

Geometry of Power(s) in Digital Context: A Constitutional Perspective

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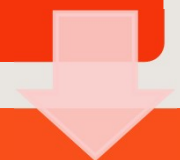
FINDINGS



Starting points...




Does a change in the relevant technological environment lead to a significant impact on judicial protection for fundamental rights?



What is the impact of digital technologies on the relationship between judicial power and political power?



Which are the new challenge for constitutional law in the algorithmic society? And what about public power and private powers?



Which new geometry of powers is it possible to define in the algorithmic society?



The United States

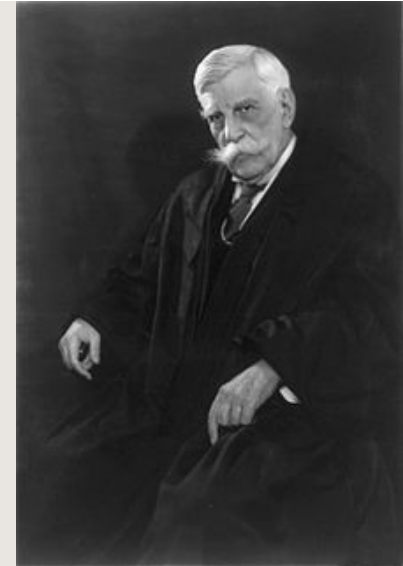
First Amendment (1791)

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the



Marketplace of ideas

The emergence of truth is the result of the public confrontation of **different points of view**, no matter how offensive, wrong or inadequate they may be



“the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out”
(Abrams v. United States, 250 US, 616, 630, 1919)

Art. 10 ECHR

(2). The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of:

national security

territorial integrity or public safety

for the prevention of disorder or crime

for the protection of health or morals

for the protection of the reputation or the rights of others

for preventing the disclosure of information received in confidence

or for maintaining the authority and impartiality of the judiciary

Freedom of expression in Europe

Art. 52 - EUCFR

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Judicial reactions



More
restrictive



More
protective

The US scenario

Reno v. ACLU (1997)

Radio and television, unlike the Internet, have received the most limited First Amendment protection because warnings could not adequately protect the listener from unexpected program content.

On the Internet, the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material

The US scenario

Packingham v. North Carolina (2017)

it is cyberspace – the “vast democratic forums of the Internet” in general, and social media in particular’



The European scenario

ECtHR, Pravoye Delo and Shektel (2011)

The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press.

Therefore, the policies governing reproduction of material from the printed media and the Internet may differ: the latter undeniably have to be adjusted according to the technology's specific features to secure the protection and promotion of the rights and freedoms concerned

Transatlantic Approaches to Speech

US

- «The paramount right within the American constellation of constitutional right»
- Very strict scrutiny on the conditions that constitute the legal grounds of limitations of FoE: a quasi-absolute right
- In the age of the Internet, a further expansion of the protection granted to FoE in the non-digital environment

Europe

- As opposed to the US view, European courts took a quite restrictive approach
- Freedom of expression enjoys protection as fundamental right «among the others» (non absolute right)

Geometry of Powers

Geometry in the
world of atoms



The vertical model

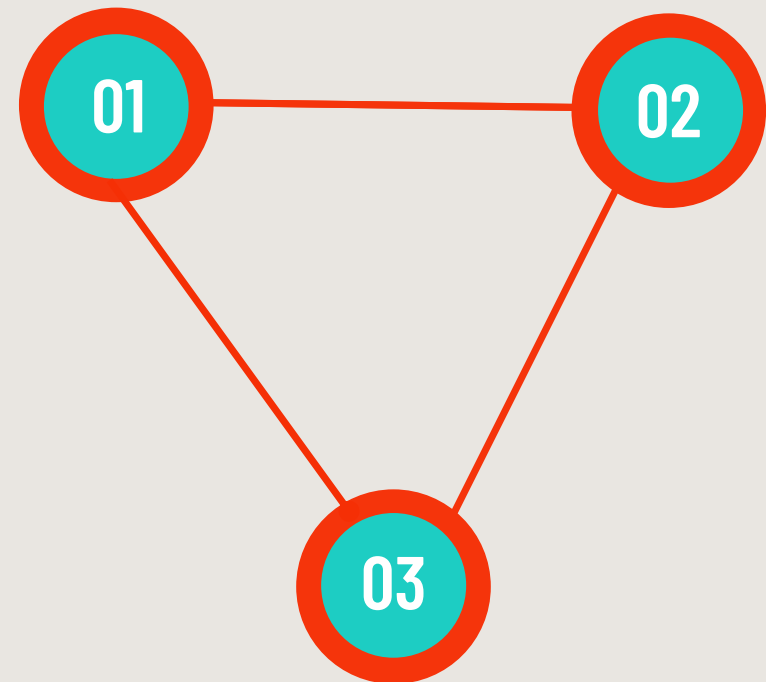
Moving forward...

How to rethink this triangle?

Which new geometry of powers is it possible to define in the algorithmic society?

Governments

Individuals



Intermediaries

Jack M. Balkin, 'Free Speech is a Triangle' (2018) 118 Columbia Law Review 2012

A New Geometry?

The shift of
paradigm



Public



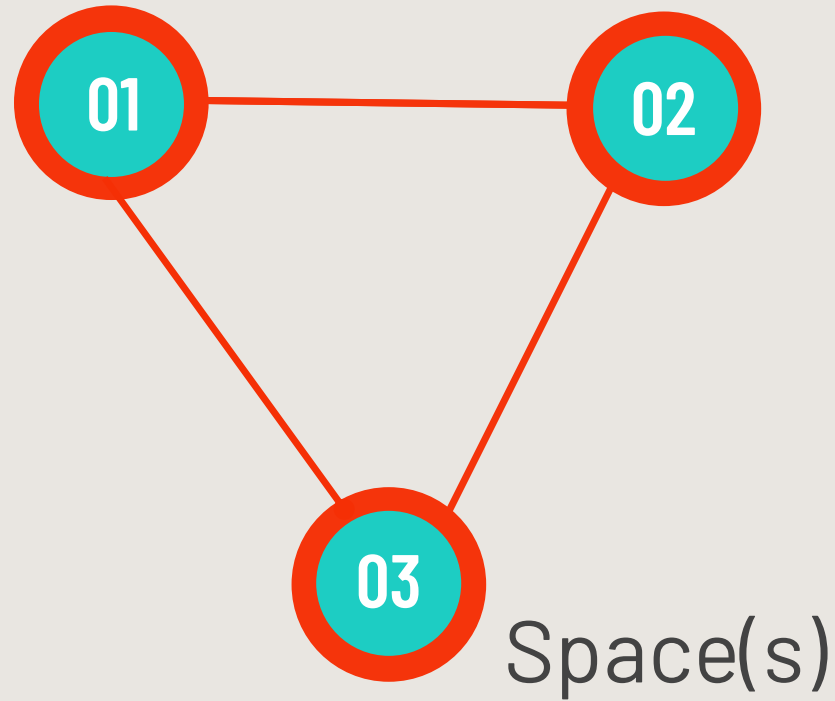
Private



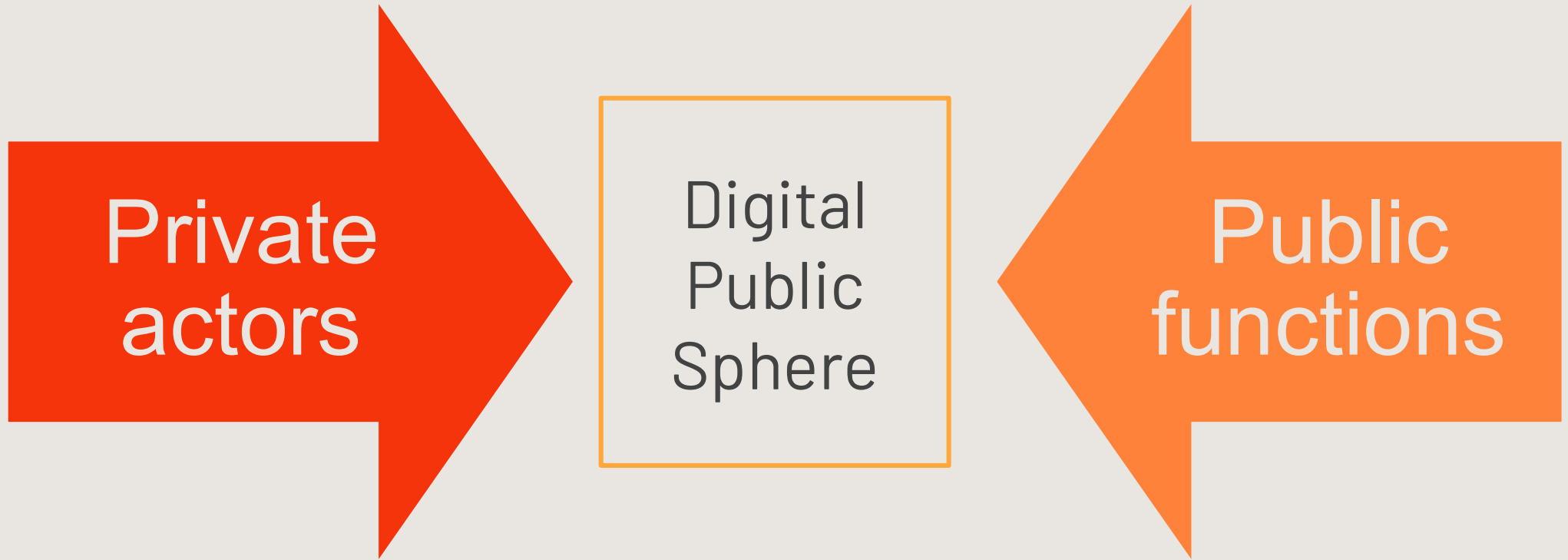
Geometry of Powers

Values (rights)

Actors



A New Geometry?



Private actors as competing forces for public actors



A Long Time Ago



Digital Constitutionalism



An appealing notion to explain
the current **constitutional
moment**

**Not refoundation but expansion of
constitutionalism in the digital age**



Digital Constitutionalism



Synchronic and descriptive value:
Identifying the challenges and opportunities
for constitutionalism in the digital age



Programmatic and normative value:
Defining the reactions and transformations
of constitutionalism to the digital age

Geometry of Powers



Geometry in the
algorithmic society



The horizontal model



Digital Constitutionalism

The path of European Digital Constitutionalism

1990-2010

01

Digital Liberalism

Judicial Activism

02

2010-2015

2015-2021

03

Digital Constitutionalism,
European fortress

A New Phase?

04

Transatlantic Geometry



United States (1996)
«the twenty-six words that
created the internet»

European Union (2000)
digital minimalism and
regulation



Her Majesty Antitrust



Transatlantic Geometry

The reason for a shift
(and transfiguration)

Power and
algorithms

Lessig
reloaded

Antitrust
sunset



Reaction and Remedies Transatlantic Assymetry

Reactions and remedies

The untouchable State action doctrine

Normative value of metaphoric language
as a possible solution?

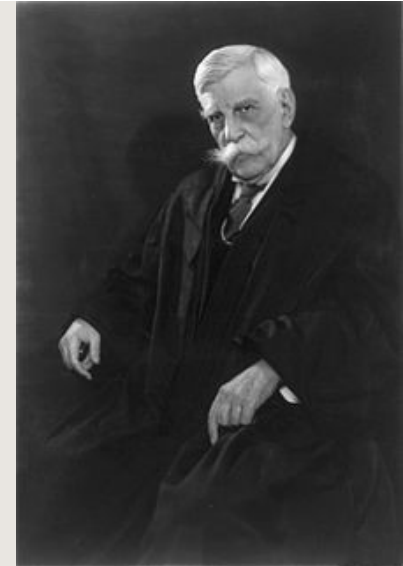
Risks of confusion

A laboratory of hybridisation

Facebook Oversight Board

Marketplace of ideas

The emergence of truth is the result of the public confrontation of **different points of view**, no matter how offensive, wrong or inadequate they may be




“the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out”
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Digital space: descriptive or normative value



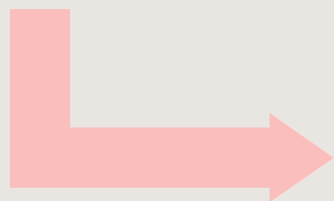
While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ [...] and social media in particular. [Justice Kennedy, *Packingham v. North Carolina*, 2018]



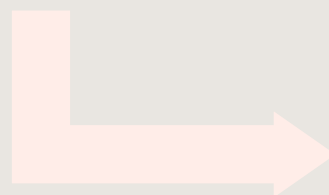
Reaction and Remedies



Fragmentation



Horizontality

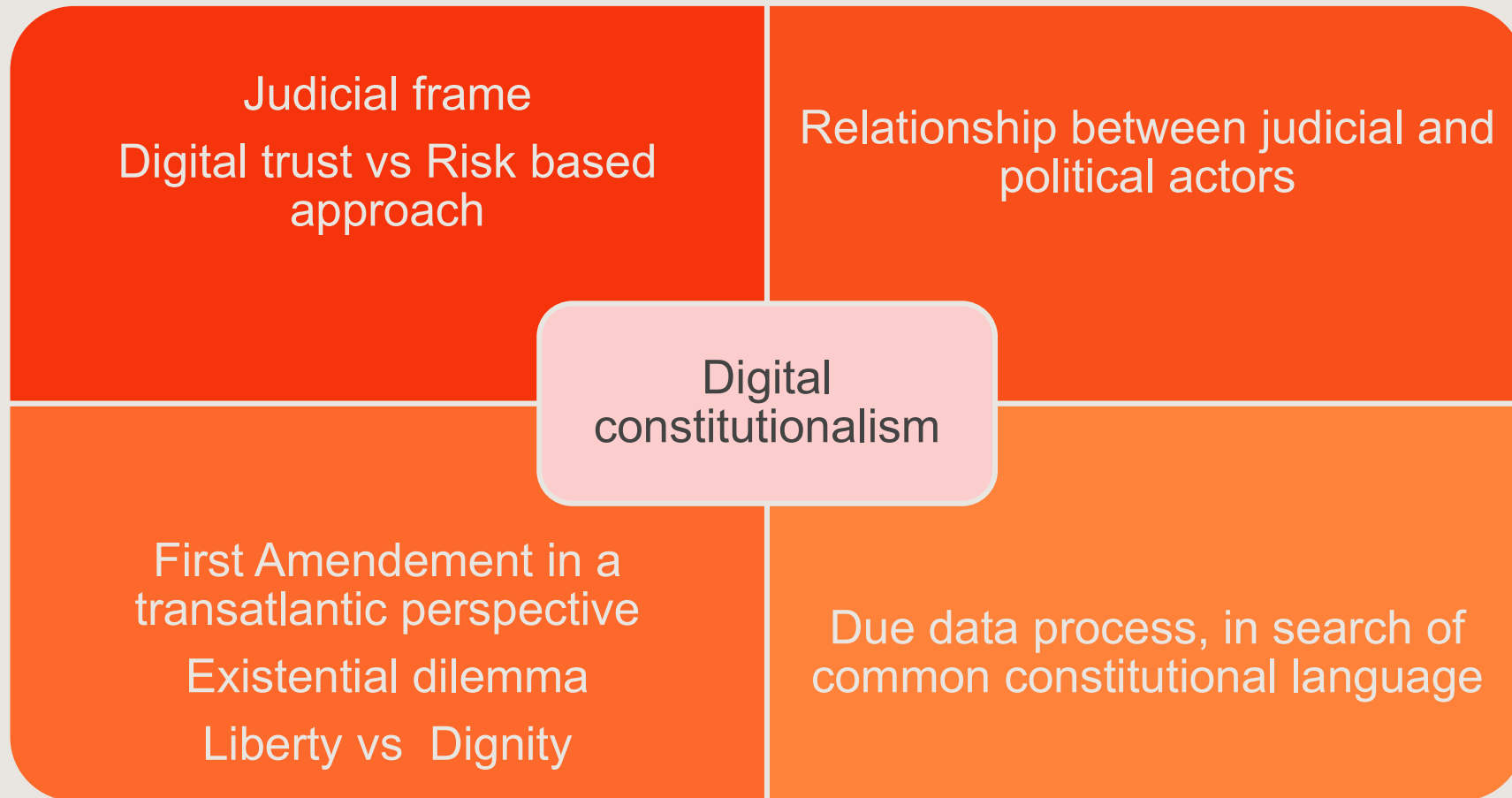


Proceduralisation

The European reaction



Geometrical Findings





THANKS!

Happy to discuss

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