Critique of Digital Constitutionalism: Deconstruction and Reconstruction from a Societal Perspective, 13 *Global Constitutionalism* 488, 498.

[57]Ibid, 344.

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around the alleged 'skewed narrations, fallacies' and oversimplification by digital constitutionalists of the ways in which private power is established, wielded and exerted as against users by corporations.[58] Put simply, his concern is that digital constitutionalism fails to understand how corporations historically assumed enormous power, which, in a similar measure, is reoccurring in the digital space. To be sure, Terzis critique draws mainly upon Gregorio's expansive and problematic framing of digital constitutionalism. That means he does consider the plethora of regulatory initiatives at the EU in mounting criticisms of digital constitutionalism. To that extent, his account – unlike Costello's – does not expressly present digital constitutionalism as private policy.

Portrayal of digital constitutionalism as private policy also runs in Pereira and Keller's critical account. Indeed, Pereira and Keller's criticism of digital constitutionalism takes two forms. One is the perceived conceptual disorder that followed the term's perceived contradictory and multiple applications and references in the literature. The second criticism relates to the risk of legitimising the concentration of power in the hands of technology companies by dubbing their human rights language as constitutionalism.[59] That is where one reads the apparent focus on private sector attempts at constitutionalising self-regulatory measures. Unlike Terzis' account, Pereira and Keller consider the ways in which scholarship in phase III frames digital constitutionalism as a framework for pluralist sources of constitutionalism. For instance, one sees references to Brazil's Marco da Civil, which is often considered, or at least at its inception, as an example of a national digital bill of rights.[60]

The authors' focus on the impact of the use of the suffix constitutionalism outside the traditional State-based framework of constitutional law suggests that the focus is on private sector-based initiatives. But this approach of interpreting digital constitutionalism only or primarily through the lens of the private sector is deeply reductive. In inspiring the most recent reference to multi-level constitutional initiatives, the private sector – that is technology companies – were just one among a broad array of actors. Digital constitutionalism, which finds normative expression in the form of digital bills of rights, has been a multi-level and multi-stakeholder project in which, beyond private actors, States and intergovernmental organisations as well as civil society groups played a role.

The focus in the recent body of critical scholarship on private sector initiatives is not surprising given the emphasis given to private power in digital constitutionalism scholarship. As shown in the second section, phase II – where the term digital constitutionalism was first coined – fashioned it as a bulwark as against private power. This was not, however, reflected in digital bill of rights initiatives of the time, where both State and private power received fairly equal attention. Thus, multi-stakeholderism has been a constant feature of digital constitutionalism. By downsizing the framing of digital constitutionalism to the initiatives of technology companies, critics fail to consider the complex structure of initiatives that make up digital constitutionalism.

Over the years, variants of such bills have emerged at the national (e.g. Brazil's Marco da Civil and Nigerian Digital Rights and Freedom Bill), regional (African Declaration on Internet Rights and Freedoms and European Declaration on Digital Rights and Principles) and international levels (Charter of Human Rights and Principles for the Internet, Article 19's Universal Declaration of Digital Rights). But this also means that the identity

[58]Terzis (n 38) 2, 4–10.

[59]Pereira and Keller (n 38) 2677–2678.

[60]Ibid, 2666–2667; see also Carlos Souza et al (2017) 'Notes on the Creation and Impacts of Brazil's Internet Bill of Rights', 5 *The Theory and Practice of Legislation* 73.

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of each document's author is diverse. Brazil's legislation, which drew considerable input during its development from non-state actors, is essentially a State-led initiative.[61] So was Nigeria's bill, which, however, failed to obtain presidential assent after adoption by the legislature.[62] States were thus one stakeholder in the complex web of constitutionalisation of the digital space.

Civil society groups have been the primary source of digital bills of rights. A survey by Redeker et al found that over two-thirds of digital bill of rights initiatives were proposed by civil society groups.[63] Strategically aimed as advocacy tools, civil society initiatives have had a significant impact not only in inspiring initiatives by other stakeholders but also in spurring regulatory proposals, including in Europe, which are inaccurately presented – as already submitted – as evidence of European digital constitutionalism. Article 19's Universal Declaration is one of the most recent examples of civil society-led initiatives that served as the basis for the conceptualisation of digital constitutionalism. Intergovernmental organisations at the regional and international levels likewise have contributed to the digital bill of rights movement. Good cases in point are the EU's Declaration on Digital Rights and Principles and the African Human Rights Commission's Declaration of Principles on Freedom of Expression and Access to Information.[64]

As the above highlight suggests, the normative sources and proponents of digital bills of rights paint a rather complex picture of digital constitutionalism. Private actors have been contributors to the digital bill of rights movement alongside other stakeholders, albeit to a lesser extent. This stands in contrast to the position of critics who not only appear to see initiatives of private digital powers as the sole normative sources of digital constitutionalism but also attach much weight to the constitutional role of the initiatives. As Rodotà – a pioneer scholar of digital bills of rights – rightly cautioned us, (digital) rights activism championed by Internet corporations is likely to be clouded by their business priorities.[65] Thus, constitutionally styled initiatives of corporations should be taken with a grain of salt, but it is also vital to consider where those, in the grand scheme of things, sit in the normative structure of digital constitutionalism.

Further painting a rather complex picture of digital constitutionalism is that private actors contributed to the development of multistakeholder digital bill of rights initiatives. An example is Contract for the Web, a culmination of, as noted above, Berners-Lee's proposal for digital Magna Carta. Among the biggest technology companies that contributed to this crowd-sourced and multi-stakeholder initiative are Google and Microsoft.[66] This further calls for nuance in our framing of the role that digital platforms play in the constitutionalisation of the digital space. Digital platforms not only unilaterally declare allegiance to constitutional rights and principles but also present, in certain cases, themselves to scrutiny involving other actors such as governments and civil society groups.

[61]See Souza et al (n 60) 75–82.

[62]See Paradigm Initiative Supports Digital Rights and Freedom Bill as Nigeria Moves Toward Strengthening Human Rights Online (October 2024) <https://shorturl.at/tZfY6> Last accessed 12 April 2025.

[63]Redeker et al (n 26) 312–313; see also a database of digital constitutionalism initiatives compiled by the Digital Constitutionalism Network at <https://digitalconstitutionalism.org/database/?showAll=1> Last accessed 12 April 2025.

[64]EU Declaration (n 55); Declaration of Principles (n 23).

[65]Stefano Rodotà, 'Data Protection as a Fundamental Right' in Serge Gutwirth et al (eds), *Reinventing Data Protection?* (Dordrecht: Springer, 2009) 82.

[66]See details at <https://contractfortheweb.org/about/> Last accessed 12 April 2025.

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Overall, critics are right to point out the risks associated with giving credence to promises of digital platforms expressed in half-hearted constitutional language. But by reducing digital constitutionalism exclusively to these private sector initiatives, or 'private policy' as Costello calls them, critics undermine the validity of their sharp criticisms. One way this plays out is that their critical takes do not account for the constitutional role and value of digital constitutionalist initiatives advanced by other actors, particularly civil society actors. This is a remarkable lapse in any treatment of digital constitutionalism because tangible progress, albeit gradual, has been attained through the catalytic and contributory role of the digital bill of rights. I return to consider this later in this section. That said, framing private sector progressive standards in constitutional terms is not necessarily problematic. It is indeed in line with one of the defining features of the digital constitutionalist initiatives, as shall be discussed in what follows.

Exhortatory discourse

Critics fail to realise not only the inchoate state of the discourse on digital constitutionalism but also that their criticisms are not sufficiently informed by the true origins, underlying objectives and normative character of digital constitutionalism initiatives. A common preoccupation of many detractors of digital constitutionalism is the concern that something that does not possess, or should not possess, the character of constitutionalism is being called as such. As highlighted above, Costello goes to great lengths to show how digital constitutionalism initiatives, particularly those advanced by technology companies, fail to possess the core normative minimums of constitutionalism. Likewise, Pierera and Keller object to the prospect of a host of multi-level initiatives in the form of digital bills of rights, claiming the revered nomenclature of constitutionalism. In their own words:

> In the first line of critical assessment, the question to be tackled involves mainly the theoretical viability of appropriating the symbolic credentials of modern constitutionalism to describe and analyse *political and social phenomena that take place outside the context of nation-states.* […] The multiple applications of digital constitutionalism have concurred to hollow out and trivialise the idea of constitutionalism itself, especially insofar as they may be conflated with the ideas of industry regulation and even of self-regulation.[67] [Emphasis Added]

For Pierera and Keller, the involvement of non-state actors such as technology companies makes the output devoid of any constitutional character. At the centre of this concern, then, is the multi-level structure of digital constitutionalism efforts. While the authors specifically mention initiatives of the private sector, the argument seems also to be targeted at initiatives that are advanced by other non-state actors, such as civil society groups. This is a point worth highlighting, given the significant role, as already submitted, that civil society groups at various levels played in the digital bill of rights movement.

Now this leads one to raise the question of whether attaining the status of constitutionalism in the traditional sense of the term has been an object of the digital bill of rights movement. The answer to this would have to take into account, again, the diversity of sources in digital constitutionalism. With respect to State-led national initiatives, the

[67]Pereira and Keller (n 38) 2674.

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objective is obviously to introduce laws that legislate digital rights and freedoms as well as governance norms. Brazil's Marco da Silva is an example. Not only that it recognise widely advocated digital rights such as the right to Internet access, but it also sets out governance norms on topics such as net neutrality and intermediary liability.[68] Initiatives of technology companies that introduce rules that define user rights and governance arrangements are a form of bylaw aimed essentially as a private governance framework. But these two forms of digital constitutionalism initiatives constitute a small fraction of the broader movement.

Much of the digital constitutionalism effort has been the preserve of civil society groups, particularly those working in the field of digital human rights. The reference civil society groups would include, in this context, a broad range of actors that do not fall into the category of either State actors or the private sector. This would include academia among other stakeholder groups. In line with the mandate of such organisations to advocate in the public interest, the objectives, normative character and strategies of digital constitutionalism initiatives of civil society groups are different from the above two forms of digital bills of rights. An archetypal civil society initiative would seek to shape and influence public policy, lawmaking and industry practices. Redeker and colleagues' survey has shown that the majority of digital constitutionalism initiatives are issued by civil groups with the stated objective of influencing policy and legislation.[69]

What then best describes the normative character of such initiatives is that they are advocacy instruments. But advocacy is intrinsically aspirational. Once a particular cause is advocated for, there cannot be a guarantee that the sought-after changes will be acted upon by either actors in the public or private sector. That makes them aspirational, seeking to bring about desirable socio-economic or political change through targeted exhortations.[70] By and large, digital constitutionalism initiatives have thus been an exhortatory discourse. Article 19's initiative for a Universal Declaration of Digital Rights offers an instructive example. In launching this initiative inspired directly by the Universal Declaration of Human Rights, its authors argue that there is a 'need to maintain the original visionary and inspirational approach of [civil society and digital communities] community'.[71] Alluding to some of the far-reaching rights proposed in the Declaration, such as the 'right to hack' and hence its aspirational object, the authors state – tongue-in-cheek – that the Declaration could be 'distressing' to readers with a legal background.[72] This attests to the essentially exhortative nature of civil society initiatives.

This point is vital in the effort to introduce some nuance to the above-mentioned criticisms of digital constitutionalism. The suffix constitutionalism to such initiatives should be considered without losing sight of the hortatory nature of the initiatives. In deploying constitutional or human rights language and rhetoric, it should not be considered as an attempt to claim the status that constitutionalism holds. On account of the digital bill of rights central feature as an advocacy movement, it should be seen as a constitutional aspiration. That then would mean that the question of whether these initiatives have attained or fulfilled the stringent criteria of constitutionalism is misplaced.

One cannot, of course, fault critics of digital constitutionalism for this conceptual misrepresentation. Scholars of digital constitutionalism, particularly those who belong to

[68]See Marco Civil (n 15) Chapter II, Chapter III, Sections I & III.

[69]Redeker et al (n 26) 308–312.

[70]Ibid, 306.

[71]The Universal Declaration of Human Rights (Article 19, 2017) <https://shorturl.at/Mj1qS> Last accessed 12 April 2025.

[72]#InternetOfRights: Creating the Universal Declaration of Digital Rights (Article 19, 2017) <https://shorturl.at/Mj1qS> Last accessed on 12 April 2025.

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the third phase, are equally, if not mainly, to blame. In failing to put this nuance in the framing of digital constitutionalism, they made the whole discourse vulnerable to and an easy target for critics who might not have considered the true origins and complex normative structure of initiatives that underpin it. Thus, acknowledging the fundamentally aspirational and exhortatory nature of digital constitutionalism initiatives is central to making sense of constitutionalism in the digital context.

I should, however, qualify this broad framing of digital constitutionalism with two caveats. As an exhortatory aspirational discourse, digital constitutionalism initiatives have not (yet!) earned the status of constitutionalism. That does not, however, mean they are inherently ineligible for or incapable of attaining it. Like any aspiration, it might be attained gradually but in rather intricate forms. One plausible instance is through dynamic and iterative processes of norm cross-fertilisation by which norms, rights and principles often anchored in digital constitutionalism initiatives may form part of formal processes of constitutional design. That way, digital bills of rights might indeed earn the label digital constitutionalism. This is not, of course, a far cry from reality. A number of countries have either included in their constitutions or recognized through constitutional courts digital rights, particularly the right to Internet access. Examples include Greece, where Internet access is a constitutionally enshrined human right as well as France and Costa Rica, whose respective constitutional courts have recognized the right to Internet access.[73] Arguably, this could be taken to signify the gradual constitutionalisation of digital bills of rights and hence digital constitutionalism.

The second caveat is that anchoring advocacy on constitutional grounds can also prove reasonably effective. Albeit incrementally, the objectives of shaping law, policy and industry practices are fulfilled to a degree, perhaps due to the constitutionally aspirational formulation of digital constitutionalism initiatives. What lies at the heart of all this, then, is that digital constitutionalism has not only been an exhortatory discourse but also an essentially gradualist discourse. For that reason, digital constitutionalism is better understood as a gradualist discourse. What follows turns to consider at some length this defining feature of digital constitutionalism by which concrete changes are brought about gradually.

Gradualist discourse

One of the recent critiques of digital constitutionalism focuses on the project's lack of ambition in the choice of tools needed to attain its stated objectives of upholding rights and constraining power. Zalnieriute argues that the pursuit of soft legalisation by digital constitutionalists undermines the object of constraining ever-expanding corporate as well as State power in the digital space.[74] The concern is that little or no effort is made to introduce binding legal rules that would bring about meaningful change by going beyond

[73]See Constitution of Greece (May 2008) Article 5A(2) ('All persons have the right to participate in the information society'); Constitutional Council of France, Decision No 2009–580 (June 2009) Para 12 ('The free communication of ideas and opinions is one of the most precious rights of man […] and the this freedom implies freedom to access [public communication services]) The English version of the judgement is available at the Council's website at <https://shorturl.at/0qKHI>; Constitutional Court of Costa Rica (July 2010) Para V ('The Constitutional Court concludes that the verified delay in opening the telecommunications market has [violated the constitutional right of access to new information technologies]) Translation by Andreaz Guadamuz (April 2012) available at <https://shorturl.at/k6f88>; Spanish version of the judgement is available at <https://shorturl.at/JR5K8> Last accessed 12 April 2025.

[74]Zalnieriute (n 33) 230–235.

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due process and transparency standards of soft law.[75] The author dubs the focus on such standards as a means to counter unaccountable digital power as 'procedural fetishism'.[76] She writes:

> Lacking enforceable constraints and obligations for tech companies in national or international law, digital constitutionalist efforts have therefore often been forced to rely on self-regulation through which tech companies assume responsibility for their own rules or practices and oversee (sic) any sanctions for noncompliance.[77]

To address this soft law problem, the author proposes a series of radical reforms. To be sure, most of the proposed reforms are not new. One of these ambitious reforms is the adoption of an international treaty that imposes binding (data privacy) obligations on technology companies.[78] The question of why the treaty is restricted to address privacy aside, this argument is problematic on many levels. For one, the proposed international treaty is highly unlikely to materialise for many reasons. Apart from the inevitable protracted nature of treaty processes, the prospect of subjecting corporations to international legal obligations is close to impossible. One need not look anywhere other than the several attempts to impose binding human rights obligations on transnational corporations over several decades. Opposed not only by such corporations but also by powerful States such as the US, where these companies are incorporated, they remain beyond the reach of international law.

The most recent attempt has been made by the Human Rights Council, which established a Working Group in 2014 to draft an 'international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[79] The Working Group then presented a zero draft which, in its first version, appeared to impose direct obligations on corporations, but this was later abandoned in subsequent versions of the text due to strong opposition from powerful States and corporations.[80] The delegate of the UK, for instance, expressed scepticism that the text can gather sufficient political support, while the US representative not only maintained objection to the process altogether but also called on the Working Group to abandon it in favour of alternative approaches.[81]

This offers a glimpse of a future that any legislative initiative that imposes obligations on transnational corporations, such as technology companies, awaits. Ten years on, the

[75]One should however point out the contradiction in the author's construction of the argument. As highlighted above, the author views binding rules adopted at the national and regional levels such as EU acts within the framework of digital constitutionalism. See Zalnierute (n 33) 231–232.

[76]Zalnieriute (n 33) 235–253.

[77]Ibid, 233.

[78]Ibid, 253.

[79]Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights, HRC Res 26/9 (14 July 2014).

[80]Elements of the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (September 2017) Sec 3.2 <https://bit.ly/2fF5crq> Last accessed 12 April 2025. See also Doug Cassel, 'The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2018) 3 *Business and Human Rights Journal* 277, 281.

[81]Annex to the Report on the Seventh Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, UN Doc A/HRC/49/65 (January 2021) paras 22–23.

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draft text is yet to be finalised, let alone closer to adoption.[82] That is also indicative of the inherently protracted nature of the treaty process, which makes it less ideal for the highly dynamic nature of the digital space, where more proactive and agile governance measures are needed. That makes the use of a soft law approach pragmatic. The problem with radical claims of the sort propounded by Zalnieriute is that they risk sounding more like polemically positioned, ideology-laced activism. This would transform an otherwise innocuous aspirational constitutional discourse into a controversial ideological battle-ground. Actors with a stake in the discourse, including technology companies, would find the incentive and opportunity to dispute or resist desirable changes in the protection of human rights and freedoms in the digital space.

Another problematic aspect of Zalnierute's contention relates to the little normative value she attaches to soft law in digital constitutionalism. Looked at closely, her point discounts soft legalisation in two ways. One is overlooking the important quality of soft law in charting the process towards hard legalisation. In international law, soft law has been a way station towards hard law in multiple domains.[83] Indeed, some of the regional regulatory initiatives discussed by the author – and other neo-digital constitutionalists discussed in phase IV – are, to a degree, culminations of discursive processes that started in soft law form. Thus, soft law worked in practice through a gradual and incremental process of legalisation to rein in the unprecedented power of technology companies.

As aspirational advocacy instruments, civil society-led initiatives, as already discussed, seek to influence policy making at various levels. In that sense, progressive legislative measures should be seen, in certain cases, as results of the advocacy efforts of civil society groups. Of course, empirically establishing the causal link between the adoption of a particular regulatory measure of a particular State or intergovernmental organisation with digital bills of rights is difficult. Perhaps this offers a fertile ground for further research. But an instance where a major regulatory measure followed a soft law measure can be found in the context of a digital constitutionalism initiative of an intergovernmental organisation, i.e., the EU.

Before the proposal for the AI Act was tabled before the EU's legislative bodies in 2021, a high-level expert group was established with a mandate, inter alia, to draft AI ethics guidelines. The final version of the guidelines was launched after public consultation on the initial draft in 2019.[84] In terms of structure and objective, the guidelines resemble a typical digital bill of rights. Recall here the point made above that AI principles constitute the new generations of digital bills of rights. It is also interesting to note that the Act refers to the EU Declaration of Digital Rights and Principles, which, as noted above, is an example of a digital bill of rights.[85] As a soft law, the guidelines carry no legally binding force. But a few years later, the guidelines served as a starting point for the draft AI Act.[86]

[82]Updates regarding the treaty process are available at <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc> Last accessed 12 April 2025.

[83]See Leo Gross, *Essays on International Law and Organization* (Dordrecht: Springer 2014) 176; see also Hilary Charlesworth, 'Law Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press 2012) 198.

[84]Ethics Guidelines for Trustworthy AI (High-Level Expert Group on Artificial Intelligence, 2019) <https://shorturl.at/ojQm5> Last accessed 12 April 2025.

[85]Regulation (EU) 2024/1689 of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) 2024/1689 (12 June 2024) Recitals 7.

[86]Explanatory Memorandum, Proposal for Regulation of the European Parliament and of the Council Laying Down harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) COM (2021) 206 final (21 April 2021) Para 3.

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This is also reflected in the adopted version of the Act, where references are made extensively to the guidelines.[87] When one considers the large number of inputs and feedback given to the high-level expert group on the first draft,[88] one cannot rule out the possibility that civil society input into the development of the guidelines. And civil society groups often use bills of rights as a means of informing the normative direction of legislative initiatives.

Contrary to Zalnieriute's claim, the foregoing illustrates that soft law as a cornerstone of the digital constitutionalism project wields a significant potential in fulfilling the objectives of upholding rights, constraining power and setting governance norms. But it does so through gradual discursive processes that bear fruit over a period of time. Such discursive processes admittedly take time to yield results, but that is much shorter than ambitious international treaty processes that often face difficult political gridlock. That is also the reason why digital constitutionalism should be viewed as a gradualist discourse that seeks to realise constitutional aspirations through incremental steps taken at various levels, and involving different stakeholders.

Once framed as a gradualist discourse, the role of digital constitutionalism efforts in attaining the goals of upholding rights and constraining powers can be put in a clearer context. This role would essentially be charting a discourse with clear constitutional aspirations that could only be fulfilled over time through incremental and multi-level efforts mediated by States, civil society groups, the private sector, intergovernmental organisation and other stakeholders. That would also portray the whole project of digital constitutionalism in a manner that does not invite unreasonable expectations, and hence the resultant criticisms.

Conclusion

Digital constitutionalism has gained unprecedented popularity in the past few years. Journal articles, special issues, monographs and edited collections that carry the term have become commonplace. Rightly so, this has also generated a body of scholarship that interrogates the normative and conceptual coherence of digital constitutionalism as well as the tendency to call almost any regulatory intervention in the digital space as such. Inspired by this debate, this article sought to enrich the conversation by reimagining the way how digital constitutionalism should be presented and interpreted in the literature in two respects.

First, it offered a contextualised narration of the ways in which the use of digital constitutionalism evolved in the past two decades or so. By putting the evolution of digital constitutionalism in four phases, the article sought to demonstrate the disjointed nature of the scholarly conversation. This offers an important background to the second objective of this article, which is to bring some nuance to the ways in which critics approached digital constitutionalism. In this article, I considered two common threads in the recent critiques of digital constitutionalism. One relates to the use of the suffix 'constitutionalism' to describe initiatives that do not possess one or more of the elements of traditional constitutionalism. The second thread is that critics tend to deconstruct and interpret digital constitutionalism, relying largely on some of the problematic conceptualisations of digital constitutionalism that emerged in phase IV. As shown in this article, there is a tendency to call regulatory

[87]Regulation (EU) 2024/1689 (n 85) Recitals 7.

[88]Details on the consultation process are available at <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> Last accessed 12 April 2025.

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initiatives of the EU as well as self-regulatory measures of digital platforms as reflections of the rise of digital constitutionalism. Bringing nuance to these criticisms was the second objective of this article by uncovering the role of digital bills of rights in the emergence of digital constitutionalism in its relatively coherent form.

One cannot dispute the critique that initiatives discussed under the rubric of digital constitutionalism lack key elements of constitutionalism. As shown in this article, digital constitutionalism is, at its core, a collective label for a series of initiatives often called digital bills of rights advanced at various levels by various actors. While certain initiatives are launched in the form of legislation at the national level, others are proposed as a form of soft law by regional and international actors. Among proponents of digital bills of rights are academics, States, technology companies and civil society groups. But forming a central part of the digital bill of rights movement are civil society groups who launched a series of initiatives that seek to uphold human rights, or digital rights, and set limits to the acquisition and exercise of power in the digital space. This defining feature of what came to be called as digital constitutionalism readily fails to fulfil, to use Costello's words, the core minimums of traditional constitutionalism.

To that degree, the criticism is warranted but calls for some nuance so that the full meaning and role of digital constitutionalism can be made clearer. For the most part, scholars who study digital bills of rights – namely, those in phase III – sought to call the disparate and multi-level digital constitutionalism as a means of capturing the underlying objective of the initiatives. Beyond influencing policy, law and industry practices, the digital bills of rights movement has been an aspirational project. The term digital constitutionalism should also be considered against this characteristic feature of digital bills of rights. That means achieving the most revered status, or at least objectives, of constitutionalism has been the aspiration of the proponents of the digital bill of rights movement. In that sense, digital constitutionalism should be understood as an inchoate discourse that seeks to attain or emulate the values, norms and principles traditionally carried under constitutionalism.

Not only was the digital bill of rights project aspirational, but also that it was also essentially a discourse, albeit disjointed, that is being held among multiple stakeholders over an extended period of time on the issue of digital rights and governance through legal texts of various forms and juridic effects. Through such conversation on issues of common concern, informal and gradual cross-fertilization of norms, changes in law and policy take place. In that sense, digital constitutionalism is not a concept (and certainly not an ideology) in the strict sense of the term. Framing what is essentially a discourse as a concept or ideology is partly liable for the recent sustained attack on the epistemic as well as juridical value of digital bills of rights, which form the foundational basis on digital constitutionalism. As argued in this article, the most pertinent way to frame digital constitutionalism is as an inchoate, aspirational and gradualist discourse being held not just by technology companies – as wrongly interpreted by some critics – but also by other State and non-state actors.

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