


RESEARCH ARTICLE

Critique of digital constitutionalism: Deconstruction and reconstruction from a societal perspective

Angelo Jr Golia 

School of Law, University of Trento, Via Verdi, 53-38122, Trento, Italy
Email: angelojunior.golia@unitn.it

Abstract

Digital constitutionalism is a strand of scholarship that focuses on the relationship between constitutional law and the socio-legal challenges posed by the digital revolution. However, such scholarship often builds uncritically on the tenets of liberal, state-centred constitutional theory, giving rise to contradictions between analytical starting points and normative aspirations. Against this background, with an approach inspired by societal constitutionalism, this article engages with digital constitutionalism as both an *object* and a *means* of critique. As an object, digital constitutionalism is assessed in the light of its contradictions. As a means, digital constitutionalism is used to assess the limits of traditional, liberal, state-centred constitutional theory. In other words, societal constitutionalism is the theoretical lens used to both deconstruct and reconstruct digital constitutionalism according to its normative aspirations. The article has three main goals: first, linking different discourses within digital constitutionalism, highlighting its critical potential; second, advancing some proposals based on such reflections; and third, bringing digital constitutionalism closer to the broader global constitutionalism discourse. After an overview of societal constitutionalism, the article focuses on digital constitutionalism's definition and three functionally differentiated systems: politics, economy and law. For each of them, it highlights analytical and normative gains deriving from the societal constitutionalism-based approach as well as policy proposals to be developed further.

Keywords: constitutional theory; critical theory; digital constitutionalism; digital revolution; societal constitutionalism; societal perspective

I. Introduction

On 10 November 2021, the UK Supreme Court (UKSC) delivered a landmark judgment in the case *Lloyd v Google*.¹ Mr Lloyd, former executive director of a consumer watchdog, had sued Google for damages on his behalf and that of other residents of England and

¹*Lloyd (Respondent) v Google LLC (Appellant)* [2021] UKSC 50, 10.11.2021.

Wales under sections 4(4) and 13 of the *Data Protection Act 1998* (DPA98). Between 9 August 2011 and 15 February 2012, Google had allegedly treated the data of over four million users for commercial purposes without their knowledge or consent. In order to circumvent the unavailability of a ‘general’ class action in English law, the lawsuit was based on a representative procedure. As Google is a US-based corporation, Mr Lloyd had to apply for permission to serve the claim outside the jurisdiction, proving that the claim had a reasonable prospect of success.² In response, Google argued that the allegations did not provide a basis for claiming compensation and, in any event, the court should not permit the lawsuit to continue as a representative action.

After contrasting decisions by first and second instance courts, the UKSC unanimously ruled in Google’s favour. According to the Court, the term ‘damage’ in section 13 refers to material damage or mental distress distinct from, and caused by, unlawful processing of personal data. Therefore, Mr Lloyd would have to demonstrate that Google made unlawful use of personal data relating to each individual *and* that the individual suffered some damage as a result. Compensation cannot be awarded for mere ‘loss of control’ of personal data. Moreover, the Court found that the claim did not concern the ‘same interest’ required under the chosen representative procedure. Particular cases will require *individualized* assessments of what happened to class members, who would not be participating in the action. Damages could be claimed in a representative action only if they can be calculated on a basis that is common to all persons represented. If this is not the case, only liability issues could be decided in a representative action, with the individuals in question bringing separate claims for compensation. Unsurprisingly, the decision disappointed privacy activists. However, it is fair to say that the UKSC reasserted relatively unquestioned tenets of liberal constitutionalism.³ Activists and policy-makers may criticize the holding, but the failure to question some assumptions in more depth leaves them somehow defenceless.

The *Lloyd* decision is significant in itself, especially for data protection law. However, besides its specificities, it is here recalled for its explanatory value, as a telling example of a contradiction within digital constitutionalism, a strand of scholarship dealing with the relationship between constitutional law and the sociolegal challenges posed by the digital revolution.⁴

Indeed, the literature using an explicit constitutionalist language has hardly explored digital constitutionalism’s critical potential. When it comes to operationalization, digital constitutionalism generally turns around few – crucial, but still somehow narrow – issues: free speech, privacy, safeguard of electoral processes, consumer protection, market regulation.⁵ Most importantly, digital constitutionalism typically builds on (Western)

²CPR Part 6.37(1)(b).

³More recently, see in the same direction CJEU, Judgment of the Court (Third Chamber), *UI v. Österreichische Post AG*, Case C-300/21, 4.05.2023, holding that the mere infringement of the GDPR does not per se give rise to a right to compensation for individuals. Article 82 GDPR requires establishing: (1) ‘damage’, either material or non-material; (2) an actual infringement of the GDPR; and (3) a causal link between the two.

⁴For the definitional issues, see Part III of this article. Among recent contributions, Giovanni De Gregorio, ‘The Rise of Digital Constitutionalism in the European Union’ (2020) 19 *International Journal of Constitutional Law* 41; Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart, Oxford, 2021); Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (Routledge, London, 2022).

⁵For an exception, see Hans W Micklitz *et al* (eds), *Constitutional Challenges in the Algorithmic Society* (Cambridge University Press, Cambridge, 2022).

liberal constitutionalism as an unquestioned ‘good’ matrix, whose principles need to somehow be injected into the digital sphere.⁶ In other words, such scholarship hardly assesses the traditional assumptions of constitutional theory critically.⁷ Among them, one might include the relatively rigid state/society and public/private divides; the focus on *political* power as the main focus of constitutional normativity; the rigid divide between national and international/global legal systems; state-centred legal monism; the static conception of law, detached from the time and means of its application/dissemination; the conception of legal subjects as rational, self-authorized actors, ‘free’ from concrete societal constraints and the effects of information overload/asymmetries; and an over-reliance on courts for the effective protection of rights.

In an age where the pervasive impact of digital technologies on ‘everyday life’⁸ is becoming increasingly apparent, this relative lack of self-reflection results in a tension between analytical starting points and policy proposals. Digital constitutionalism’s political rationality (the *possibility to think* the given otherwise) is hardly accompanied by a critical phenomenology (the *forcing to appear*).⁹ I suggest that such tension is problematic in relation to digital constitutionalism’s transformative possibilities. Against this backdrop, this article has two main goals; first, linking different discourses within digital constitutionalism, highlighting its critical potential; and second, advancing some proposals based on such reflection. In this sense, the article does not outline a distinct strand of digital constitutionalism, but rather a specific perspective, a *reconstruction* in the light of elements sparsely present in it.

The goals of the article are reflected in its title, which plays on the ambivalence of the connective *of*: digital constitutionalism is both the *object* and the *means* of critique. As an *object*, the article assesses digital constitutionalism in the light of its inner tension. As a *means*, the article uses digital constitutionalism to assess the intrinsic limits of liberal constitutional theory in one of the most relevant societal spheres of world society. Understanding digital constitutionalism as a critical theory of constitutionalism¹⁰ may help cope with its inner tension, thus strengthening its normative thrust and giving more coherence to research and policy agendas. At the same time, the (unavoidably partial)

⁶For a mapping of the debate, see Karen Yeung, ‘Constitutional Principles in a Networked Digital Society’ (2022) IACL Roundtable, The Impact of Digitization on Constitutional Law.

⁷For exceptions, although not always resorting to constitutionalist language, see Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, New Haven, CT, 2012), esp. Ch 1; Jennifer Cobbe and Jatinder Singh, ‘Regulating Recommending: Motivations, Considerations, and Principles’ (2019) 10 *European Journal of Law and Technology* 10, available at <<https://ejlt.org/index.php/ejlt/article/view/686>>; Salomé Viljoen, ‘A Relational Theory of Data Governance’ (2021–22) 131 *Yale Law Journal* 573; Aziz Huq, ‘Toward a Theorization of Digital Constitutionalism’ (2022) *The Digital Constitutionalist*. Available at <<https://digi-con.org/toward-a-theorization-of-digital-constitutionalism>>, talking about a ‘structural diagnostics’ approach.

⁸In the sense of Henri Lefebvre, *Critique of Everyday Life* (Verso, New York, 1991–2005 [1958–81]). A point of reference on the issue is Luciano Floridi, *The Fourth Revolution: How the Infosphere is Reshaping Human Reality* (Oxford University Press, 2014).

⁹Emilios A Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (London: Cambridge University Press, 2021) 1–2.

¹⁰Jack Balkin, ‘Critical Legal Theory Today’ in Francis J. Mootz (ed), *On Philosophy in American Law* (Cambridge University Press, Cambridge, 2009) 64–72: ‘Critical theories ask how law legitimates power in both senses of the word: how it shapes, channels and restrains power, and how it mystifies, disguises and apologizes for it. In addition, a critical theory studies how the very acts of making, interpreting and applying law produce and proliferate ever new forms of power, both just and unjust.’

attempt to keep many legal discourses on digital technologies together contributes to the de-fragmentation of digital constitutionalism. In that sense, this article contributes to both the *deconstruction* and the *reconstruction* of (digital) constitutionalism.

In order to highlight digital constitutionalism's critical potential, the article resorts to societal constitutionalism, one of the theoretical frameworks used in the global constitutionalism literature.¹¹ References to such a framework are frequent, especially regarding the emergence of new forms of normativity within the regulatory spaces opened by digital technologies.¹² Even without subscribing to societal constitutionalism, authors often refer to it in matters of transnational private regulation, (global) legal pluralism and dispute-settlement.¹³ However, digital constitutionalism authors use societal constitutionalism primarily to account for 'constitutional' norms within the regulatory spaces opened by digital technologies. Such use leaves the impression that societal constitutionalism only legitimizes new forms of governmentality. In contrast, this article deploys societal constitutionalism to bring the critical/transformational potential of digital constitutionalism out. By this means, it also pursues a third goal: bringing digital constitutionalism close(r) to the broader galaxy of global constitutionalism.¹⁴

Part II provides an overview of societal constitutionalism, highlighting its elements of critique, while Part III reconciles societal constitutionalism and digital constitutionalism, focusing on the latter's definition and three functionally differentiated systems, namely politics, economy and law. For each of them, it highlights the analytical and normative gains for digital constitutionalism of a societal constitutionalism perspective, pointing to some proposals that require further development. Part IV concludes the article.

¹¹Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, Oxford, 2012); Angelo Jr Golia and Gunther Teubner, 'Societal Constitutionalism: Background, Theory, Debates' (2021) 15 *Vienna Journal of International Constitutional Law* 357. On societal constitutionalism as a strand of global constitutionalism, see Antje Wiener, Anthony F Lang, James Tully, Miguel Poiaras Maduro and Matthias Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1, 7.

¹²Lex Gill, Dennis Redeker and Urs Gasser, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2018) 80 *The International Communication Gazette* 302; Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation' (2019) 33 *International Review of Law, Computers & Technology* 76; Nofar Sheffi, 'We Accept: The Constitution of Airbnb' (2020) 11 *Transnational Legal Theory* 484; Roxana Radu, Matthias C Kettman, Trisha Meyer and Jamal Shahin, 'Normfare: Norm Entrepreneurship in Internet Governance' (2021) 45(6) *Telecommunications Policy* 102148. For an account of the different perspectives of digital constitutionalism – state, societal and global – see Francisco De Abreu Duarte, Giovanni De Gregorio and Angelo Jr Golia, 'Perspectives on Digital Constitutionalism', in *Handbook on Law and Technology* (forthcoming). Róisín Á Costello, 'Faux ami? Interrogating the Normative Coherence of "Digital Constitutionalism"' (2023) *Global Constitutionalism* 1, 7, points to how digital constitutionalism adopts the 'descriptive rhetoric of constitutionalism'. It seems, however, that Costello's criticism does not capture the inner richness of digital constitutionalism's discourse.

¹³Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (Oxford University Press, Oxford, 2013) 160ff; Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press, Oxford, 2015); Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press, Cambridge, 2019) 115–25; Matthias Kettmann, *The Normative Order of the Internet: A Theory of Rule and Regulation Online* (Oxford University Press, Oxford, 2020) 185–95.

¹⁴Understood as the legal-political discourse addressing questions related to rights, democracy and the rule of law in and through their transnational/global dimension: see Wiener et al., *Global Constitutionalism* (n 10).

II. Societal constitutionalism as a critical theory

The state/society divide

Original elaborations of societal constitutionalism focused on the difficulty of liberal constitutional theory in detecting social authoritarianism *in conceptual terms*, even when state structures remain formally liberal-democratic.¹⁵ Such drifts, as societal constitutionalism authors note, are structural rather than accidental tendencies of modernity, rooted in fragmented meaning, instrumental calculation, bureaucratic organization and charismatic leadership. Confronted with such processes, liberal constitutionalism's concepts may at best address selected sets of *purposefully* arbitrary exercises of collective power by private actors, but many mechanisms of social control escape them, especially *inadvertently* arbitrary exercises of collective power. One might think of the organizational design of pharmaceutical research and industry, which opens up the possibility of data manipulation, with harmful effects on people's health and science generally. Similarly, the academia/science complex, based on cooptation, reputation and quantification of teaching and research, triggers publish-or-perish, ghost-writing, citation cartels, manipulation of data and mental health distress, disproportionately affecting subaltern groups.¹⁶ The design of organizations dealing with sexual assault often contributes to the reproduction of power structures, victim (self-)marginalization and gender (micro-)violence.¹⁷

The examples could continue. The point is that counteractions to authoritarian drifts and conditions for non-authoritarian social change cannot be based only on separation of powers, due process, fundamental rights or judicial review in their state-centered perspective. Negative externalities generated by different societal processes should also be addressed through ecologically oriented – rather than strictly rational/instrumental – reciprocal limitations among collective actors and social systems, centred around norm-producing institutions *within* society.

Societal constitutionalism also critiques liberal constitutionalism's relatively rigid state/society divide. In this sense, it does not overcome, but rather reframes, the public/private divide, individuating relationships of authority/ domination within relatively autonomous spheres of civil society and focusing on both purposeful and inadvertent forms of social control in the relationships with 'private' governments.

Early societal constitutionalism focused on formal organizations – bureaucratic apparatuses, corporations, parties, churches. Notably, building on Luhmann's theory of functional differentiation and an autopoietic conception of law, Gunther Teubner has in addition incorporated issues related to the autonomization/transnationalization of social processes triggered by globalization.¹⁸ The following sections highlight the points most relevant to our purposes.

Functional systems and communication media

Societal constitutionalism focuses on politics, economy, press, science and so on as functionally differentiated systems of modern society and on their distinct

¹⁵David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press, Cambridge, 1992) particularly 11–13, 40–41.

¹⁶Zeena Feldman and Marisol Sandoval, 'Metric Power and the Academic Self: Neoliberalism, Knowledge and Resistance in the British University' (2018) 16 *tripleC* 214.

¹⁷Nicole Bedera, 'Settling for Less: How Organizations Shape Survivors' Legal Ideologies Around College Sexual Assault', PhD thesis (University of Michigan, 2021). Available at: <<https://doi.org/10.7302/3912>>.

¹⁸Gunther Teubner, *Law as an Autopoietic System* (Blackwell, Oxford, 1993).

communication media (power, money, information, truth, etc.).¹⁹ By these means, it expands the target of constitutionalism. Constitutional problems do not derive just from the power imperative of politics or the monetization imperative of economy, but also from the knowledge imperative of science, the innovation imperative of technology, the news/information cycle imperative of the press and the juridification imperative of law. Threats to human and ecological integrity thus derive also from depersonalized processes linked to the reproduction/accumulation of power, money, information, knowledge and juridical authority.²⁰ Effective constitutionalization, then, takes place only if and to the extent that norms emerging within *and* between social systems perform both constitutive and limitative functions towards such communication media.²¹

The internal/external divide

Societal constitutionalism also focuses on the transnationalization/autonomization of systems, stressing how constitutional questions related to organizations – states, corporations, international organizations – and regimes, such as global politics, international investment law and global science, increasingly emerge and need to be addressed beyond states' territorial borders. In other words, societal constitutionalism focuses on the fact that globalization changed existing questions by moving them at the level of the world society, whereas states and international politics – while remaining central²² – determine social evolution less than before.²³ At the same time, to the extent that globalization consists in the competitive alignment of national – especially welfare – systems, state-centred constitutionalism simultaneously enables the global expansion of capitalist exploitation and obstructs the very possibility of thinking and acting in terms of transnational counteractions, and particularly of transnational solidarity and democracy.²⁴

Constitutionalism beyond the state

Like other strands of global constitutionalism,²⁵ societal constitutionalism embraces legal and constitutional pluralism. It argues that, with globalization, legal systems go through a

¹⁹Understood as the 'effect mechanisms' of the functionally differentiated society. Communication media 'are based on symbols which are thought to be effective in communication – e.g. symbols of money, power, truth or love – and which as such effective symbols motivate other social actors to do something they would not have done without this effective use of symbols'. Rudolf Stichweh, 'Systems Theory' in Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino (eds), *International Encyclopedia of Political Science, Vol 8* (Sage, Thousand Oaks, 2011).

²⁰Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by Private Transnational Actors' (2006) 69 *Modern Law Review* 327; Gunther Teubner, 'The Constitution of Non-Monetary Surplus Values' (2020) 30 *Social and Legal Studies* 501.

²¹Teubner, *Constitutional Fragments* (n 10) 81ff.

²²Gert Verschraegen, 'Hybrid Constitutionalism, Fundamental Rights and the State' (2011) 40 *Netherlands Journal of Legal Philosophy* 216; Gunther Teubner, 'Societal Constitutionalism without Politics? A Rejoinder' (2011) 20 *Social & Legal Studies* 248.

²³Teubner, *Constitutional Fragments* (n 10) 42ff.

²⁴Christodoulidis (n 8) 3, 475.

²⁵Lars Viellechner, 'Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law' (2012) 4 *Goettingen Journal of International Law* 599; Anne Peters, 'Constitutionalization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law Contributions to Disciplinary Thought* (Edward Elgar, Cheltenham, 2019) 151–53; Cormac Mac Amhlaigh, *New Constitutional Horizons: Towards a Pluralist Constitutional Theory* (Oxford University Press, Oxford, 2022).

fragmentation whereby different, interconnected systems increasingly develop their own norms. Such ‘fragments’ do not exist in a vacuum, but rather interact with each other and with the environment according to *different* legal/illegal distinctions,²⁶ ultimately based on distinct principles of legitimacy. For example, the global investment regime is sustained by both formal and informal normative instruments as well as by national and international instruments.²⁷ However, its concrete operation is determined by standards of legitimacy oriented to the protection of investment capital – that is, to the profit accumulation imperative.²⁸

In this constellation, effective constitutionalization may occur only if the norms emerging *within* and *between* such functional systems constitute *and* constrain the communication processes that, especially following globalization, have been partially ‘freed’ from the constraints of state-centred politics. Societal constitutionalism argues that at the level of world society, with no authoritative third instance, such a result can only be reached if sufficient external pressures are exercised – for example, political demands over economic processes and the other way around – and their internal structures are open to such external demands.

To sum up, societal constitutionalism questions the identification of law with state law and problematizes the link between state and constitution. By these means, it opens to the possibility of constitutionalization processes not exclusively centred around states. From a normative perspective, such a pluralist view means building a theory of collisions suited to the emergence of normative systems of qualitatively different nature.²⁹

Certainly, states retain a central role in generating external pressures and designing the internal normative infrastructures of other systems. Moreover, alternative arenas of contestation, discussion, and decision-making complement rather than replace state politics. At the normative level, this view calls for reconciliation and productive use of impulses coming from states and their constitutions; and for the strengthening of the learning capacities of other systems. In this respect, and importantly, societal constitutionalism does not necessarily advocate for “less government” and/or private (self-) regulation. Rather, it calls for strategies taking into consideration the existence of non-state normativities, productively combining them in regulatory mixes which ultimately strategize the specific reflexivity of each social field.

Law as an autopoietic system

Societal constitutionalism is based on an autopoietic conception of law³⁰ – that is, a social theory of law incorporating the fundamental paradoxes of modern law: self-validation and circularity. Under such conception, law is not a set of static norms, removed from

²⁶Gunther Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1992) 13 *Cardozo Law Review* 1443; Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

²⁷Giovanna Adinolfi, ‘Soft Law in International Investment Law and Arbitration’ (2021) 1 *Italian Review of International and Comparative Law* 86.

²⁸Silvia Steininger, ‘What’s Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration’ (2018) 31 *Leiden Journal of International Law* 33.

²⁹Teubner, *Constitutional Fragments* (n 10) 154–62; Horatia Muir Watt, ‘When Societal Constitutionalism Encounters Private International Law: Of Pluralism, Distribution, and “Chronotopes”’ (2018) 45 *Journal of Law and Society* 185.

³⁰Teubner, *Law as an Autopoietic System* (n 17).

social time and context. Instead, it is a social system itself – that is, a system of meaning, of socially constructed communications, based on its own code: the legal/illegal distinction.³¹ Its fundamental function is the generalization/stabilization of normative expectations.

Under the autopoietic conception, both the *emergence* and the *reproduction* of legal systems are constrained by the need to perform their function and preserve their operational autonomy. In other words, law can generalize/stabilize normative expectations emerging from its social environment – for example, moral, religious and economic norms – only if it does not immediately identify with them. Law can ‘read’ and solve conflicts emerging from society only through the legal/illegal distinction, continuously reframed by its own *internal* operations: legal procedures, acts, norms, doctrinal concepts. In this sense, law generates its own validity through the internal translation/misunderstanding of impulses coming from its environment. Re-elaborated through ‘productive misreadings’,³² such impulses are given legal meaning through chains of communication based on the legal/illegal distinction. Legal systems emerge, ‘live’, and perform their societal functions by permanently re-regulating themselves, that is, through creative ‘errors’, paradoxes, doctrinal inventions provoked but not mechanically determined by such impulses. Legal systems re-generate their meaning within the possibilities allowed by existing patterns but in unpredictable, contingent, ‘blind’ ways. Modern law, then, is not merely ‘responsive’ but rather ‘reflexive’ to social impulses.³³

This also means that to effectively perform their functions within an increasingly fragmented society, legal systems have to preserve some degree of flexibility, indeterminacy and unpredictability, while at the same time persisting in the face of disappointment about social expectations. This openness/indeterminacy is crucial to absorb cognitive expectations and increase law’s capacity to learn from the environment. Put differently, the possibility of having (micro-)variations of meaning is essential to the reproduction of legal systems and the preservation of their societal function.

Time and means of dissemination of law

Based on the idea of law as a system of social communications, societal constitutionalism advances a different approach to law’s relationship with its means of dissemination and time. As the production, interpretation and application of law also draw on information not conserved in legal texts (in the narrow sense),³⁴ legal acts are influenced by their means – oral, printed, digital – of dissemination and the point in time when they are communicated. At the same time, each legal act (legislation, judicial decisions, administrative acts, contracts) is a communicative *event* based on the legal/illegal code, potentially rearranging the meaning of past communications and changing future patterns of law’s evolution.

³¹Thomas Vesting, *Legal Theory and the Media of Law* (Edward Elgar, Cheltenham, 2018) 19–84.

³²That is, the self-transformative process whereby systems use events in their environment as material for meaning production: Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (n 25) 1447.

³³Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239.

³⁴Vesting (n 30), 119.

But time does not always flow at the same speed. The different social ‘speeds’ of time and the related perceived need to produce legal meaning matching social, technological and environmental change have an impact on law’s evolution, notably the sources of legal validity and the types of acts that take centre stage in law-making.³⁵ In an age of growing functional differentiation and accelerated technological and environmental change, legal systems are increasingly called on by their environment to produce increasingly new legal meaning and to ‘learn’ from their own operation, even without explicit political consensus.³⁶ In this sense, the crisis of ‘general and abstract’ models of law-making – which parallels the relative decline of treaty-based law-making in international law – is coherent with the rise of judicial and administrative bodies as the ‘real’ places of law’s production, as well as of private and hybrid forms of regulation. Such dynamics are not accidental features; rather, they are deeply ingrained in the increasingly fragmented sociolegal structures of modernity.³⁷

Rights and democracy

Societal constitutionalism puts communication media (power, money, normativity, truth) at the centre of constitutional theory. As such, they participate in the subjectification of individuals and collective actors – in their ‘interpellation’.³⁸ Based on this assumption, societal constitutionalism advances a critique of the liberal theory of rights, centred on individuals as rational, self-authorized, pre-social actors, detached from societal constraints and excluding social systems as right-holders to be protected on their own. Indeed, social control/manipulation may well emerge even when individuals can express a will that has been ‘freed’ from the constraints of political power or economic need.³⁹ At the same time, societal constitutionalism highlights the need to preserve different social systems from reciprocal encroachments and colonization.⁴⁰ As the COVID-19 pandemic has shown, the scientification of politics and the politicization of science are equally dangerous sides of the same coin. Put differently, societal constitutionalism highlights the need to mobilize the trans-subjective potential of rights.⁴¹ In normative terms, this means using both existing and new legal instruments to translate rights-based claims into political issues and to thematize/problematize how to address collective societal harms. This is

³⁵Riccardo Prandini, ‘The Future of Societal Constitutionalism in the Age of Acceleration’ (2013) 20 *Indiana Journal of Global Legal Studies* 731.

³⁶Jaye Ellis, ‘Crisis, Resilience, and the Time of Law’ (2019) *Canadian Journal of Law & Jurisprudence* 305.

³⁷Gunther Teubner, ‘Breaking Frames: The Global Interplay of Legal and Social Systems’ (1997) 45 *The American Journal of Comparative Law* 149.

³⁸Louis Althusser, ‘Ideology and Ideological State Apparatuses (Notes Towards an Investigation)’ in *Essays on Ideology* (Verso, New York, 1984 [1970]).

³⁹Teubner, *Constitutional Fragments* (n 10), 139ff.

⁴⁰Understood as the process whereby a system (e.g. economy) subjects the reproduction of the media of other systems (power, juridical authority, information, truth) to the reproduction of its own medium (e.g. money).

⁴¹Teubner, *Constitutional Fragments* (n 10), 145; Gunther Teubner, ‘Counter-Rights: On the Trans-Subjective Potential of Subjective Rights’ in Paul F. Kjaer (ed), *The Law of the Political Economy: Transformations in the Functions of Law* (Cambridge University Press, Cambridge, 2020).

particularly relevant when such harms derive from depersonified processes and so-called 'global injustice',⁴² as is the case with mass data collection and treatment.⁴³

What about democracy? Societal constitutionalism rejects the view that procedures based on elections, representation and organized opposition within state institutions are the sole possible model of democratic legitimation.⁴⁴ In particular, it rejects the impossibility of democracy in global/transnational settings and contests approaches aiming to compensate the lack of democratic legitimacy of non-state systems through state-centred models (e.g. chains of delegation/authorization starting from national parliaments).

In contrast, societal constitutionalism advances a theory of democracy based on polities not necessarily delimited by personal or territorial belonging⁴⁵ or an assigned status of citizenship, nor identified with an international community or a 'global civil society'.⁴⁶ They are rather individuated by how affected by a given system certain subjects or groups are (or perceive themselves to be).

Within these communities, democratic legitimation does not necessarily take place according to traditional representative schemes or the majority principle. Rather, the principle of representation is generalized through the *institutionalization of self-contestation*, to be re-specified according to the specific rationality and normativity of each system.⁴⁷ Under such a view, authentic democratic processes emerge if and to the extent that subjects affected by systems' operations stably practise substantive and even direct participation and contestation in their normative production. Various decision-making fora should mirror a plurality of democratic legitimation schemes, also going through transnational organizations, grassroots movements, trade unions and NGOs. The 'political' (*le politique*)⁴⁸ is not limited to 'politics' (*la politique*)⁴⁹ and increasingly emerges in private or hybrid arenas.⁵⁰ Societal constitutionalism's pluralism individuates processes of democratization allowing different kinds of actors to participate in legal production taking place in distinct spheres at the global level. In this way, against all critical claims that it is the doom of democracy, globalization may offer an opportunity to exploit the democratic potential of social processes beyond the institutions of state

⁴²See Simon Caney, 'Responding to Global Injustice: On the Right to Resistance' (2015) 32 *Social Philosophy and Policy* 51, 59.

⁴³Martin Tisné and Marietje Schaake, *The Data Delusion: Protecting Individual Data Isn't Enough When the Harm is Collective* (Luminata, 2020), available at: <<https://luminategroup.com/storage/1023/The-Data-Delusion—July-2020.pdf>>.

⁴⁴Gunther Teubner, 'Quod omnes tangit: Transnational Constitutions Without Democracy?' (2018) 45 *Journal of Law and Society* 5.

⁴⁵Chris Thornhill, 'The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy' (2018) 45 *Journal of Law and Society* 73.

⁴⁶Jiří Příbáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (Routledge, London, 2021).

⁴⁷Teubner, 'Quod omnes tangit' (n 43), 14–15.

⁴⁸Understood as the set of collective reflections, conflicts and decisions on social options diffused at the level of society as a whole.

⁴⁹Understood as the subsystem within the functionally differentiated society whose function is to guarantee the capacity to make collectively binding decisions: see Claudio Baraldi, Giancarlo Corsi and Elena Esposito, *Unlocking Luhmann: A Keyword Introduction to Systems Theory* (Bielefeld University Press, Bielefeld, 2021) 171–74.

⁵⁰Gunther Teubner, 'Societal Constitutionalism and the Politics of the Commons' (2012) 21 *Finnish Yearbook of International Law* 2.

politics. In sum, societal constitutionalism looks at how to institutionalize the possibility of bottom-up social variation and contestation.

III. Reconciling digital and societal constitutionalism

This part of the chapter focuses on digital constitutionalism's definition and three systems – politics, economy and law – whose communication media – power, money and juridical authority – are central to modern society. First, it aims to frame existing analyses as parts of a broader theory with a critical potential. The premise is that such analyses do not explicitly focus on the fact that digital technologies create new possibilities for politics, economy and law to control and manipulate individuals through their own communication media⁵¹ and allow for new forms of colonization⁵² among systems (for example, digital economy towards politics or science, or digital press towards politics). Second, it aims to operationalize such insights. In particular, it highlights the analytical and normative gains that digital constitutionalism may achieve from its reconciliation with societal constitutionalism, pointing towards some proposals.

Definition

In one of its first explicit formulations, Suzor describes digital constitutionalism as an attempt 'that seeks to articulate and realize appropriate standards of legitimacy for governance in the digital age'.⁵³ Subsequently, Redeker, Gill and Gasser have defined digital constitutionalism as a 'common term to connect 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'.⁵⁴ Relying on societal constitutionalism, they frame digital constitutionalism as the 'process of constitutional rule-making that arises from social groups like civil society or transnational business corporations' and included the limitation of both public and private power within the subject matter of digital constitutionalism. However, they include within the scope of digital constitutionalism only documents, charters and declarations that explicitly aim to establish different types of an 'Internet Bill of Rights' and focus on political questions and communities. Therefore, they deny the 'constitutional quality' of other types of norms, especially those produced by IOs and private enterprises, such as the norms developed by Meta.⁵⁵ Those documents overwhelmingly focus on crucial but relatively narrow issues: freedom of expression, privacy, right of access to the internet. Therefore, their definition is still anchored to a conception of constitutional norms as limitations to (political) power and largely

⁵¹Michal Lavi, 'Manipulating, Lying, and Engineering the Future' (2023) 33 *Fordham Intellectual Property, Media and Entertainment Law Journal* 221, 269–89.

⁵²See n 39. Even the 'European Declaration on Digital Rights and Principles for the Digital Decade' (Brussels, 26.1.2022 COM(2022) 28 final) seems to be based on an individualist approach largely overlooking potential harms to science, press and politics.

⁵³Nicolas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4 *Social Media + Society* 1. The use of constitutionalist language in relation to the digital environment precedes Suzor's work: Celeste (n 11); Costello (n 11) 4–7.

⁵⁴Gill, Redeker and Gasser (n 11) 303.

⁵⁵Celeste (n 11) 86–90.

overlooks subtler dynamics of manipulation and colonization deriving from the impact of digitalization.

Celeste advances yet another formulation – again explicitly based on societal constitutionalism. He defines digital constitutionalism as ‘the ideology which aims to establish and to ensure the existence of a normative framework for the protection of fundamental rights and the balancing of powers in the digital environment’. Such ideology should permeate, guide and inform the constitutionalization of the digital environment, understood as the process that ‘aims to produce a series of normative counteractions to address the alterations of the constitutional ecosystem generated by the advent of digital technology’. The advantage of framing digital constitutionalism as a theoretical concept lies ‘in the possibility to distinguish it from its implementation, its translation into reality’. Further, Celeste’s notion of constitutionalization as a process that aims to produce normative counteractions captures well the tasks to which digital constitutionalism is called.

However, his conception of ideology is somehow still sanitized: a ‘structured set of values and ideals’.⁵⁶ Expanding on Althusser’s work⁵⁷ and its reading by Johns,⁵⁸ digital constitutionalism as an ideology can rather be defined as the constitutional discourse that investigates and contributes to shaping the socially constructed relationships of individuals to their actual conditions of existence, directly or indirectly mediated by digital technologies. This definition focuses on the dynamics of hailing/interpellation triggered by digital technologies – that is, dynamics by which different socio-political apparatuses and processes, be they work, sex, gender, ethnicity, citizenship or other, constitute individuals and collective actors as social subjects through digital technologies. This conceptually thicker notion of digital constitutionalism brings about three analytical gains.

First, it highlights that digital constitutionalism deals – *should* deal – primarily with how digital technologies affect and shape the social existence of individuals, collective actors and social systems.⁵⁹ In this sense, such notion aims to counter the risk that the constitutionalist language might be coopted to conceal or otherwise legitimize the powers and social processes that digital constitutionalism is supposed to address.⁶⁰

Second, digital technologies and globalization have not created, but rather made more visible and urgent, questions left unaddressed by state-centred liberal constitutionalism. In this regard, the insistence on counteractions to the alteration of a previously existing equilibrium gives the impression that digital constitutionalism deals with totally new constitutional questions, which emerged only with digital technologies. Undoubtedly, digital constitutionalism deals with questions that have assumed different quality and

⁵⁶Ibid 89.

⁵⁷Althusser (n 37).

⁵⁸Fleur Johns, ‘Governance by Data’ (2021) 17 *Annual Review of Law and Social Science* 4.1, particularly 4.7–4.8. See also Cohen, *Configuring the Networked Self* (n 6) Ch 1; Viljoen (n 6); Jenna Burrell and Marion Fourcade, ‘The Society of Algorithms’ (2021) 47 *Annual Review of Sociology* 213; Luciano Floridi (ed), *The Onlife Manifesto: Being Human in a Hyperconnected Era* (Springer, Dordrecht, 2015). For an empirical account of how social media and targeted profiling shape individual autonomy and (self-)perception, see Moritz Büchi, Eduard Fosch-Villaronga, Christoph Lutz, Aureilia Tamò-Larrieux and Shruthi Velidi, ‘Making Sense of Algorithmic Profiling: User Perceptions on Facebook’ (2023) 26 *Information, Communication & Society* 809.

⁵⁹Viljoen (n 6) 654; Burrell and Fourcade (n 57) 227ff.

⁶⁰For this criticism, see Costello (n 11); Jane Reis Gonçalves Pereira and Clara Iglesias Keller, ‘Constitucionalismo Digital: contradições de um conceito impreciso’ (2022) 13 *Revista Direito e Práxis* 2648.

significance with digital technologies. However, at their core, such questions were already present in the legal structures of (Western) modernity. ‘Analogue’ constitutionalism was not characterized by equilibrium, but rather hid its absence. The task of digital constitutionalism is not to regain some paradise lost, but rather to open the eyes before hell.⁶¹ This conceptual move helps ‘see’ the subject matter of digital constitutionalism – not simply the regulation of digital technologies and their disruptive impact, but rather of already existing constitutional questions reshaped by digitality.

Third, this definition offers a point of convergence for different and somehow still sparse strands of scholarship addressing the impact of digital technologies, especially those that do not speak – at least, not explicitly – a constitutional language. This would concern, among others, ‘critical data studies’, ‘algorithmic regulation’ and ‘law and political economy’. Critical data studies explore data as situated in complex ‘data assemblages’ of action referring to the vast systems, comprising not just data infrastructures, but also the ‘technological, political, social and economic apparatuses that frame their nature, operation and work’, including processes of data collection and categorization to the subsequent cleaning, storing, processing, dissemination and application of data.⁶² Algorithmic regulation is a concept ‘entailing sustained, intentional attempts to employ algorithmic decision-making in order to influence behaviour or manage risk’.⁶³ Law and political economy is a more general strand that has emerged in recent years, featuring particular attention to the material relationships triggered or affected by digitality and its legal infrastructures.⁶⁴ Coalescing such strands around a broad – but still conceptually thick – definition of digital constitutionalism, while still keeping their specificities, might contribute to a richer and possibly more nuanced debate, generative of more effective solutions. At the same time, it would contribute to establishing a stronger dialogue with existing discourses of global constitutionalism.⁶⁵ In this sense, such a move frames digital constitutionalism in a more comprehensive and possibly ambitious way – that is, as *the* constitutional theory of the digital age.

Politics

Power is a traditional focus of digital constitutionalism. There is a vast body of literature on the impact of digital technologies on politics and democracy, with contrasting views on

⁶¹Fleur Johns, ‘“Surveillance Capitalism” and the Angst of the Petit Sovereign’ (2020) 71 *British Journal of Sociology* 1049; Amy Kapczynski, ‘The Law of Informational Capitalism’ (2020) 129 *The Yale Law Journal* 1460.

⁶²See Rob Kitchin, ‘Big Data, New Epistemologies and Paradigm Shifts’ (2014) 1 *Big Data & Society* 1; Andrew Iliadis and Federica Russo (eds), ‘Special E-Issue: Critical Data Studies’ (2016) 3 *Big Data & Society* 1; Thao Phan and Scott Wark, ‘Racial Formations as Data Formations’ (2021) 8 *Big Data & Society* 1. Undoubtedly, critical approaches to platform regulation pre-date these elaborations: Elettra Bietti, ‘A Genealogy of Digital Platform Regulation’ (2023) 7 *Georgetown Law Technology Review* 1, 1719.

⁶³Karen Yeung, ‘Algorithmic Regulation: A Critical Interrogation’ (2017) 12 *Regulation and Governance* 505. See also Lena Ulbricht and Karen Yeung, ‘Algorithmic Regulation: A Maturing Concept for Investigating Regulation of and Through Algorithms’ (2022) 16 *Regulation & Governance* 3.

⁶⁴See, for example, Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019) 183–204; Kapczynski (n 60).

⁶⁵Edoardo Celeste, ‘The Constitutionalisation of the Digital Ecosystem: Lessons from International Law’ in Angelo Jr Golia, Matthias Kettemann and Raffaella Kunz (eds), *Digital Transformations in Public International Law* (Nomos, Baden Baden, 2022).

whether they open to positive or negative developments.⁶⁶ In this context, societal constitutionalism conceives power not as coercion or merely as self-interested influence on social actors' behaviour, but as the specific communication medium⁶⁷ of the political system. Societal constitutionalism focuses not only on new possibilities of the arbitrary exercise of power but also on the impact of digital technologies on the conditions of reproduction of power itself, conceived in this specific way. In other words, societal constitutionalism asks digital constitutionalism how it can preserve the capacity of politics to produce socially legitimized, collectively binding decisions under conditions of extreme social fragmentation, where consensus based on the traditional procedures of (representative) democracy is more difficult to reach.⁶⁸

Such an issue goes beyond the preservation of a 'free marketplace of ideas' and a functioning public sphere.⁶⁹ It requires a broader reflection on the conditions through which (presumptions of) consensus to the purposes of collective decision-making may emerge.⁷⁰ The digital revolution has debunked, or at least raised questions about, yet another myth of liberal political theory: the direct connection between the social availability of 'correct' information and the emergence of authentic socio-political consensus via well-functioning state institutions. Indeed, thanks also to digital technologies, new and old (collective) actors can voice dissent, generate conflict, 'force' debates and move them in different directions, in ways different from those emerged in state-centred constitutional modernity.⁷¹ In this sense, as the constitutional theory of the digital age, digital constitutionalism is called to incorporate into its reflections a legal-institutional analysis of the impact of digital technologies on both national and transnational collective actors and their respective strategies, including political parties, movements, religious confessions and academic institutions.⁷²

At the same time, digital constitutionalism is called to address the impact of digital technologies on the dangerous capacity of politics to control individuals and colonize other social fields. This issue does not concern only the rise – in different forms and degrees – of state surveillance and profiling⁷³ in both liberal-democratic and

⁶⁶Siva Vaidhyanathan, *Antisocial Media: How Facebook Disconnects Us and Undermines Democracy* (Oxford University Press, Oxford, 2018); Nathaniel Persily, *The Internet's Challenge to Democracy: Framing the Problem and Assessing Reforms* (Kofi Annan Foundation, 2019); Barrie Sander, 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law' (2021) 32 *European Journal of International Law* 159. For a literature review of the impact of social media on social cohesion and democracy, see Sandra González-Bailón and Yphtach Lelkes, 'Do Social Media Undermine Social Cohesion? A Critical Review' (2022) *Social Issues and Policy Review*, available at <<https://doi.org/10.1111/sipr.12091>>.

⁶⁷See n 17.

⁶⁸Niklas Luhmann, *Trust and Power* (Wiley, Chichester, 1979) 167–84.

⁶⁹See, however, Jack Balkin, 'To Reform Social Media, Reform Informational Capitalism' in Lee Bollinger and Geoffrey R. Stone (eds), *Social Media, Freedom of Speech and the Future of Our Democracy* (Oxford University Press, Oxford, 2022) 233–54.

⁷⁰Jürgen Habermas, 'Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere' (2022) 39 *Theory, Culture & Society* 145.

⁷¹Vesting (n 30) 469–527.

⁷²In this direction, see Sebastian Berg and Jeanette Hofmann, 'Digital Democracy' (2021) 10 *Internet Policy Review* 1, 6–8; and Vesting (n 30) 522–23.

⁷³Mireille Hildebrandt, 'Profiling and the Rule of Law' (2008) 1 *Identity in the Information Society* 55; Frederike Kaltheuner and Elettra Bietti, 'Data is Power: Towards Additional Guidance on Profiling and Automated Decision-making in the GDPR' (2018) 2 *Policy & Practice* 1.

authoritarian countries.⁷⁴ There are already rich reflections on the effects of predictive policing,⁷⁵ automated decision-making⁷⁶ and ‘nudging’.⁷⁷ As the COVID-19 pandemic has shown, digital technologies and algorithms open the way to new and subtler forms of constraint, political control and manipulation of both individuals and autonomous social fields.⁷⁸ However, a societal constitutionalism-oriented approach to digital constitutionalism calls for a more comprehensive approach to the bidirectional relationship between digital technologies and the (self-)reproduction of power. More generally, the digital revolution ‘asks’ constitutional theory to rethink the relationship between state and society: neither a stark separation nor a complete indistinction, but rather an intensification of interdependence and mutual relationships.

In normative terms, such an approach highlights the need to strengthen the cognitive openness of state (administrative) apparatuses and procedures;⁷⁹ and to establish stricter prohibitions on the use of AI by both public and private actors.⁸⁰ Such openness should be directed to absorb and re-elaborate in their concrete operation programmes not strictly related to self-referential decision-making capacities.⁸¹ But besides state structures and public apparatuses, establishing and reinforcing mechanisms of cognitive openness to political impulses is even more urgent within private or hybrid organizations such as Meta or ICANN.⁸² In that sense, Meta’s establishment of the Oversight Board to adjudicate

⁷⁴See, among many, Sarah Jakob, ‘The Corporate Social Credit System in China and Its Transnational Impact’ (2021) 12 *Transnational Legal Theory* 294; Larry Catá Backer, ‘And an Algorithm to Entangle Them All?’ in Nico Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press, Cambridge, 2021); Lucas Miotto and Jiahong Chen, ‘Manipulation, Real-time Profiling, and their Wrongs’ in *The Philosophy of Online Manipulation* (Routledge, London, 2022); Tiberiu Dragu and Yonatan Lupu, ‘Digital Authoritarianism and the Future of Human Rights’ (2021) 75 *International Organization* 991.

⁷⁵Sarah Brayne, ‘Big Data Surveillance: The Case of Policing’ (2017) 82 *American Sociological Review* 977; Burrell and Fourcade (n 57) 221–26; Céline Castets-Renard, ‘Human Rights and Algorithmic Impact Assessment for Predictive Policing’ in Micklitz et al (n 4).

⁷⁶Monika Zalnieriute, Lyria Bennett Moses and Georgo Williams, ‘The Rule of Law and Automation of Government Decision-Making’ (2019) 82 *Modern Law Review* 425.

⁷⁷Karen Yeung, ‘“Hypernudge”: Big Data as a Mode of Regulation by Design’ (2017) 20 *Information, Communication & Society* 118. See more generally Amnon Reichman and Giovanni Sartor, ‘Algorithms and Regulation’ in Micklitz et al (n 4).

⁷⁸David Restrepo Amariles, ‘From Computational Indicators to Law into Technologies: The Internet of Things, Data Analytics and Encoding in COVID-19 Contact-Tracing Apps’ (2021) 17 *International Journal of Law in Context* 261; Anatoliy Gruzd and others, ‘Special e-Issue: Studying the COVID-19 Infodemic at Scale’ (2021) 8 *Big Data & Society* 1.

⁷⁹Julie Cohen, ‘The Regulatory State in the Information Age’ (2016) 17 *Theoretical Inquiries in Law* 369, argues that a regulatory state optimised for the information economy must develop rubrics for responding to three macro-problems: (1) platform power – the power to link facially separate markets and/or to constrain participation in markets by using technical protocols; (2) infoglut – unmanageably voluminous, mediated information flows that create information overload; and (3) systemic threat – nascent, probabilistically defined harm to be realized at some point in the future.

⁸⁰From different perspectives, see Giovanni De Gregorio, ‘The Normative Power of Artificial Intelligence’ (2023) 30 *Indiana Journal of Global Legal Studies* (forthcoming); and Irina Domurath, ‘Rage Against the Machine: Profiling and Power in the Data Economy’ (2023) 30 *Indiana Journal of Global Legal Studies* (forthcoming).

⁸¹Sofia Ranchordas, ‘Empathy in the Digital Administrative State’ (2022) 77 *Duke Law Journal* 1341. In the same direction, see Johannes Himmelreich, ‘Against “Democratizing AI”’ (2022) 38(4) *AI & Society* 1333.

⁸²Undoubtedly, actors such as Meta and the ICANN are significantly different also from digital constitutionalism’s perspective. The constitutional aspects concerning the structural and logical layers of the internet are different from those concerning content moderation and platform governance (the social layer).

content moderation issues on its platforms could be seen as an opportunity to open the inner normative system of a profit-driven entity to social demands.⁸³

Interestingly, democratization has always been a weak spot of both digital constitutionalism⁸⁴ and global constitutionalism.⁸⁵ In this regard, failures to replicate state-centred models of democratic legitimation show how unsuited to the digital sphere(s) they are.⁸⁶ Unsurprisingly, the digital constitutionalism literature has focused mostly on procedural aspects such as fairness, participation, transparency, accountability and judicial review,⁸⁷ to the point where it has been accused of ‘procedural fetishism’.⁸⁸ These proposals are certainly valuable and, under the pressure of the *colère publique* triggered by recurring scandals, have been to some extent implemented by private ‘governors’.⁸⁹ However, in order to avoid risks of cooption, the democratization of the digital sphere must also involve the dimensions of struggle, conflict and contestation, especially in fields where the risks of abuses are higher, such as law enforcement, border control, migration and asylum.⁹⁰ Here again, societal constitutionalism – in line with recent strands of global constitutionalism⁹¹ – highlights the need to preserve spaces for conflict and contestation also within the social spheres variably controlled by digital ‘governors’. In this regard,

As such, legitimacy standards are different and engage state constitutionalism and the (global) political system differently. On these issues, from the perspective of the structural layer, see for example, Angelina Fisher and Thomas Streinz, ‘Confronting Data Inequality’ (2022) 60 *Columbia Journal of Transnational Law* 829.

⁸³For the impact of reduced profitability on the openness to social planning initiatives, see Kate Klonick, *The End of the Golden Age of Tech Accountability* (2023, forthcoming) and Angelo Jr Golia, ‘Testing the Transformative Potential of Facebook Oversight Board: Strategic Litigation within the Digital Constitution?’ (2023) *Indiana Journal of Global Legal Studies* (forthcoming).

⁸⁴Moritz Schramm, ‘Where is Olive? Or: Lessons from Democratic Theory for Legitimate Platform Governance’ (2022).

⁸⁵See only Jürgen Habermas, ‘The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society’ in *Europe: The Faltering Project* (Cambridge, MA: MIT Press, 2009).

⁸⁶One can think of ICANN’s elections in 2003; or Facebook’s democratic experiments in 2009–2012: John Palfrey, ‘The End of the Experiment: How ICANN’s Foray into Global Internet Democracy Failed’ (2004) 17 *Harvard Journal of Law & Technology* 409; Tobias Mahler, ‘The Internet Corporation for Assigned Names and Numbers (ICANN) on a Path Toward a Constitutional System’ in Tobias Mahler (ed), *Generic Top-Level Domains: A Study of Transnational Private Regulation* (Edward Elgar, Cheltenham, 2019) 40–53.

⁸⁷Giovanni De Gregorio, ‘Democratising Online Content Moderation: A Constitutional Framework’ (2020) 36 *Computer Law & Security Review* 1, 11–16; Blayne Haggart and Clara I Keller, ‘Democratic Legitimacy in Global Platform Governance’ (2021) 45 *Telecommunications Policy* 1, 14–16, highlighting how most proposals – Meta’s Oversight Board, judicial adjudication as one of the 2015 Manila Principles for Intermediary Liability, and the human-rights-centric framework outlined in the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN Human Rights Council Report no A/HRC/38/35) – are based on a narrow conception of legitimacy as throughput legitimacy.

⁸⁸Monika Zalnieriute, ‘Against Procedural Fetishism: A Call for a New Digital Constitution’ (2023) 30 *Indiana Journal of Global Legal Studies* (forthcoming).

⁸⁹Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harvard Law Review* 1598.

⁹⁰Dimitri van den Meerssche and Rebecca Mignot-Mahdavi, *Failing Where It Matters the Most* (2022) *The Digital Constitutionalist*, available at: <<https://digi-con.org/failing-where-it-matters-most>>, with a critical take on the AI Act of the European Union.

⁹¹Christian Volk, ‘Why Global Constitutionalism Does Not Live up to its Promises’ (2012) 4 *Goettingen Journal of International Law* 551, 567, 571–74; Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge University Press, Cambridge, 2018); Anne Peters, ‘Constitutional

proposals to establish a right to contest AI – especially in its collective dimension – are promising.⁹²

But *who* will contest? Which polities will raise conflict if the digital spaces is multi-jurisdictional and multilayered? This question touches upon another crucial point of the relationship between digital constitutionalism and politics: the territorial one. Indeed, both the state/society divide and the internal/external divide⁹³ need to be reframed. Here, a closer connection with societal constitutionalism helps understand that digital constitutionalism is either a *global* constitutionalism – ‘thinking’ in multijurisdictional and multilevel terms – or it is not.⁹⁴ Digital constitutionalism contributes to the internationalization/globalization of constitutional discourses, understood also as a trajectory where the state territory is less and less *the* symbolic space for power relationships and consensus-building. Put in a different way, digital constitutionalism contributes to the conceptual disentanglement of issues concerning sovereignty from those concerning legality and constitutionality.

Digital constitutionalism has long dealt with issues concerning jurisdictional conflicts – especially over hate speech and data protection – and the multilayered/hybrid governance of the internet.⁹⁵ However, a focus on the impact of the reproduction of power and legitimated collective decision-making helps ‘see’ how digitality often sustains trends toward supra- and transnational engagement and a centre/periphery rather than internal/external mindset. If states aim at effectively preserving their capacity to regulate key societal fields – crucial to the building of consensus – they are pushed to coordinate with other actors or to extend the effects of their domestic law beyond their territory.⁹⁶ Such a focus might also help de-parochialize some digital constitutionalism discourses that frame issues of digitality as if they fell only within the scope of national constitutions.

More generally, in locating arenas for democratization and contestation, societal constitutionalism focuses on communities of users, consumer organizations, internet activists and other civil society segments, highlighting their essential role in triggering variations in social communication and in the successful operation of reflexive processes out of which normative expectations about network infrastructure emerge.⁹⁷

Theories of International Organisations: Beyond the West’ (2021) 20 *Chinese Journal of International Law* 649, 681–83.

⁹²Niva Elkin-Koren, ‘Contesting Algorithms: Restoring the Public Interest in Content Filtering by Artificial Intelligence’ (2020) 7 *Big Data & Society* 1; Margot E Kaminski and Jennifer M Urban, ‘The Right to Contest AI’ (2021) 121 *Columbia Law Review* 1957; Ngozi Okidegbe, ‘The Democratizing Potential of Algorithms?’ (2022) 53 *Connecticut Law Review* 739; Kars Alfrink et al, ‘Contestable AI by Design: Towards a Framework’ (2022) *Minds and Machines*, available at <<https://doi.org/10.1007/s11023-022-09611-z>>. Francesca Palmiotto Ettore, *The Right to Contest Automated Decisions* (2023) *The Digital Constitutionalist*, available at: <<https://digi-con.org/the-right-to-contest-automated-decisions>>.

⁹³Rooted in liberal legal and political theory: see John Locke, *Two Treatises of Government* (Yale University Press, New Haven, CT, 2003), § 147; William Blackstone, *Commentaries*, Vol I (University of Chicago Press, Chicago, 1979) 160, 243.

⁹⁴Celeste (n 64); De Abreu Duarte, De Gregorio and Golia (n 11).

⁹⁵Kettemann (n 11).

⁹⁶This certainly raises a range of issues from Third World and post-colonial perspectives, which help further link digital constitutionalism to current global constitutionalism debates: see Jonathan Havercroft, Jacob Eisler, Jo Shaw, Antje Wiener and Val Napoleon, ‘Decolonising Global Constitutionalism’ (2020) 9 *Global Constitutionalism* 1; Peters (n 90) 690–93.

⁹⁷Christoph Graber, ‘Net Neutrality: A Fundamental Right in the Digital Constitution?’ (2023) 30 *Indiana Journal of Global Legal Studies* (forthcoming), with a case study on net neutrality.

In this same context, a societal constitutionalism-oriented approach links digital constitutionalism and international law discourses, giving a coherent account of the (re-)emergence of states with phenomena such as the splinternet,⁹⁸ technological and regulatory competition and an enforcement frenzy made of national laws on content moderation, antitrust and data protection.⁹⁹ However, rather than a return to the self-contained units of a Westphalian global order, such a re-emergence can be read as the rise of macro-geopolitical units, which increasingly (try to) act ‘imperial’¹⁰⁰ – that is, in terms of centre/periphery.¹⁰¹ New processes of fragmentation, polarization and hybridization, with their related normative conflicts, are emerging along blurred and ever-shifting¹⁰² spheres of influence.¹⁰³ In these processes, the relative power of states, the distinct strategies pursued by key private actors gravitating in their orbits¹⁰⁴ and technological/infrastructural asymmetries play a central role.¹⁰⁵ Moreover, in their emergence and development, such processes show remarkably *functional* features, taking different forms and degrees of intensity depending on how close to the reproduction of political power and consensus-building distinct issues are.¹⁰⁶ Put differently, the faultlines of fragmentation, the various forms of ‘splinternet’ and the different roles of private actors emerging with the ‘return’ of state politics into the digital sphere vary greatly, depending on the specific issue. This functional reading is also coherent with the fact that conditions and consequences of the competition among global players such as the United States, China and the European Union change dramatically depending on whether such competition concerns the structural layer (e.g., control over data infrastructures), the logical layer (e.g., control over Internet protocols) or the social layer (e.g., content moderation on social media platforms).

Economy

Digital technologies have increased the capacity of autonomous self-reproduction and colonization of the economy. The data economy has become so central that data are

⁹⁸Dramatically accelerated following the Russian war of aggression in Ukraine: see Emily Birnbaum and Rebecca Kern, ‘The Russian: Splinternet’ is here’ Politico, available at: <<https://www.politico.com/news/2022/03/04/russia-splinternet-facebook-twitter-00014408>>.

⁹⁹Chien Huei Wu, ‘Sovereignty Fever: The Territorial Turn of Global Cyber Order’ (2021) 81 *Heidelberg Journal of International Law* 651, particularly 675–76; Henning Lahmann, ‘On the Politics and Ideologies of the Sovereignty Discourse in Cyberspace’ (2021) 32 *Duke Journal of Comparative & International Law* 61.

¹⁰⁰Golia, Kettemann and Kunz (n 64) 11–22; Roxana Vatanparast, ‘Data Governance and the Elasticity of Sovereignty’ (2020) 46 *Brooklyn Journal of International Law* 1.

¹⁰¹Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, Oxford, 2020) 132–70; Matthew S Eerie and Thomas Streinz, ‘The Beijing Effect: China’s Digital Silk Road as Transnational Data Governance’ (2021) 54 *New York University Journal of International Law & Politics* 1; Elaine Fahey, *The EU as a Global Digital Actor: Institutionalising Global Data Protection, Trade, and Cybersecurity* (Hart, Oxford, 2022).

¹⁰²Danielle Flonk and Markus Jaktentfuchs, ‘Authority Conflicts in Internet Governance: Liberals vs Sovereignists?’ (2020) 9 *Global Constitutionalism* 364.

¹⁰³Giovanni De Gregorio and Roxana Radu, ‘Digital Constitutionalism in the New Era of Internet Governance’ (2022) 30 *International Journal of Law and Information Technology* 68.

¹⁰⁴Sofia Ranchordas, Giovanni De Gregorio and Catalina Goanta, ‘Big Tech War Activism’ (2022) *Verfassungsblog*, available at: <<https://verfassungsblog.de/big-tech-war-activism>>.

¹⁰⁵De Gregorio and Radu (n 102) 73–76.

¹⁰⁶See Fischer-Lescano and Teubner, ‘Regime-Collisions’ (n 25).

progressively regarded as capital,¹⁰⁷ be they ‘coded’ through law or not.¹⁰⁸ This phenomenon has increased the already alarming commodification tendencies of global, neoliberal capitalism. Here, one main problem is informational capitalism, understood as a business model based on the monetization of information and data collected by the actors of the digital economy, characterized by a compulsion to engagement growth that – combined with oligopolistic markets¹⁰⁹ – triggers vicious dynamics. Informational capitalism does not just affect individuals’ material and psychological conditions of existence; it also drains social systems and collective actors (political movements, business entities, media, education, and research institutions) of their functional autonomy. Its effects on individuals’ mental health, and on political engagement and politics, are well known, as they are to the actors involved.¹¹⁰ In some ways, digital platforms are societal black holes, capturing other systems in their ever-growing accretion disc. Importantly, the externalities produced by the digital economy affect the capacity of politics to produce consensus-based decisions; of science to produce socially shared truth;¹¹¹ of the non-digital economy to produce and redistribute economic value; and so on.

For example, in terms of the economy/politics interface, digital and cryptocurrencies and smart contracts endanger the capacity of politics to influence economic processes through monetary, budgetary, and fiscal policies and politically legitimated decisions, affecting the capacity to redistribute economic value to the purposes of political consensus. In terms of the economy/press interface, the problems of journalism certainly did not start with the digital revolution. However, the effects of real-time web analytics, clickbait on social media platforms and information bubbles on the quality of journalism are well known¹¹² and have led to the consolidation of larger news organizations¹¹³ and a transformation in the professional self-understanding of journalism.¹¹⁴ In terms of the economy/science interface, digitalization and open-access solutions managed by business

¹⁰⁷Jathan Sadowski, ‘When Data is Capital: Datafication, Accumulation, and Extraction’ (2019) 6 *Big Data & Society* 1; Chunlei Tang, *Data Capital: How Data is Reinventing Capital for Globalization* (Springer, Dordrecht, 2021).

¹⁰⁸Pistor (n 63) 183–205; Kapczynski (n 60) 1498ff; Roxana Vatanparast, ‘The Code of Data Capital: A Distributional Analysis of Law in the Global Data Economy’ (2021) 1 *Juridikum* 98.

¹⁰⁹Dina Srinivasan, ‘The Antitrust Case Against Facebook: A Monopolist’s Journey Towards Pervasive Surveillance in Spite of Consumers’ Preference for Privacy’ (2019) 16 *Berkeley Business Law Journal* 39; Nicolas Petit, *Big Tech and the Digital Economy: The M oligopoly Scenario* (Oxford University Press, Oxford, 2020).

¹¹⁰See the scandal following Frances Haugen’s revelations in 2021, showing that Meta was aware of the negative impact on teenagers of Instagram and the contribution of Facebook activity to violence in developing countries: ‘The Facebook Files. A Wall Street Journal investigation’, available at: <<https://www.wsj.com/articles/the-facebook-files-11631713039>>. On the importance of trade secrets and their constitutionalization as property rights in the power of data companies, see Amy Kapczynski, ‘The Public History of Trade Secrets’ (2022) 55 *UC Davis Law Review* 1367.

¹¹¹Ziv Epstein, Nathaniel Sirlin, Antonio Arechar, Gordon Pennycook and David Rand, ‘The Social Media Context Interferes with Truth Discernment’ (2023) 9 *Science Advances* 1.

¹¹²Berta García Orosa, Santiago Gallur Santorun and Xosé López García, ‘Use of Clickbait in the Online News Media of the 28 EU Member Countries’ (2017) 72 *Revista Latina de Comunicación Social* 1261.

¹¹³Nik Milanovic, ‘We Need New Business Models to Burst Old Media Filter Bubbles’, TechCrunch, 29 October 2020, available at: <<https://techcrunch.com/2020/10/28/we-need-new-business-models-to-burst-old-media-filter-bubbles>>.

¹¹⁴Mariella Bastian, Natali Helberger and Mykola Makhortykh, ‘Safeguarding the Journalistic DNA: Attitudes towards the Role of Professional Values in Algorithmic News Recommender Designs’ (2021) 9 *Digital Journalism* 835; Victor Pickard, ‘Can Journalism Survive in the Age of Platform Monopolies?’

corporations run the risk of increasing publish-or-perish, reputation-seeking dynamics and predatory publishing and of reinforcing the position of hegemonic actors.¹¹⁵

Digital constitutionalism has often addressed such issues using a piecemeal approach, inspired by liberal theory assumptions. Still, some particularly apparent problems brought by the digitalization of the economy have been addressed quite quickly. Central banks have proved ready to defend their control over currencies against business capture in the form of crypto-currencies and crypto-finance instruments.¹¹⁶ A similar development can be identified where the dynamics of (social) power are relatively easy to identify. Especially after the COVID-19 pandemic exposed, in all its gravity, the conditions of platform workers,¹¹⁷ some courts¹¹⁸ and legislators¹¹⁹ have been acting relatively swiftly to ensure that such workers enjoy access to the legal protections afforded to employees.

However, other dynamics remain largely off the radar. One example is content monetization, which is characterized by the potential intertwining of commercial and political speech and remains a blind spot for public regulators¹²⁰ mostly left to private governance.¹²¹ Another significant example is provided by the fields of data protection and data ownership,¹²² generally gravitating around valid legal consent and right to property of individuals. This approach, however, often does not consider well-known problems of consent in privacy law,¹²³ exacerbated by the business models of Big Tech

Confronting Facebook's Negative Externalities' in Terry Flew and Fiona Martin (eds), *Digital Platform Regulation: Global Perspectives on Internet Governance* (New York: Palgrave Macmillan, 2022) 23–41.

¹¹⁵See the debate 'Open/Closed' at <<https://verfassungsblog.de/category/debates/open-closed>>; and Rafaela Kunz, 'Opening Access, Closing the Knowledge Gap?' (2021) 81 *Heidelberg Journal of International Law* 23, 43–45.

¹¹⁶Yaiza Cabedo, 'International Race for Regulating Crypto-Finance Risks: A Comprehensive Regulatory Framework Proposal' in Micklitz et al (n 4).

¹¹⁷Sarah Kassem, 'Labour Realities at Amazon and COVID-19: Obstacles and Collective Possibilities for Its Warehouse Workers and MTurk Workers' (2022) 1 *Global Political Economy* 59.

¹¹⁸CJEU, Judgment of the Court (Grand Chamber), *Asociación Profesional Elite Taxi*, Case C-434/15, 20.12.2017; Corte di cassazione, no. 1663/2020, 24.01.2020 (Italy); Cour de cassation, no. 374/2020, 4.03.2020 (France); Tribunal Supremo, no. 805/2020, 25.09.2020 (Spain); UKSC, *Uber BV and Others (Appellants) v Aslam and Others (Respondents)*, 2019/0029, 19.11.2021, (UK); Bundesarbeitsgericht, 9 AZR 102/20, AZR 102/20, 01.12.2020 (Germany). See, however, in California, *Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest*, 4 Cal 5th 903 (Cal 2018).

¹¹⁹See, for example, California Assembly Bill 5 (AB 5) of 18 September 2011; the Spanish 'Ley rider' (Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales, available at: <<https://www.boe.es/eli/es/rd/2021/05/11/9>>; EU's Proposed Platform Work Directive, Brussels, 9.12.2021, COM (2021) 762 final, 2021/0414 (COD), available at: <<https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en>>.

¹²⁰Catalina Goanta, *Human Ads Beyond Targeted Advertising: Content Monetization as the Blind Spot of the Digital Services Act* (2021). For a broader discussion, see Catalina Goanta and Sofia Ranchordas (eds), *The Regulation of Social Media Influencers* (Edward Elgar, Cheltenham, 2020).

¹²¹See Robyn Caplan and Tarleton Gillespie, 'Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy' (2020) *Social Media + Society* 1.

¹²²Sjef van Erp, 'Ownership of Digital Assets?' (2016) 5 *European Property Law Journal* 73; Václav Janeček, 'Ownership of Personal Data in the Internet of Things' (2018) 34 *Computer Law & Security Review* 1039; Patrik Hummel, Matthias Braun and Peter Dabrock, 'Own Data? Ethical Reflections on Data Ownership' (2021) 34 *Philosophy & Technology* 545.

¹²³Ignacio Cofone, 'Beyond Data Ownership' (2021) 43 *Cardozo Law Review* 501. See also Hummel, Braun and Dabrock (n 121).

companies and their purposeful cultivation of users' 'digital resignation'.¹²⁴ Further, the treatment of data by Big Tech platforms is not only a matter of individual privacy and valid consent, especially considering the collective dimension of related harms.¹²⁵

These problems emerge even with the most advanced regulatory instruments, such as the 2016 GDPR of the European Union.¹²⁶ This has been a relative success as a form of 'Brussels effect'¹²⁷ and, more recently, enforcement agencies have started to deploy its potential less timidly.¹²⁸ However, besides serious enforcement issues,¹²⁹ the GDPR is still 'grounded in procedural and neoliberal paradigms: the primacy of individual rights, individual choices, and self-determination [which do not] capture the most salient aspects of data in platform ecosystems ... Data is relational and collectively constructed in ways that individual consent or self-determination guarantees cannot alone address.'¹³⁰ Even the recent Digital Services Act (DSA)¹³¹ goes in the same direction when it falls short of a complete ban on targeted advertising and, in order to prohibit the use of UX tweaks to manipulate/force consent, requires platforms to offer parity in consent flows for refusing or agreeing to hand over data (Art. 25).¹³²

Furthermore, even in fields covered by current initiatives, the focus often remains relatively narrow. For example, the substantive scope of the guarantees provided by the European Union's proposed Platform Work Directive¹³³ is limited to so-called 'gig' workers, even though algorithmic management is now present in workplaces and sectors well beyond the 'core' platform businesses.¹³⁴ From yet another perspective, current discussions rarely capture the transnational dimension of platform economy, potentially

¹²⁴Cf. Joseph Turow, Yphtach Lelkes, Nora A Draper and Ari Ezra Waldman, *and others, Americans Can't Consent to Companies' Use of Their Data* (Annenberg School for Communication, University of Pennsylvania, Philadelphia, 2023); and Nora A Draper and Joseph Turow, 'The Corporate Cultivation of Digital Resignation' (2019) 21 *New Media & Society* 1824.

¹²⁵Tisné and Schaake (n 42).

¹²⁶Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

¹²⁷See Fahey (n 100).

¹²⁸See the Irish Data Protection Commission (DPC) 390 million euros fine to Meta, adopted on the basis of a decision of the European Data Protection Board (EDPB) ruling Meta's reliance on contract terms as the lawful basis for personalised advertising invalid: Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), DPC Inquiry Reference, IN-18-5-7, available at <https://edpb.europa.eu/system/files/2023-01/edpb_binding_decision_202204_ie_sa_meta_instagramservice_redacted_en.pdf>.

¹²⁹Estelle Massé, 'Four Years under the EU GDPR. How to Fix Its Enforcement', AccessNow (2022), available at <<https://www.accessnow.org/wp-content/uploads/2022/07/GDPR-4-year-report-2022.pdf>>.

¹³⁰Bietti (n 61), 47.

¹³¹Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

¹³²However, the DSA has now prohibited ad profiling of minors (Art 28) and the use of highly sensitive personal data such as racial or ethnic origin, political or religious affiliation, sexuality or health data for behavioural targeting (Art 26, para 3). For legislation headed in this direction in the United States, see the California Privacy Rights Act of 2020.

¹³³European Commission, *Proposal for a Directive on Improving Working Conditions in Platform Work*, COM(2021) 762 final, 09.12.2021.

¹³⁴One may think of Amazon's use of automated decision-making systems in its warehouses, and of the employers' use of remote monitoring tools for formerly office-based employees: Aislinn Kelly-Lyth and Jeremias Adams-Prassl, 'The EU's Proposed Platform Work Directive', *Verfassungsblog*, 14 December 2021, available at: <<https://verfassungsblog.de/work-directive>>.

triggering races to the bottom on wages and workers' rights, related to geographical differences in skills and labour costs.¹³⁵

A societal constitutionalism-oriented approach may contribute to partially recalibrating the focus. It starts from the assumption that informational capitalism poses significant constitutional issues even when single, fully informed and non-coerced individuals can access and validly consent to the treatment of their data and, more generally, interact with digital technologies.¹³⁶ For example, it points to the necessity to further explore risk-based regulatory models¹³⁷ inspired by consumer¹³⁸ and environmental law.¹³⁹

Another contribution is the spotlight on the threats of informational capitalism on the institutional dimensions of rights beyond individual freedoms – for example, on the integrity of science. In this regard, societal constitutionalism-oriented approaches focus on how to establish new prohibitive rules *and* to enforce non-binding norms emerging from within the involved sectors.¹⁴⁰

Further, societal constitutionalism-oriented approaches focus on the digitalization of the economy in its transnational dimension and on collective/social rights. This consideration applies to different proposals targeting digital service providers. Here, while digital constitutionalism's liberal assumptions can be identified on both sides of the Atlantic, they are influenced by distinct conceptions of the relationship between state and society and their own varieties of capitalism.¹⁴¹

¹³⁵See, however, Julieta Haidar and Marteen Keune (eds), *Work and Labour Relations in Global Platform Capitalism* (Edward Elgar, Cheltenham, 2021); and Konstantinos Papadakis and Maria Mexi, 'Managing Complexity in the Platform Economy: Self-regulation and the Cross-border Social Dialogue Route' (2021), available at: <<https://www.graduateinstitute.ch/communications/news/managing-complexity-platform-economy-self-regulation-and-cross-border-social>>.

¹³⁶See Tisné and Schaake (n 42).

¹³⁷Pietro Dunn and Giovanni De Gregorio, 'Risk-Based Regulation in European Digital Constitutionalism' (2023) *The Digital Constitutionalist*, available at: <<https://digi-con.org/risk-based-regulation-in-european-digital-constitutionalism>>.

¹³⁸Serge Gijrath, 'Consumer Law as a Tool to Regulate Artificial Intelligence' in Micklitz et al (n 4).

¹³⁹In this direction, see Cofone (n 122); Tommaso Fia, 'An Alternative to Data Ownership: Managing Access to Non-Personal Data through the Commons' (2020) 21 *Global Jurist* 181; Dan Wielsch, 'Political Autonomy in the Digital World: From Data Ownership to Digital Constitutionalism' (2023) 30 *Indiana Journal of Global Legal Studies* (forthcoming). In some respects, the DSA moves towards constitutional restraints of the digital economy when it requires 'very large online platforms' to periodically conduct and publish assessments concerning systemic risks, particularly before launching new services (Art 34), with related mitigation obligations (Art 35), regulatory oversight of their algorithms and to provide public interest researchers with access to data to enable independent scrutiny of platform effects (Art 40), a provision heading in the direction pointed to by Kapczynski (n 109). On the limits of transparency requirements of instruments such as the DSA, however, see Marta Maroni, "'Mediated Transparency": The Digital Services Act and the Legitimation of Platform Power' in Päivi Leino-Sandberg, Maarten Zbigniew Hillebrandt and Ida Koivisto (eds), *(In)visible European Government: Critical Approaches to Transparency as an Ideal and a Practice* (Routledge, forthcoming).

¹⁴⁰Raffaella Kunz, 'Tackling Threats to Academic Freedom Beyond the State: The Potential of Societal Constitutionalism in Protecting the Autonomy of Science in the Digital Era' (2023) 30 *Indiana Journal of Global Legal Studies* (forthcoming).

¹⁴¹For the different trajectories of libertarian, liberal and neoliberal regulatory approaches in the United States and Europe, see Bietti (n 61). For the specifically ordoliberal approach of the EU, see Benjamin Farrand, 'The Ordoliberal Internet? Continuity and Change in the EU's Approach to the Governance of Cyberspace' (2023) 2 *European Law Open* 106. For regulatory approaches beyond those areas, see Marta Cantero Gamito, 'Regulation of Online Platforms' in Jan M Smits et al (eds), *Elgar Encyclopedia of Comparative Law* (Edward

In the United States, legislators let the digital economy expand with little to no regulation and courts do not normally give legal relevance to the private power exercised by digital actors, leaving them grow in a sort of regulatory vacuum.¹⁴² In hindsight, this is coherent with the emergence of Big Tech companies as veritable ‘governors’,¹⁴³ sometimes with de facto normative and adjudication systems.¹⁴⁴ Further, it is coherent with proposals focusing on lifting intermediary immunity under section 230,¹⁴⁵ which makes it extremely difficult to hold platforms liable for illegal content,¹⁴⁶ and on antitrust law as the main instrument to break Big Tech giants and even as an instrument of democratization.¹⁴⁷

In Europe, the DSA and the Digital Markets Act (DMA)¹⁴⁸ go in a partially different direction. Indeed, they aim at ‘constitutionalizing’ the role of digital service providers in matters of data collection and content moderation¹⁴⁹ and at enhancing the role of private actors in enforcement mechanisms.¹⁵⁰ At the same time, European courts have been more open to taking into consideration the societal role of social media companies, sometimes applying constitutional rights in inter-private relationships through the explicit or implicit recourse to the time-honoured doctrine of horizontal effect of fundamental rights.¹⁵¹ However, these instruments ‘still address significant threats to fundamental rights on a market access fashion.’¹⁵²

In different ways, then, both US and European approaches still intervene only externally on the ‘governors’ of the digital economy. Such actors are still in control, and informational

Elgar, Cheltenham, forthcoming); and Lin Zhang and Julie Yujie Chen, ‘A Regional and Historical Approach to Platform Capitalism: The Cases of Alibaba and Tencent’ (2022) 44 *Media, Culture & Society* 1454.

¹⁴²Ruth B Collier, VB Dubal and Christopher Carter, *Labor Platforms and Gig Work: The Failure to Regulate* (UC Berkeley Working Paper Series, 2017); Julian Posada, ‘Embedded Reproduction in Platform Data Work’ (2022) 25 *Information, Communication & Society* 816.

¹⁴³Klonick, ‘The New Governors’ (n 88) 1621.

¹⁴⁴Meta’s Oversight Board is the most prominent instance: see Kate Klonick, ‘The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression’ (2020) 129 *Yale Law Journal* 2418.

¹⁴⁵47 U.S.C. § 230, enacted in 1996 and providing immunity for website platforms with respect to third-party content.

¹⁴⁶Veronica Shleina et al, ‘*The Law of Facebook: Borders, Regulation and Global Social Media*’ (City Law School, New York, 2020) City Law School Research Paper No 2020/01, 14; Cantero Gamito (n 140).

¹⁴⁷Viktoria Robertson, ‘Antitrust, Big Tech, and Democracy: A Research Agenda’ (2022) 67(2) *The Antitrust Bulletin*, available at: <<https://doi.org/10.1177/0003603X22108274>>.

¹⁴⁸Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

¹⁴⁹In the sense that private actors are required to incorporate ‘public’ values and standards such as the respect of fundamental right: see especially Arts. 1(1), 14(4), 34(1)(b), 35 DSA.

¹⁵⁰Rupprecht Podszun, ‘Private Enforcement and the Digital Markets Act’, *Verfassungsblog*, 1 September 2021, available at: <<https://verfassungsblog.de/power-dsa-dma-05>>.

¹⁵¹See, for example, the decisions of the German constitutional court BVerfG, 22.05.2019 - 1 BvQ 42/19, ECLI:DE:BVerfG:2019:qk20190522.1bvq004219; and of the Tribunal of Rome, CasaPound c. Facebook, 12.12.2019. Matthias Kettemann and Anna S Tiedeke, ‘Back Up: Can Users Sue Platforms to Reinstate Deleted Content?’, *Internet Policy Review* 9 (2020), available at <<https://policyreview.info/articles/analysis/back-can-users-sue-platforms-reinstate-deleted-content>>.

¹⁵²Cantero Gamito (n 140), 6. For a problematisation of the ambiguous nature – antitrust or regulatory instrument – of the DMA, see Natalia Moreno Belloso and Nicolas Petit, ‘The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove’ (2023) *European Law Review* (forthcoming).

capitalism remains at the core of their business model. From the perspective of societal constitutionalism, such approaches are insufficient because they hardly intervene on the internal structures and cognitive processes of the actors involved. In the case of digital companies, this approach is often ineffective or triggers unintended, paradoxical consequences such as collateral censorship, over-blocking and de-platforming.¹⁵³

A societal constitutionalism-oriented approach focuses *also* on changing internal structures and incentives. In this direction, it supports proposals such as those advanced by Balkin, arguing against the outright repeal of intermediary immunity from liability of social media companies¹⁵⁴ and suggesting leveraging such immunity by conditioning it on social media companies 'adopting business practices that ensure their trustworthy and public-regarding behaviour'.¹⁵⁵ This approach could be expanded through tax, labour and company law instruments.

A first proposal would be introducing forms of 'digital capital tax' – that is, progressive taxation tied to the quantity of active users and/or data processed by digital service providers, regardless of any related profit.¹⁵⁶ Undoubtedly, this proposal builds on literature qualifying data as capital as such,¹⁵⁷ to be targeted to the purposes of taxation and economic redistribution.

A second proposal would be imposing on the private actors of the digital economy and digital service providers within certain dimensional and economic thresholds forms of corporate governance, involving co-decision with representatives of collective interests (labour, health, press, environment, etc.). Importantly, this proposal does not target only the business model – informational capitalism – but the legal infrastructure and the organizational models of the economic actors profiting from it.

A third proposal would be imposing obligations or at least linking incentives (tax breaks or liability immunities) to the negotiation and effective implementation of transnational company agreements¹⁵⁸ with associations of workers, artists, journalists, local communities and other groups in the different systems in which they operate. Such agreements should concern not only employment conditions but also redistribution of the profits to both individuals and collective entities whose (digital) labour is monetized.¹⁵⁹ Such agreements, in turn, may be overseen and monitored by public authorities and/or public interest certification bodies, possibly linked to international institutions such as the International Labour Organization.¹⁶⁰ In the same context, the

¹⁵³See the studies on the effects of the 2017 German Network Enforcement Act, the main inspiration for the DSA: Alexander Peukert, 'Five Reasons to be Skeptical About the DSA', *Verfassungsblog*, 31 August 2021, available at: <<https://verfassungsblog.de/power-dsa-dma-04>>.

¹⁵⁴Such as that provided by section 230 in the United States and Article 15 of the EU eCommerce Directive.

¹⁵⁵Balkin (n 68), 1301–02.

¹⁵⁶See Omri Marian, 'Taxing Data' (2022) 47 *Brigham Young University Law Review* 511; and, within the specific framework of digital constitutionalism, Angelo Jr Golia, 'Data Capital Tax within the Puzzle of (Economic) Digital Constitutionalism: Questions for a Comprehensive Research and Policy Agenda' (2023) *The Digital Constitutionalist*. Available at <<https://digi-con.org/data-capital-tax-within-the-puzzle-of-economic-digital-constitutionalism-questions-for-a-comprehensive-research-and-policy-agenda/>>.

¹⁵⁷See n 109.

¹⁵⁸Papadakis and Mexi (n 134).

¹⁵⁹Parminder J Singh and Jai Vipra, 'Economic Rights Over Data: A Framework for Community Data Ownership' (2019) 62 *Development* 53; Wielsch (n 138); Pickard (n 113) 34–37.

¹⁶⁰A list of publications on digital labour platforms is available at <<https://www.ilo.org/global/topics/non-standard-employment/crowd-work/publications/lang-en/index.htm>>.

Australian News Media Bargaining Code of 2021¹⁶¹ – designed to have large technology platforms pay local news publishers for the content made available or linked on their platforms – remains an interesting experiment.¹⁶²

Importantly, these proposals aim to reduce the reliance on the business model of informational capitalism; to redirect value into activities not immediately related to data economy; to internalize non-economic incentives and impulses coming from digital economic actors' social environment; and to reduce the need to link regulatory interventions to the violation of individual rights. Importantly, they intervene on the internal structures of economic actors but are not forms of market constitutionalism.¹⁶³ Rather, they aim to unveil, sustain and exploit contradictions rooted in material conditions of the digital sphere. By these means, they are meant to trigger and sustain processes of struggle and contestation within the involved systems, to set preconditions for repoliticization and to open up to non-predetermined policy outcomes, while at the same time reducing the competitive alignment of national systems of social and economic protection. They search for interventions 'in relation to law, rather than under its auspices'.¹⁶⁴ Here again, societal constitutionalism may contribute to make digital constitutionalism become an authentic (global) constitutionalism, whereby economic processes emerged from digitalization can be both enabled and constrained beyond purely market-based rationality. In this sense, such a move also connects digital constitutionalism to the current 'social' turn of global constitutionalism.¹⁶⁵

Law

The impact of digital technologies on law has long been studied. In the digital constitutionalism discourse, the focus is mostly on legislative, judicial and administrative (state) functions, in their relationship with individuals and their rights.¹⁶⁶ The literature has analysed future-proofing legislation¹⁶⁷ and experimental

¹⁶¹Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021. For a review of current initiatives in this field, see Asa Royal and Philip M Napoli, 'Platforms and the Press: Regulatory Interventions to Address an Imbalance of Power' in Flew and Martin (eds) (n 113) 43–67.

¹⁶²Although the law, as eventually enacted, ended up reinforcing incumbent news organisations without addressing the perverse effects of informational capitalism on journalism and the press system: see Stillgherrian, 'Australia's News Media Bargaining Code is a Form of Ransomware, and Someone Paid Up', ZDNet, 4 March 2021, available at: <<https://www.zdnet.com/article/australias-news-media-bargaining-code-is-a-form-of-ransomware-and-someone-paid-up>>; Caroline Fisher, Kerry McCallum and Sora Park, 'Is the News Media Bargaining Code Fit for Purpose?', *The Conversation*, 29 November 2021, available at: <<https://theconversation.com/is-the-news-media-bargaining-code-fit-for-purpose-172224>>; James Meese and Edward Hurcombe, 'Global Platforms and Local Networks: An Institutional Account of the Australian News Media Bargaining Code' in Flew and Martin (eds) (n 113), 151–72.

¹⁶³Whereby market is both the site of production and regulation of social issues. See Teubner, 'The Constitution' (n 19) 515–18.

¹⁶⁴Christodoulidis (n 8) 13.

¹⁶⁵Anne Peters, 'Global Constitutionalism: The Social Dimension' in Takao Suami et al (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018); Peters, 'Constitutional Theories of International Organisations' (n 90) 688–89.

¹⁶⁶Pollicino (n 3).

¹⁶⁷Sofia Ranchordás and Mattis van 't Schip, 'Future-Proofing Legislation for the Digital Age' in Sofia Ranchordás and Yaniv Roznai (eds), *Time, Law, and Change: An Interdisciplinary Study* (Hart, Oxford, 2020).

regulation,¹⁶⁸ as well as the impact of digital and algorithmic technologies on administrative,¹⁶⁹ judicial¹⁷⁰ and law-enforcement settings.¹⁷¹ Attention is also paid to how the augmented speed and quantity of conducts in specific regulatory fields – for example, online speech – trigger a qualitative shift in the way law operates.¹⁷²

Especially in the 1990s and 2000s, techno-enthusiasts have seen in new technologies the opportunity to either get rid of legal regulation altogether; or at least to make law ‘computable’, so legal issues are ultimately decidable according to a strict binary relation 1/0.¹⁷³ Similarly, the application of machine-learning and AI to the legal profession would increasingly improve so-called predictive justice, thus making most human legal professionals redundant.¹⁷⁴ Such developments would arguably fix some features of the law perceived exclusively as problems: slowness, inefficiency, complexity, relative unpredictability. Therefore, with a degree of simplification – and leaving aside anarcho-libertarian views – one can identify an oscillation between two paradigms:¹⁷⁵ first, a ‘competition’ paradigm, whereby the digital code and its inherent normativity stands as a competitor of law – of the legal code – and may potentially replace it as an instrument of social regulation;¹⁷⁶ and second, a ‘hijacking’ paradigm, whereby the digital code changes the nature of law and the way it operates.¹⁷⁷

In both cases, critical approaches highlight related risks, especially the fact that technologies may strengthen the role of law in cementing the hegemony of groups that already control law-production and, more generally, the fact that both paradigms enormously increase the colonization capacities of politics and capitalist economy towards other systems.¹⁷⁸

What is the contribution of societal constitutionalism to this debate? First, it helps individuate different trends as part of a single phenomenon, pre-dating the emergence of digital technologies. Digital technologies made dynamics inherent to modern Western

¹⁶⁸Sofia Ranchordas, *Experimental Regulations and Regulatory Sandboxes: Law Without Order?* (University of Groningen Faculty of Law, 2021).

¹⁶⁹Zalnieriute, Bennett Moses and Williams (n 75).

¹⁷⁰See, for example, Tania Sourdin, *Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar, Cheltenham, 2021); Monika Zalnieriute and Felicity Bell, ‘Technology and the Judicial Role’ in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, Cambridge, 2021).

¹⁷¹See Francesca Galli, ‘Law Enforcement and Data-Driven Predictions at the National and EU Level’ in Micklitz et al (n 4).

¹⁷²See Julie E Cohen, ‘Law for the Platform Economy’ (2017) 51 *UC Davis Law Review* 133; Evelyn Douek, ‘Content Moderation as Systems Thinking’ (2022) 136 *Harvard Law Review* 527.

¹⁷³Famously, Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, New York, 1999). For a reconstruction, see Shleina et al (n 145) 13–17; Bietti (n 61).

¹⁷⁴Pistor (n 63) 183ff; Salvatore Caserta, ‘Digitalization of the Legal Field and the Future of Large Law Firms’ (2020) 9 *Laws* 1.

¹⁷⁵See Vagios Karavas, ‘The Force of Code: Law’s Transformation Under Information-Technological Conditions’ (2009) 10 *German Law Journal* 463. For an overview of the debate, see Christopher Markou and Simon Deakin, ‘Is Law Computable? From the Rule of Law to Legal Singularity’ in Simon Deakin and Christopher Markou (eds), *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (Hart, Oxford, 2020).

¹⁷⁶Katharina Pistor, ‘Rule by Data: The End of Markets?’ (2020) 83 *Law and Contemporary Problems* 101.

¹⁷⁷Mireille Hildebrandt, ‘Code-Driven Law: Freezing the Future and Scaling the Past’ in Deakin and Markou (eds) (n 174).

¹⁷⁸See, for example, Jennifer Cobbe, ‘Legal Singularity and the Reflexivity of Law’ in Deakin and Markou (eds) (n 174).

law emerge even more clearly. In normative terms, this view calls for an increased attention to the judicial and administrative structures that deal with and use new technologies. But even more importantly, and in contrast to discourses centred around individual rights, (judicial) redress, and litigation, digital constitutionalism needs to re-focus on administrative law, conceived *also* as the law of the social planning – that is, the law dealing with the redistribution of social and economic value in a relatively centralized way.¹⁷⁹

Second, by focusing on the constraint and protection of law's specific communication medium (juridical authority), societal constitutionalism helps keep together both the 'competition' and the 'hijacking' paradigms. In contrast to approaches treating law too instrumentally, as if it were only a tool augmenting dynamics lying elsewhere (mainly in politics and economy), societal constitutionalism highlights that juridification of society – exponentially amplified by digital and data-driven technologies – is a risk *in itself*, and not just to the extent that it serves political or economic purposes.¹⁸⁰ The unconstrained juridification of the social world made possible by computation enormously increases the dangers deriving from the standardization/normalization imperative of juridical authority, even in hypothetical non-capitalist societies. Relatedly, especially in the light of the disciplining effects deriving from its internal dynamics,¹⁸¹ law needs to remain scrutable and contestable.¹⁸²

With regard to protection, societal constitutionalism calls for the preservation of some 'imperfect' features of law. As a specific form of social regulation, law presupposes a distinction between norm-making and norm-abiding, a distinction that preserves areas of agency, potential disobedience and ultimately humanity. The idea of the rule of law implies the *possibility* of its breach. Preserving this possibility for the law – however "just" – to be violated, as well as a certain degree of openness, uncertainty and unpredictability – in turn linked to law's medial, cultural, and human features – is important for several reasons. First, it preserves its capacity to absorb cognitive expectations from its environment, that is, to its 'learning'.¹⁸³ Second, it leaves room for the micro-variations that are

¹⁷⁹Douek (n 171), especially 584ff. In that sense, see the recent EDPB decision, recalled above at n 127 or the interim ban of the AI chatbot ChatGPT adopted on 30 March 2023 by the Italian Data Protection Authority, available at: <<https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870832>> are interesting developments>.

¹⁸⁰Jürgen Habermas, *The Theory of Communicative Action. Vol. 2: Lifeworld and System – A Critique of Functional Reason* (Beacon Press, Boston, 1987). For a broader application of Habermas's colonization thesis to algorithmic regulation, see Hao Wang, *Algorithmic Colonization: Automating Love and Trust in the Age of Big Data* (University of Amsterdam, 2022).

¹⁸¹Constraints of decision, of rational justification and of rule-making: see Gunther Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' (2009) 72 *Modern Law Review* 1.

¹⁸²Mireille Hildebrandt, 'Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics' (2018) 68 *University of Toronto Law Journal* 12; Christopher Markou and Simon Deakin, 'Ex Machina Lex: Exploring the Limits of Legal Computability' in Deakin and Markou (eds) (n 174): 'the application of machine learning to legal adjudication at the very least obscures the political issues at stake in the process of juridical classification. But it also undermines the effectiveness of legal reasoning as a means of resolving political issues. Legal reasoning involves more than the algorithmic application of rules to facts.' Laurence Diver, 'Disprudence: The Design of Legitimate Code' (2021) 13 *Law, Innovation & Technology* 325 has coined the concept of 'computational legalism' to indicate a combination of ruleishness, opacity, immediacy, immutability and pervasiveness, a concept that confuses rule-fetishism with acting under the rule of law. Most recently, see also John Tasioulas, 'The Rule of Algorithm and the Rule of Law' (2023) *Vienna Lectures on Legal Philosophy*, available at: <<https://doi.org/10.2139/ssrn.4319969>>.

¹⁸³Christoph B Graber, 'How the Law Learns in the Digital Society' (2021) 3 *Law, Technology and Humans* 12.

fundamental to preserve law's capacity to regulate and evolve *with* society.¹⁸⁴ Third, it preserves its autonomy as a distinct social system that is not entirely exploitable by other systems, notably politics and the economy.

Valuing such imperfect, inefficient features is counter-intuitive, especially if one builds on ideas of judicial activity as the result of if/then syllogisms, of law-making as the result of a democratic will giving rise to determinate commands and of certainty as mere consistency. To protect the reflexive nature of legal knowledge and normativity, one must embrace its incomplete/contingent nature. In fact, 'there are limits to the computability of legal reasoning and, hence, the use of AI to replicate the core processes of the legal system'.¹⁸⁵ Techno-enthusiasts, who see hyper-determinism and the 'legal singularity'¹⁸⁶ as positive outcomes, may have some traction in the public discourse *also* because they build on assumptions deeply rooted in traditional constitutional theory. Questioning such assumptions, then, is a critical contribution of a digital constitutionalism informed by societal constitutionalism. In positive terms, this calls for a jurisprudence linking, without merging, the coercive effects of technology – in both its materiality and its cultural/social fallout,¹⁸⁷ the normative structures and processes that are specific to law¹⁸⁸ and its human features.¹⁸⁹ Indeed, the socio-technical substratum of digital technologies influences its constraining effects, the actual possibilities for transformation, and the contestation of norms and policy solutions.¹⁹⁰

The third contribution of societal constitutionalism concerns legal pluralism, understood *also* as a critical stance towards state-centred legal theory. Legal pluralism is by no means foreign to digital constitutionalism, but societal constitutionalism pushes it to take it more seriously. This means addressing at least four aspects as part of one analytical and normative framework.

First, a differentiated assessment of the impact of digital technologies on qualitatively distinct types of normative systems, or 'jurisdictions', is required.¹⁹¹ Digital and data-driven technologies affect both state and non-state normative orders.¹⁹² Furthermore,

¹⁸⁴See Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart, Oxford, 2004) 26.

¹⁸⁵Markou and Deakin (n 174), relying on Teubner, *Law as an Autopoietic System* (n 17); and Niklas Luhmann, *Law as a Social System* (Oxford University Press, Oxford, 2004).

¹⁸⁶Benjamin Alarie, 'The Path of the Law: Towards Legal Singularity' (2016) 66 *University of Toronto Law Journal* 443.

¹⁸⁷Cohen, *Configuring the Networked Self* (n 6) Ch 10.

¹⁸⁸In this direction, see again Vesting (n 30), focusing on the media-cultural aspects of code's normativity; Hildebrandt, 'Code-Driven Law: Freezing the Future and Scaling the Past'; Graber (n 182); Diver, 'Digisprudence: The Design of Legitimate Code' (2021) 13(2) *Law, Innovation and Technology* 325. For an earlier discussion, see Mireille Hildebrandt, 'Legal Protection by Design: Objections and Refutations' (2011) 5 *Legisprudence* 223.

¹⁸⁹Cf. Tasioulas (n 181); and Mariavittoria Catanzariti, 'Algorithmic Law: Law Production by Data or Data Production by Law?' in Micklitz et al (n 4), emphasizing the role of human legal professionals in public bureaucracies. Such aspects are completely lost, for example, in efficiency-oriented approaches such as Cary Coglianese and Alicia Lai, 'Algorithm v. Algorithm' (2022) 71 *Duke Law Journal* 1281.

¹⁹⁰Graber (n 182).

¹⁹¹Fleur Johns and Caroline Compton, 'Data Jurisdictions and Rival Regimes of Algorithmic Regulation' (2022) 16 *Regulation & Governance* 63 at 66 define 'data jurisdiction' as 'a domain in which particular notions of what ought to be, and to be said and done, are propagated through the assemblage, formatting, dissemination, and use of data'.

¹⁹²*Ibid* 65.

such technologies trigger different dynamics, depending on the type of communication medium (power, money, knowledge), the institutional form (states, corporations, IOs, transnational regimes) and their ideological/cultural environment.

Second, there is a need for an assessment of the impact of the digital and data-driven technologies on different techniques of co- and self-regulation. New technologies do not only facilitate the autonomization of non-state normative systems; they also change how state and non-state normative systems relate to each other and, importantly, how they may inform each other's evolution.¹⁹³

Third, the development of conflict-of-law approaches specifically suited to the normative conflicts arising from the application of digital and data-driven technologies is imperative.¹⁹⁴ Such approaches, already emerging in the practice of adjudicators dealing with both state¹⁹⁵ and non-state normative orders,¹⁹⁶ should be oriented not only to impose sanctions or solve conflicts but also to trigger processes of learning¹⁹⁷ and effective constitutionalization within the involved systems. The internal procedures and structures of digital 'governors' such as Google and Meta must be made responsive to external demands so they can be turned into actual changes in their operations and in the effective limitation of their expansive tendencies.¹⁹⁸ Strategically exploiting the reflexive dynamics of the involved systems is thus one of the goals of a pluralist constitutional theory suited to the reality of digital technologies.¹⁹⁹

Fourth, an assessment of the fragmenting impact of different normative orders emerging from the digital sphere on legal subjectivity is required.²⁰⁰ The normative/disciplining effects of digitality and data-driven technologies – whether based on the legal code or not – do not just contribute to the social construction of individual and collective actors, but also frame their sociolegal position differently, ranging from their outright invisibility to indirect legal relevance to the recognition of personality with only a few legal

¹⁹³Michael A Cusumano, Annabelle Gawer and David B Yoffie, 'Can Self-Regulation Save Digital Platforms?' (2021) 30 *Industrial and Corporate Change* 1259; Marta Maroni and Elda Brogi, 'Freedom of Expression and the Rule of Law: The Debate in the Context of Online Platform Regulation' in Pier L Parcu and Elda Brogi (eds), *Research Handbook on EU Media Law and Policy* (Edward Elgar, Cheltenham, 2021).

¹⁹⁴See Johns and Compton (n 190).

¹⁹⁵Jan Czarnocki, 'Saving EU Digital Constitutionalism Through the Proportionality Principle and a Transatlantic Digital Accord' (2021) 20 *European View* 150.

¹⁹⁶In the field of the interaction between national courts case law and the de-platforming decisions adopted by digital companies, see Edoardo Celeste, 'Digital Punishment: Social Media Exclusion and the Constitutionalising Role of National Courts' (2021) 35 *International Review of Law, Computers & Technology* 162. For a discussion with a focus on Google, see Guilherme Cintra Guimarães, *Global Technology and Legal Theory* (Routledge, London, 2019), particularly 69ff.

¹⁹⁷Graber (n 182) 18–23.

¹⁹⁸Cf, in the field of cryptocurrency regulation, Immaculate D Motsi-Omoijiade, *Cryptocurrency Regulation: A Reflexive Law Approach* (Routledge, London, 2022) and, in the field of academic freedom, Kunz (n 139 139).

¹⁹⁹See CJEU, Judgment of the Court (Grand Chamber), Facebook Ireland and Schrems, Case C-311/18, 16.07.2020 (Schrems II), invalidating the EU-US Privacy Shield, a framework that regulated Trans-Atlantic data transfers, as certain provisions of the United States' Foreign Intelligence Surveillance Act and the subsequent surveillance programmes do not ensure a level of protection essentially equivalent to that guaranteed by EU law, notably Article 45(1) of the GDPR read in the light of Articles 7 and 8 of the EU Charter of Fundamental Rights (paras 94–105 and 178–202).

²⁰⁰Cohen (n 6), Ch 1; Johns (n 60); Katrina Geddes, 'The Death of the Legal Subject: How Predictive Algorithms are (Re)constructing Legal Subjectivity' (2023) 25 *Vanderbilt Journal of Entertainment & Technology Law* 1.

entitlements up to the full-fledged armoury of legal rights granted in that specific system. Importantly, these effects are different for each of the centres of digital normativity. The normativities emerging from digital platforms such as Meta have different social construction effects from, say, those emerging from states' digital administration, or those from organizations governing the infrastructure of the internet such as ICANN, or blockchain-based networks such as Bitcoin. Such multiplicity gives rise to continuous fragmentation, reconstruction and mutual reconfiguration of 'relational subjects' that the theory of digital constitutionalism needs to capture comprehensively.²⁰¹

IV. Conclusion

This article has highlighted digital constitutionalism's critical and transformative elements, using the instruments provided by societal constitutionalism as a strand of global constitutionalism. It argued that, in order to address the challenges posed by new technologies, digital constitutionalism should embrace an explicitly critical discourse, questioning several assumptions of liberal, state-centred constitutional theory. By overcoming its inner contradictions, digital constitutionalism could be framed as a more ambitious constitutional theory for the digital age and as an opportunity for a long-overdue reckoning of constitutional theory with itself.

However, unveiling contradictions is not an end in itself. Rather, highlighting contradictions has – indeed, must have – a transformative outlook, so that constitutionalism may address questions largely left unresolved if not hidden: private societal power, relevance of (transnational) legal pluralism, harms deriving from depersonalized social processes, democratic legitimation beyond the state.

How does this relate to the *Lloyd* decision recalled in the introduction? That particular case was recalled mostly for its explanatory value, as it highlights the inner limits of liberal understanding of individual rights. An authentically transformative digital constitutionalism needs to focus on the analytical and normative premises leading the UKSC to decide in such a way. First, massive illegitimate treatments of personal data need to be addressed as a question of *constitutional* relevance, not only for the immediate harm to the people involved but also and foremost for the broader societal effects triggered by such treatments. In that case, it was addressed through the language and instruments of tort law, private rights, and compensation claims instead of, say, administrative law. Second, absent a suitable class action, the need to individualize the harm to the purposes of the compensation pushed the claimants to choose a weak procedural strategy based on a representative action. Third, a narrow understanding of 'damage' limited to material or mental effects on single individuals fails to address – and even obscures – the trans-subjective nature of the harms triggered by mass collection and processing of data by business actors.

Even beyond the specific procedural history of the *Lloyd* decision, there are several issues that a different approach to the UKSC case may unveil. Among them are the legal and economic structures incentivizing a digital 'governor' such as Google to the illegitimate treatment of users' data; and the model of corporate governance of a company dealing with such a huge amount of data and with such a significant societal role. These issues should be brought more decisively to the fore of the scholarship using a constitutionalist language. In that sense, this article called for less criticism and more (self-)

²⁰¹Karl-Heinz Ladeur, 'Die Zukunft der Medienverfassung' in Karl-Heinz Ladeur et al (eds), *Die Zukunft der Medieverfassung* (Mohr Siebeck, Tübingen, 2021); Viljoen (n 6); Geddes (n 199).

critique through the instruments provided by societal constitutionalism as the strand of global constitutionalism best suited to the challenges of digitality.

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