Europe's Digital Constitution

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Moments after completing his purchase of Twitter in October 2022, Elon Musk tweeted that "the bird is freed"—an apparent reference to his contested acquisition of the social media company and his newfound authority to reinstate his favored free speech norms on the platform. The European Union did not hesitate to respond. Within hours, European Commissioner Thierry Breton retorted to Musk on Twitter: "In Europe, the bird will fly by our rules." This exchange between an American tech entrepreneur and a European regulator captures the core dynamic in today's digital economy: American tech companies seek to remake the world with their innovative products and services but face growing regulatory constraints that come predominantly from the EU.

Over the past decade, the EU has emerged as the leading regulator of American tech companies. Many of the EU's competition enforcement actions today appear to target the tech industry—or, as many would point out, the *American* tech industry. The EU's stringent rules on data privacy, disinformation, hate speech, online copyright, and digital services taxes have added to the regulatory burdens the U.S. tech industry faces in Europe. And there is more to come, with exacting rules regulating platform workers currently being debated before the European Parliament and the Council of Ministers and a comprehensive regulation on artificial intelligence (AI) being finalized. European digital regulations are also significant for foreign companies in that they often generate a so-called Brussels Effect, a regulatory phenomenon which explains why global companies frequently implement EU rules across their worldwide operations to avoid the costs of complying with multiple different regulatory regimes.

These regulatory constraints originating from Europe reflect the EU's deep-seated belief that markets will not, left to their own devices, yield optimal outcomes, and that government intervention is needed to protect citizens' rights in the digital era. In contrast, the US has traditionally embraced a techno-libertarian view that emphasizes the primacy of free markets, free speech, and the free internet. This pro-market ethos is deeply embedded in the U.S. regulatory regime, which consists of weakly enforced antitrust laws, the absence of a federal data privacy law, and permissive content moderation rules that shield tech companies from liability. As a result, the US has largely been watching from the sidelines as Brussels—not Washington—has been writing the rules for the digital economy.

Protection or Protectionism?

While it is well understood that the EU regulates, the motivations behind its regulatory agenda are subject to debate. The US often views EU regulatory efforts as protectionist, unfairly targeting U.S. tech companies who outcompete their weaker European rivals. In 2015, President Obama described EU antitrust investigations into Google and Facebook as reflecting European tech companies' inability to compete with their U.S. counterparts. More recently, Charlene Barshefsky, the former U.S. Trade Representative, accused the EU of digital protectionism and called for an end to Europe's "techno-nationalism."

This common argument focusing on digital protectionism is plausible, yet overly simplistic. Of course, it is politically less costly for the EU to leverage its regulations against leading tech companies when those companies are, in large part, foreign rather than European. The EU has also not been spared from the recent nativist shift in trade and technology policy around the world. Like the US and China, the EU has become more conscious of its need to build its domestic technological capabilities and to reduce its foreign dependencies in a contested geopolitical environment, adopting a narrative of strategic autonomy and

emphasizing a need to pursue technological sovereignty. Such policy goals risk veering governments, including the EU, toward greater techno-nationalism. But singling out protectionism as the key driver of the EU digital regulation either mischaracterizes the EU's regulatory impulses or, at the very least, provides a highly incomplete account of the EU's motivations.

Instead, European digital regulations reflect a host of values that are consistent with the broader European economic and political project. The EU's digital agenda reflects its manifest commitment to fundamental rights, democracy, fairness, and redistribution, as well as its respect for the rule of law. These normative commitments, and the laws implementing those commitments, can be viewed in aggregate as Europe's digital constitution. Here, the term "constitution" is used liberally to refer not to a formal constitution, but to a set of expansive digital regulations that form a normative and principled foundation for a digital economy and society as construed by European laws. This usage of the term constitution is consistent with what many American scholars today describe as the small-c constitution, referring to rules that reflect fundamental values serving a "constitutional function" in society.

By insisting that its vision for the digital economy must be embedded in laws—which are written and enforced by democratic institutions—the EU rejects the American techno-optimist idea of a "lawless" or self-governing internet, advancing instead a view that the digital transformation needs to be firmly anchored in the rule of law and subjected to democratic oversight. While the American regulatory approach frequently emphasizes that the government does not understand technology and should hence refrain from regulating it, the European approach is more concerned that tech companies do not understand how technology implicates constitutional democracy and fundamental rights, which their products and services often undermine.

The Four Pillars of Europe's Digital Constitution

Europe's digital constitution has emerged and evolved over the past decade around four key pillars: *fundamental rights, democracy, fairness and redistribution,* and the impetus to create *a digital single market*. It views governments as having a central role in upholding the fundamental rights of individuals, preserving the democratic structures of society, ensuring a fair distribution of benefits in the digital economy, and advancing European integration by creating a digital single market.

Fundamental rights form a values-based constitutional foundation for European integration, guiding EU legislative activity as well as its engagement with the world in all policy areas. Digital transformation has altered the ways in which businesses operate and societies function, implicating a number of fundamental rights in the process. As the demand for data multiplies, so does the potential for its misuse—by public and private actors alike. As a result, the EU has sought to limit both government surveillance and the exploitation of internet users' personal data by tech companies. The EU also looks to protect internet users from discrimination by regulating the ways AI systems are developed and deployed. EU regulators are further committed to safeguarding freedom of expression, which they see as under threat when internet platforms moderate content online. At the same time, they recognize the need to balance that freedom against other fundamental rights such as human dignity, which can be undermined by illegal and harmful content online. Together, these specific issues drive the EU's digital agenda, placing the protection of fundamental rights at the heart of Europe's digital constitution.

The Treaty of the EU emphasizes "freedom" and "democracy" as the EU's founding principles. Whether digital technologies advance or threaten democracy is subject to a debate. For techno-optimists, technology can amplify individual freedoms and revitalize democracies. Yet, critical voices point to a myriad of ways for technology to undermine democracy. Online communication channels have not only cultivated civic

engagement; they have also facilitated the spread of disinformation, undermining public debate and the legitimacy of democratic elections. Online platforms also sow discord and deepen societal divisions. In light of this, the internet's potential to amplify freedom and usher in a revitalized democracy has been, at best, only partially realized, and, at worst, proven to be a false promise. Aware of these dangers, the EU has adopted a number of regulatory instruments, including measures aimed at countering disinformation and strengthening free and pluralistic media—both of which the EU sees as crucial for sustaining democratic discourse. Through these efforts, the EU is elevating the preservation and strengthening of democracy as a central tenet of its digital constitution.

Of course, a commitment to fundamental rights and democracy are not uniquely European values. The US would claim that those same values also define the US's approach towards digital governance. However, in the US, the rights discourse often centers on protecting free speech as *the* fundamental right implicated by the digital transformation, whereas the EU is looking to balance the right to free speech with a host of other fundamental rights, including human dignity, non-discrimination, and the right to data privacy. The US and the EU also differ in how they seek to advance democracy through digital regulation. American regulators, who often evince techno-libertarian instincts, fear overdoing content moderation rather than underdoing it. Thus, while the EU at times restricts online speech in the name of democratic discourse, the US frequently invokes this very same principle to allow such speech to remain online.

In addition to its efforts to protect fundamental rights and democracy, the EU has woven a commitment to *fairness and redistribution* into its digital regulations. Values relating to social fairness and solidarity are defining features of European economic policy. The EU's commitment to fairness and redistribution is consistent with the European social market economy model, which seeks to combine a free-market capitalist economy with social progress and a welfare state. Despite its many benefits, digital transformation has led to an exceedingly concentrated economy where a few powerful companies control economic wealth and political power, accentuating inequalities and widening the gap between winners and losers. Consequently, EU regulations are aimed at reducing this power imbalance and distributing the gains from the digital economy more equally.

Reflecting these commitments, the EU has pursued policies that shift power away from platforms to workers, internet users, smaller businesses, and to the public at large. In recent years, the EU's focus to fairness and redistribution has manifested itself in three different areas of digital regulation. First, the EU has deployed its competition laws to rein in the power of large tech companies, with the goal of empowering smaller firms and consumers. Second, EU Member States have led the quest toward a fairer digital tax regime in an effort to share gains from the digital economy with the general public. Third, the EU has sought to enhance the social protections of platform workers. Each of these three policy areas illustrates how the EU views government regulation as an essential tool for redistributing economic wealth and opportunities in a digital society.

European regulators' concerns over fairness and redistribution often sets them apart from their American counterparts. Unlike the EU, the US has traditionally been more comfortable with income inequality, seeking to preserve equality of opportunities as opposed to equality of outcomes.

Finally, the EU's digital regulation has also been a tool to advance European integration. This effort to create a *digital single market* has provided a strong political impetus for the EU's ambitious regulatory agenda. A well-functioning digital single market calls for harmonized EU regulations as inconsistent regulatory standards hinder cross-border trade. For example, if each of the twenty-seven individual EU Member States adopted different rules to safeguard personal data, the single market could not function efficiently, as companies would face a different regulatory environment in each Member State. As a result, this overarching policy objective—advancing European integration by creating a digital single market—is directly woven into Europe's digital constitution.

This dual-objective approach underlying EU digital regulation has often allowed the EU to harness broad political support for its regulatory acts, offering both pro-regulation and pro-trade coalitions a reason to advocate for common European rules. The creation of a digital single market also provides a sound legal basis for the EU's regulatory action. For example, the EU does not have the legal authority to regulate copyright matters, which remain within the scope of Member State powers. However, in adopting the Copyright Directive, the EU relied on its existing powers to pursue harmonization measures that are necessary for the establishment and functioning of the internal market. The single market imperative provides a legal basis for many other EU tech regulations as well, including the AI Act, the Digital Services Act (DSA) and the Digital Markets Act (DMA). Many of the EU's far-reaching regulatory initiatives—however controversial—have thus benefited from being supported by a less controversial policy goal that rests on an uncontested legal basis: the completion of the digital single market and, thereby, the advancement of European integration.

The Costs and Benefits of Europe's Digital Constitution

European digital regulations provide an important corrective to what is increasingly seen as a digital society marked by the excessive influence of a few tech companies. There is a growing understanding that the freewheeling pro-market ethos underlying America's lax tech regulation has been too narrowly focused on innovation and has been too optimistic about tech platforms' ability to nurture a vibrant democratic society. Europe's digital constitution is therefore seen as both beneficial and necessary, mitigating some of the harmful effects created and sustained by the US' techno-libertarian regulatory regime. Thus, in comparison to the American regulatory approach to digital regulation—which may be viewed as too permissive—or the Chinese approach—which is often viewed as too oppressive—the EU regulatory approach can be praised for enhancing the public interest, checking corporate power, and preserving democratic structures of society.

However, Europe's digital constitution has potential weaknesses as well, three of which should be mentioned here. A common concern includes the adverse effects the EU's stringent digital rules may have on innovation. There are few leading tech companies originating from Europe today, a fact that some view as a product of the EU's excessive regulation. However, while several aspects of Europe's digital regulations can be rightly criticized. It is not clear that digital regulation as such is the reason that is holding back European innovation. t is more likely that the reasons for the US-EU technology gap can be found elsewhere, including in the EU's fragmented digital single market that hinders scaling by tech companies or in its under-developed capital markets that limit tech companies' ability to fund their innovations in the EU.

A more prominent concern may instead be the feeble implementation of Europe's Digital Constitution. The EU's digital regulations often fail to translate into effective enforcement, thus compromising the goals of the European regulatory agenda in practice. For example, lackluster enforcement of the GDPR has often left individuals' data vulnerable to exploitation. Similarly, the EU's antitrust enforcement record suggests that high fines alone may not be sufficient to effectively discipline the tech giants. The EU's ambitious new regulations, such as the DSA and DMA will therefore be some of the biggest tests of Europe's regulatory regime, revealing whether the EU is capable of translating the stated values underlying its digital constitution into actual market outcomes.

Finally, a prevalent concern of the U.S. government and the business community has been that Europe's digital constitution is an instrument for digital protectionism—or, perhaps even, regulatory imperialism. It is undeniable that U.S. tech companies have been a frequent target of the EU's antitrust enforcement. At the same time, it is not evident that the EU is targeting these companies because of their nationality as opposed to their sheer market dominance and alleged abusive practices. For instance, there is no

European search engine that the Commission is seeking to protect when challenging Google's practices. Further, the original complaint against Google came from another U.S. company, Microsoft, and not from a European competitor.

An even more damning criticism around regulatory imperialism is often associated with the Brussels Effect, which externalizes the European digital agenda across foreign markets. According to critics, the globalization of EU digital rules through the Brussels Effect compromises the democratic prerogatives of foreign sovereigns and undermines the political autonomy of their citizens. It is difficult to deny that the Brussels Effect constrains foreign governments' regulatory freedom by often overriding their preferences. The U.S. government may therefore assert that the Brussels Effect undermines its regulatory sovereignty. However, the EU can counter this criticism by arguing that it is simply regulating its own market, which it has the sovereign right to do. All the EU is doing is asking any company—whether domestic or foreign—doing business in Europe to play by European rules. If tech companies' business considerations lead them to voluntarily extend EU regulations across their global operations, the EU can hardly be accused of regulatory imperialism.

More controversially, one may also argue that the Brussels Effect offsets flaws in American democracy. Many Americans worry that extensive business lobbying has distorted the American democratic process, especially after the U.S. Supreme Court's ruling in *Citizens United* paved the way for unlimited corporate spending to influence elections. The EU legislative process, while neither flawless nor perfectly democratic, is less susceptible to corporate influence when compared to that of the US. In the EU, business interests are typically balanced with the influence that civil society groups exert over regulation. Thus, an argument—even if a controversial one—exists that the Brussels Effect may partially offset the overrepresentation of corporate interests in the US by restoring some of the consumer interests that have been overridden in the American political process.

Despite the occasional criticism, some Americans welcome the Brussels Effect as the country's techno-optimist outlook is now fading. The American public increasingly views the country's permissive laws as having vested tech companies with the kind of power that they are no longer able to responsibly handle. U.S. civil society organizations also frequently point to the EU as an example when advocating for regulatory reform at home. Congress itself is now considering several legislative reforms that, if successful, would closely align the U.S. law with that of Europe's digital constitution. At the same time, relentless lobbying by the tech industry and the continuing gridlock in Congress have prevented any meaningful tech legislation from emerging from Washington. If this turns out to be the case, the best hope for the US may, indeed, lie in Europe's digital constitution and the ability of the Brussels Effect to deliver to Americans the kind of digital regulation that they have increasingly come to support.

This blog post is based on Bradford's recent article Europe's Digital Constitution (64 Va. J. Int'l L. 1 (2023)).

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