

1 Digital Constitutionalism: An Introduction

1.1 Reframing Constitutionalism in the Digital Age

This is a book about rights and powers in the digital age. It is an attempt to reframe the role of constitutional democracies in the information or network society,¹ which, in the last twenty years, has transmuted into the algorithmic society as the current societal background featuring large, multinational social platforms ‘sit between traditional nation states and ordinary individuals and the use of algorithms and artificial intelligence agents to govern populations’.² Within this framework, states are not the only source of concern any longer. Global online platforms, such as Facebook, Amazon or TikTok, increasingly play a critical role at the intersection between public authority and private ordering.³ By focusing on the European constitutional framework as lodestar, this book looks at the rise and consolidation of European constitutionalism as a reaction to new digital powers. It also provides a normative strategy to face the opportunities and challenges of digital capitalism which, in the last twenty years, have not only led to a market revolution,⁴ and to the rise of platform capitalism,⁵ but have also impacted on the constitutional

¹ Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture* (Blackwell 2009); John Feather, *The Information Society: A Study of Continuity and Change* (American Library Association 2013).

² Jack M. Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation’ (2018) 51 U.C. Davis Law Review 1151.

³ José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford University Press 2018).

⁴ Daniel Schiller, *Digital Capitalism: Networking the Global Market System* (MIT Press 1999).

⁵ Nick Srnicek, *Platform Capitalism* (Polity Press 2016).

dimension of democracy as information capitalism,⁶ or surveillance capitalism.⁷

This research unpacks the path of the Union moving from neoliberal positions towards democratic shores guided by the beacon of European constitutionalism. Since the end of the last century, the charm of accommodating the promises of digital technologies has led to neglecting and forgetting the role of constitutionalism, and then constitutional law, in protecting fundamental rights and limiting the rise and consolidation of unaccountable powers abusing constitutional values. Neoliberal reverences, also driven by technological optimism and the consolidation of liberal narratives around Internet governance,⁸ have indeed encouraged constitutional democracies to subject public functions in the digital environment to the logic of the market by delegation or inertia. This process has contributed to the consolidation of new founding powers escaping public oversight and providing quasi-constitutional models which compete with public authorities. The case of global online platforms operating on a transnational base is a paradigmatic example of this trend. The challenges raised by the discretionary deplatforming of President Trump or the electoral concerns around the Cambridge Analytica scandal are just two major events that raised constitutional questions which are still unanswered in terms of legitimacy, power and democracy in the algorithmic society.

Rather than solving this issue by relying on the self-correction of the market, these questions constitute a call for action for scholars to reframe the role of constitutional law as an overarching framework of values and principles of the algorithmic society. If the digital environment has been an opportunity to offer cross-border services and exercise individual freedoms in a new space where information and data flow, on the other hand, it has also increased the threats to individual rights and freedoms which are no longer subject just to public interferences but also to private determinations. In other words, reframing constitutionalism in the algorithmic society requires understanding

⁶ Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2020).

⁷ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs 2018).

⁸ Jean-Marie Chenou, 'From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-stakeholderism, and the Institutionalisation of Internet Governance in the 1990s' (2014) 11(2) *Globalizations* 205.

the exercise of freedoms and new relationships of powers driven by the consolidation of digital technologies.

The question is not just about whether constitutional democracies could inject democratic values in the technological architecture. Technology is just a means for mediating the relationship of power between humans. Behind digital technologies, including artificial intelligence, there are actors defining the characteristics of these systems. These technologies are not autonomous or neutral but make decisions about human beings based on principles which are primarily shaped by other human beings. In order to face the challenges of 'algocracy',⁹ it is critical to find a way to preserve the role of human expertise.¹⁰ Therefore, the primary challenge for constitutional law in the algorithmic society is not to regulate technology but to address the threats coming from the rise of unaccountable transnational private powers, whose global effects increasingly produce local challenges for constitutional democracies.

In a sense, the mission of modern constitutionalism is to protect fundamental rights while limiting the emergence of powers outside any control.¹¹ Constitutions have been developed with a view to limiting governmental powers, thus shielding individuals from interference by public authorities. From a constitutional law perspective, the notion of power has traditionally been vested in public authorities. Constitutions already provide systems of checks and balances for limiting public powers. Still, they have not been conceived as a general barrier against the consolidation of paralegal systems or the exercise (rather abuse) of private freedom. On the contrary, constitutions aim to protect pluralism and freedoms of individuals against interferences by public actors while leaving public authorities the responsibility to intervene to ensure that fundamental rights are respected even at the horizontal level between private actors. This constitutional turn from the vertical to the horizontal dimension is generally the exception and occurs in the context of the

⁹ John Danaher, 'The Threat of Algocracy: Reality, Resistance and Accommodation' (2016) 29 *Philosophy & Technology* 245.

¹⁰ Frank Pasquale, *New Laws of Robotics: Defending Human Expertise in the Age of AI* (Belknap Press 2020).

¹¹ Andrés Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017); Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2012) NYU, Public Law Research Paper No. 10-87 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1 accessed 21 November 2021. Constitutionalism has also a positive side encouraging public actors to promote the well-being and common good. See Adrian Vermeule, *Common Good Constitutionalism* (Wiley & Sons, forthcoming); Nicolas Barber, *The Principles of Constitutionalism* (Oxford University Press 2018).

horizontal application of fundamental rights or when constitutional values permeate legal norms by regulation.¹²

In the algorithmic society, the primary threats for constitutional democracies do not come any longer exclusively from public authorities, since they come primarily from private actors governing spaces which are formally private spaces, but exerting in practice, and without any safeguard, functions traditionally vested in public authorities without any safeguard. This challenge, however, does not imply the need to revolutionise the grounding roots of modern constitutionalism but that to reframe the role of constitutional law and interpret the challenges of the algorithmic society under the lens of digital constitutionalism. As Suzor observes, 'digital constitutionalism requires us to develop new ways of limiting abuses of power in a complex system that includes many different governments, businesses, and civil society organisations'.¹³ Put in a different way, digital constitutionalism consists of articulating the limits to the exercise of power in a networked society.¹⁴

As the expression suggests, digital constitutionalism is made of two souls. While the first term ('digital') refers to technologies based on the Internet such as automated technologies to process data or moderate content, the second ('constitutionalism') refers to the political ideology born in the eighteenth century where, according to the Lockean idea, the power of governments should be legally limited, and its legitimacy depends upon complying with these limitations.¹⁵ Despite this chronological gap, the adjective 'digital' entails placing constitutionalism in a temporal and material dimension. Digital constitutionalism indeed refers to a specific timeframe, precisely the aftermath of the Internet at the end of the last century. Moreover, from a material perspective, this adjective qualifies constitutionalism, moving the focus to how digital technologies and constitutionalism affect each other. Merging the expressions 'digital' and 'constitutionalism' does not lead to revolutionising the pillars of modern constitutionalism. Instead, it aims to understand how to interpret the (still hidden) role of constitutional law in the algorithmic society. Therefore, digital constitutionalism should be seen

¹² Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019).

¹³ Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* 173 (Cambridge University Press 2019).

¹⁴ Claudia Padovani and Mauro Santaniello, 'Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System' (2018) 80 *International Communication Gazette* 295.

¹⁵ Peter Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press 2016).

not as a monolith but as the expression of different constitutional approaches to digital technologies from an internal and external point of view.

From an internal angle, digital constitutionalism does not provide a unique way to solve the challenges of the algorithmic society. Despite the relevance of global constitutionalism,¹⁶ still the way in which constitutional law reacts to the challenges of the algorithmic society is driven by regional and local constitutional traditions and cultures. This internal dimension is primarily because, even in a phase of internationalisation of constitutional law,¹⁷ constitutions represent the identity and values of a certain community which, by definition, is connected to territorial boundaries. Although the protection of constitutional rights or the rule of law are missions shared by constitutional democracies, nonetheless, how these values are effectively protected depends on the political, institutional and social dynamics of different constitutional systems. Therefore, from an internal perspective, the constitutional answers to the challenges of the algorithmic society could not always overlap but lead to diverging paths. In this book, the European and US strategies to face the challenges of platform governance provide an example of the multiple faces of digital constitutionalism across the Atlantic.

The external point of view of digital constitutionalism shows how the constitutional reactions to the challenges of the algorithmic society are different when looking not only at the internal peculiarities of constitutional models around the world but also beyond the traditional boundaries of political and legal constitutionalism.¹⁸ In particular, states' constitutions are not the only sources of norms and principles. Even outside the framework of digital technologies, constitutional law has struggled with maintaining its role in relation to the consolidation of normative principles resulting from international organisations, transnational corporations and standard-setting entities, defining the consolidation of societal constitutionalism,¹⁹ or, more broadly, legal

¹⁶ Antje Wiener and others, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1.

¹⁷ Sergio Bartole, *The Internationalisation of Constitutional Law* (Hart 2020).

¹⁸ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010).

¹⁹ Angelo Jr. Golia and Gunther Teubner, 'Societal Constitutionalism: Background, Theory, Debates' Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2021-08 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911111

and constitutional pluralism.²⁰ This form of pluralism leads to looking at legal constitutionalism under a broader umbrella where the link between law and territory is increasingly replaced by the relationship between norms and powers coming from different autonomous rationalities shaping each other in a process of mutual influence.

The rise of the algorithmic society highlights this path, underlining both the internal and external angle of digital constitutionalism. Constitutional democracies rely on policies to address common challenges but based on different constitutional values. For instance, the way in which freedom of expression promotes or limits platform power across the Atlantic shows a different constitutional sensitivity. This difference shows how, even if linked by common principles, constitutional democracies do not always share the same internal understanding of rights and powers, thus leading to diverging reactions. Likewise, the external point of view of digital constitutionalism can be examined by looking at how multiple entities influence Internet governance by imposing their internal values, while defining standards of protection competing externally with the principles and safeguards of constitutional democracies. The institutionalisation of social media councils such as the Facebook Oversight Board or the increasing power of online platforms to set the standards of protection on a global scale are nothing else than paths of constitutionalisation beyond the traditional boundaries of modern constitutionalism.

1.2 Paths of Constitutionalisation

Since the end of the twentieth century, daily life has increasingly gone digital towards an ‘onlife’ dimension.²¹ Individuals increasingly experience their rights and freedom in a ubiquitous digital environment,²² which differs from the end of the last century.²³ Within this framework, social relationships are mediated by a mix of entities expressing forms of public authority and private ordering. The pandemic season has been

[t_id=3804094](#) accessed 20 November 2021; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

²⁰ Paul S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012). Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65(3) *The Modern Law Review* 317–59.

²¹ Luciano Floridi (eds.), *The Onlife Manifesto: Being Human in a Hyperconnected Era* (Springer 2015).

²² Laura De Nardis, *The Internet in Everything: Freedom and Security in a World with No Off Switch* (Yale University Press 2020).

²³ Sherry Turkle, *Life on the Screen, Identity in the Age of Internet* (Simon & Schuster 1997).

a litmus test in this sense. Amazon provided deliveries during the lockdown phase, while Google and Apple offered their technology for contact tracing apps. These actors have played a critical role in providing services which other businesses or even the state failed to deliver promptly. The COVID-19 crisis has led these actors to become increasingly involved in daily lives, underlining how they are part of the social infrastructure.²⁴ This situation has highlighted how transnational private actors are considered essential platforms or digital infrastructures.²⁵

In this digital transition, law, technology and society, as examples of social systems, have not ceased to produce internal norms,²⁶ while continuously shaping each other in a process of mutual influence or rather digital constitutivity.²⁷ The law is indeed the result not only of its own logics but also of a compromise between technological architecture, social norms and market forces competing online.²⁸ At the same time, the law indirectly influences the other systems which, even if they produce their norms in an internal environment, are inevitably part of a greater picture. Usually, legal categories such as rules, authority or rights and freedoms contribute to shaping the boundaries of recognised powers. Although these definitions do not exist outside the legal framework but are created within the rationality of the law, these legal notions are exposed to systemic interferences from other (sub)systems. Likewise, the influence of legal systems shapes the boundaries and characteristics of technology and society.²⁹ In other words, the peculiarity of the law as a social system is to define spaces as delegated and autonomous manifestations of powers.

The rise of digital technologies has contributed to influencing the previous equilibrium among social systems, defining what Kettemann calls the normative order of the Internet.³⁰ And constitutional law was

²⁴ Jennifer Cobbe and Elettra Bietti, 'Rethinking Digital Platforms for the Post-COVID-19 Era' CIGI (12 May 2020) www.cigionline.org/articles/rethinking-digital-platforms-post-covid-19-era accessed 21 November 2021.

²⁵ Nikolas Guggenberger, 'Essential Platforms' (2021) 24 *Stanford Technology Law Review* 237.

²⁶ Niklas Luhman, *Social System* (Stanford University Press 2016).

²⁷ Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993).

²⁸ Lawrence Lessig, *Code: And Other Laws of Cyberspace. Version 2.0* (Basic Books 2006).

²⁹ David Delaney, 'Legal Geography I: Constitutivities, Complexities, and Contingencies' (2015) 39(1) *Progress in Human Geographies* 96.

³⁰ Matthias Kettemann, *The Normative Order of the Internet: A Theory of Rule and Regulation Online* (Oxford University Press 2020).

not spared in this process. The shift from atoms to bits at the end of the last century has affected constitutional values such as the protection of fundamental rights and democracy,³¹ ultimately leading to a new digital constitutional phase at the door of the algorithmic society.³² At the end of the last century, digital technologies have triggered the development of new channels, products and services, extending the opportunities to exercise economic freedoms and fundamental rights such as freedom of expression or the freedom to conduct business.³³ The Internet has fostered the possibilities to share opinions and engage with other ideas, thus fostering civil and political rights. This positive framework for democratic values was also one of the primary reasons justifying the technological optimism at the end of the last century, which considered the digital environment not as a threat but as an opportunity to empower freedoms while limiting interferences by public authorities.³⁴

From a constitutional standpoint, this revolution has led to a positive alteration of the constitutional stability. At first glance, the benefits of this bottom-up constitutionalisation would have compensated for the drawbacks of self-regulation, especially when thinking about public surveillance and monitoring. Nonetheless, the digital age is far from being outside any form of control. Apart from the interferences of public actors,³⁵ the digital environment is subject to the governance (or authority) of private actors. Google, Facebook, Amazon or Apple are paradigmatic examples of digital forces competing with public authorities in the exercise of powers online.

Within this framework, constitutional democracies are increasingly marginalised in the algorithmic society. The power of lawmakers has

³¹ Andrea Simoncini and Erik Longo, 'Fundamental Rights and the Rule of Law in the Algorithmic Society' in Hans-W. Micklitz and others (eds.), *Constitutional Challenges in the Algorithmic Society* 27 (Cambridge University Press 2021); Oreste Pollicino and Graziella Romeo (eds.), *The Internet and Constitutional Law: The Protection of Fundamental Rights and Constitutional Adjudication in Europe* (Routledge 2016).

³² Paul Nemitz, 'Constitutional Democracy and Technology in the age of Artificial Intelligence' (2018) Royal Society Philosophical Transactions A 376.

³³ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006).

³⁴ David R. Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) *Stanford Law Review* 1371.

³⁵ Justin Clark and others, 'The Shifting Landscape of Global Internet Censorship' (2017) Berkman Klein Center for Internet & Society Research Publication <https://dash.harvard.edu/handle/1/33084425> accessed 21 November 2021.

been scaled back, and it is not a surprise that courts have taken the lead to overcome legislative inertia in the digital age.³⁶ The events around the Australian Competition and Consumer Commission News Media and Digital Platforms Mandatory Bargaining Code are a paradigmatic example of the power online platforms can hold in shaping public policies and decision-making.³⁷ As an answer to this political move, Facebook first decided to ban Australian publishers and users from sharing or viewing Australian as well as international news content. Second, just a couple of days later, the social media platform changed its view, once the Australian government decided to step back and negotiate with Facebook. Facebook's (temporary) choice to ban news in Australia is not just a business decision, reflecting the platform's economic freedoms. This case shows a 'power move' to push the Australian government, which had worked for months on the bill in question, to step back and negotiate with Facebook overnight. This interaction is not just an example of how Facebook can influence public policies, but it also shows how powers are relocated among different actors in the algorithmic society, within the push towards a new phase of digital constitutionalism.

This example demonstrates why the reactions of lawmakers and courts are not the result of a constitutional moment in Ackerman's terms.³⁸ Ackerman's theory looks at constitutional values not just as a mix of expressions and interpretations of the courts, but as the set of principles agreed upon by the people in an extraordinary moment of constitutional participation. Instead, the rise and consolidation of digital private powers represents an example of the constitutionalisation of global private spheres. In this process, constitutional values as translated by lawmakers and interpreted by courts are under a process of extraconstitutional amendment or, better, a reframing which is not expressed by codification but by the constitutional contamination of private determinations. This case is a clear example of how the internal rules produced by social systems compete with the autopoietic characteristics of (constitutional) law. By referring to Teubner, this framework

³⁶ Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart 2021).

³⁷ Giovanni De Gregorio, Oreste Pollicino and Elena Perotti, 'Flexing the Muscles of Information Power: On the Australian News Media Mandatory Bargaining Code' (2021) *Verfassungsblog* (26 February 2021) <https://verfassungsblog.de/facebook-flexing/> accessed 20 November 2021.

³⁸ Bruce Ackerman, *We The People: Transformations* (Belknap Press 1998).

could be described as ‘the constitutionalisation of a multiplicity of autonomous subsystems of world society’.³⁹

The constitutionalisation of global private spheres in the algorithmic society should not be seen only as an isolated phenomenon but as a piece of the puzzle in the process of globalisation which has increasingly promoted the meeting, and conflict, of different legal systems and rationalities,⁴⁰ while raising questions about the idea of networked statehood.⁴¹

In the last thirty years, globalisation has affected legal systems, thus causing a constitutional distress.⁴² Traditional legal categories have been put under pressure. Different entities beyond state actors have extended their rules on a global scale.⁴³ Financial markets or environmental standards are paradigmatic examples of sectors where political choices are increasingly taken outside traditional democratic circuits, showing the law-making power of private actors.⁴⁴

From a transnational constitutional perspective, constitutional democracies struggle with extending their reach to transnational phenomena occurring outside their territory.⁴⁵ Local dynamics and values still constitute the basic roots of each constitutional system. Still, supra-national and international bundles, as in the case of the consolidation of multilevel constitutionalism in the European experience,⁴⁶ or the constitutionalisation of international law,⁴⁷ lead to the emancipation of

³⁹ Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* 3 (Hart 2004).

⁴⁰ Lars Viellechner, ‘Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law’ (2015) 6(2) *Transnational Legal Theory* 312; Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate 2010); Graf-Peter Callies and Peer Zumbansen *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010).

⁴¹ Angelo Jr. Golia and Gunther Teubner, ‘Networked Statehood: An Institutionalised Self-contradiction in the Process of Globalisation?’ (2021) 12(1) *Transnational Legal Theory* 7.

⁴² Mark Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49 *Virginia Journal of International Law* 985.

⁴³ Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (Columbia University Press 1996).

⁴⁴ Louis L. Jaffe, ‘Law Making by Private Groups’ (1937) 51(2) *Harvard Law Review* 201.

⁴⁵ Eric C. Ip, ‘Globalization and the Future of the Law of the Sovereign State’ (2010) 8(3) *International Journal of Constitutional Law* 636.

⁴⁶ Ingolf Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) 11(3) *European Constitutional Law Review* 541.

⁴⁷ Jan Klabbers, Anne Peters and Geir Ulfsein, *The Constitutionalisation of International Law* (Oxford University Press 2009).

constitutional values from its local roots towards a more global character where constitutional systems increasingly meet in a process of global hybridisation.

Within this framework, the rise of the Internet has not only challenged the traditional Westphalian principles of sovereignty and territory,⁴⁸ as in the case of monetary policy,⁴⁹ or underlined global and local tensions.⁵⁰ This situation was already clear in the aftermath of the *Licra v. Yahoo* case,⁵¹ and the following debate on Internet jurisdiction.⁵² The consolidation of the Internet has also led to wondering about the relationship between freedoms and power in the digital age.

1.3 Governing the Algorithmic Society

The role of constitutionalism has not been central in the debate about Internet governance and regulation. At the end of the last century, scholars, opposing liberal and anarchic approaches, struggled with explaining whether and to what extent the digital environment could be governed.⁵³ Likewise, Reidenberg focused on technology and communication networks as sources of information policy rules consisting of default rules that went beyond law and government regulation.⁵⁴ Murray went even further underlining how the effectiveness of such regulation did not only depend on the modality of regulation (e.g. network architecture) but also the power that each point of the network can exercise over other dots.⁵⁵ It was already clear that the Internet

⁴⁸ Henry H. Perritt, Jr., 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance' (1998) 5 *Indiana Journal of Global Legal Studies* 423.

⁴⁹ Katharina Pistor, 'Statehood in the Digital Age' (2020) 27(3) *Constellations* 3.

⁵⁰ Oreste Pollicino and Marco Bassini, 'The Law of the Internet between Globalisation and Localization' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* 346 (Cambridge University Press 2016).

⁵¹ Tribunal de Grande Instance de Paris, *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France c. Yahoo! Inc. et Société Yahoo! France* (2000).

⁵² Dan Jerker B. Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press 2017); Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity* (Cambridge University Press 2007).

⁵³ Jack L. Goldsmith, 'Against Cyberanarchy' (1998) 65 *University of Chicago Law Review* 1199.

⁵⁴ Joel Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' (1997–1998) 76 *Texas Law Review* 553.

⁵⁵ Andrew Murray, 'Internet Regulation' in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar 2011).

would not entirely overcome state regulation. States had already proved their ability to regulate the digital environment, such as in the case of China.⁵⁶

Nonetheless, public actors are no longer the only powerful regulators but they are just one piece of the fragmented framework of online governance. As Lynskey underlined, ‘the Internet can be regulated and Internet governance is no longer the sole purview of the State’.⁵⁷ Even if states have not lost their power over the digital environment,⁵⁸ there are new actors expressing their powers.⁵⁹ Online platforms have become more influential operating in the shadow of governments.⁶⁰ They have developed their functions as proxies or delegated entities of public authorities to enforce public policies online and autonomously rely on the mix between market power and technological asymmetry. Put another way, the economic power of business actors is now blurred with authority, so the notion of ‘power’ is meant in a broader sense than the notion of market power used, for example, in competition law.⁶¹

The problem of private power is not only economic but also political. The accumulation of arbitrary authority in the market outside any form of political accountability can be considered a similar exercise of power characterising the exercise of public authority.⁶² When freedoms turn into forms of powers, ensuring democratic oversight and safeguards can preclude market dynamics from driving constitutional values. The different degree of interrelation between market and democracy is firmly linked to the openness and sensitivity of constitutional systems. In

⁵⁶ Ronald Deibert and others, *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press 2008).

⁵⁷ Orla Lynskey, ‘Regulating Platform Power’ (2017), LSE Legal Studies Working Paper 1 http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf accessed 21 November 2021.

⁵⁸ Blayne Haggart, Natasha Tusikov and Jan A. Scholte (eds.), *Power and Authority in Internet Governance Return of the State?* (Routledge 2021).

⁵⁹ Lucie Greene, *Silicon States: The Power and Politics of Big Tech and What It Means for Our Future* (Counterpoint 2018).

⁶⁰ Hannah Bloch-Wehba, ‘Global Platform Governance: Private Power in the Shadow of the State’ (2019) 72 *SMU Law Review* 27.

⁶¹ Natali Helberger and others, ‘Governing Online Platforms: From Contested to Cooperative Responsibility’ (2018) 34(1) *The Information Society* 1; Luca Belli, Pedro A. Francisco and Nicolo Zingales, ‘Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police’ in Luca Belli and Nicolo Zingales (eds.), *How Platforms Are Regulated and How They Regulate Us* 41 (FGV Rio 2017).

⁶² Morris R. Cohen, ‘Property and Sovereignty’ (1927) 13 *Cornell Law Review* 8.

other words, where market meets democracy, it is there that it is possible to observe how constitutionalism defines its boundaries.

In the algorithmic society, transnational private corporations, primarily online platforms, exercise powers by governing digital spaces. In a ubiquitous digital environment, content and data can be easily disseminated on a global scale to access services provided for free, from e-mail services to social media platforms implementing algorithmic technologies to moderate content. Public powers still play a critical role in governing digital spaces and interfering with rights and freedoms. Nonetheless, the influence of private actors in the digital environment is increasingly raising concerns in terms of how these entities perform functions of public interest or, in some cases, mirror the exercise of public powers.

The fields of online content and data can provide interesting clues to explain how powers are relocated in the algorithmic society. In terms of speech, the digital environment has become a primary channel for individuals to exercise their rights and freedoms, especially freedom of expression.⁶³ The Internet has fostered the dissemination of information increasing the opportunities of each individual to share ideas and opinion on a global scale without supporting the infrastructural costs and be subject to the filters of traditional media outlets. A technological optimism characterised the early days of the digital environment. At the end of the last century, the Internet promised an emancipation of the public sphere and democracy from public controls through decentralisation and anonymity. This positive trend was confirmed in a countless number of cases. It would be enough to mention how social media and search engines have provided irreplaceable tools for exercising the two sides of freedom of expression, precisely the right to inform and be informed. Online speech has shown its ability to influence elections, raise the exchange of new ideas on a global scale as well as support minorities and political movements as an instrument of emancipation, like the Arab Spring.⁶⁴

Although, at first glance, this picture may suggest that the digital environment has enhanced freedom of expression while emancipating individual freedom from the interferences of public authorities, however, a closer look reveals that the flow of information online is not without control. In the last years, states have somewhat regulated

⁶³ Jack M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79(1) *New York University Law Review* 1.

⁶⁴ Gadi Wolfsfeld and others, 'Social Media and the Arab Spring: Politics Comes First' (2013) 18(2) *The International Journal of Press/Politics* 115.

online speech to tackle extreme content or the spread of unauthorised copyright content. In some cases, public actors have also relied on shutting down the Internet extensively despite the economic consequences.⁶⁵ Nonetheless, the control of online speech is not merely related to online censorship by public authorities which are already subject to constitutional obligations. The exercise of power over information also concerns private actors.⁶⁶ By implementing artificial intelligence systems to moderate content, platforms like Facebook or YouTube can decide how to moderate content by displaying and organising online information based on opaque criteria driven by their Silicon values.⁶⁷ Pariser and Sunstein have already underlined the risk of polarisation due to the creation of ‘filter bubbles’ or ‘information cocoons’.⁶⁸ Although the Internet has enhanced access to different types of information, this positive effect is lessened by a substantial restriction in the autonomy of users subject to governance of online platforms.

From a constitutional point of view, the primary concern comes from the negative or vertical nature characterising the protection of the right to freedom of expression. Unlike public actors, online platforms are not required to ensure the same constitutional safeguards when they make decisions over the organisation or removal of speech online. These actors can enforce and balance the vast amount of online information outside any public safeguard, primarily the rule of law, as also shown by the block of Donald Trump’s accounts by Facebook and Twitter.

Likewise, the field of data can tell a similar story across public and private powers. At the end of the last century, the digital environment was considered a space to ensure the protection of privacy through anonymity and decentralisation which were considered as ways to emancipate freedoms from public interferences. It is not by chance that one of the most famous slogans was ‘On the Internet, nobody knows you are a dog’.⁶⁹ As quoted by Turckle from one interview with users, ‘[y]ou can be

⁶⁵ Giovanni De Gregorio and Nicole Stremmler, ‘Internet Shutdowns and the Limits of Law’ (2020) 14 *International Journal of Communication* 4224.

⁶⁶ Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harvard Law Review* 1598.

⁶⁷ Jillian C. York, *Silicon Values: The Future of Free Speech Under Surveillance Capitalism* (Verso Books 2021).

⁶⁸ Eli Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (Viking 2011); Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007).

⁶⁹ This is an adage by Peter Steiner and published by *The New Yorker* in 1993.

Glenn Fleishman, ‘Cartoon Captures Spirit of the Internet’ *The New York Times*

whoever you want to be. You can completely redefine yourself if you want. You don't have to worry about the slots other people put you in as much. They don't look at your body and make assumptions. They don't hear your accent and make assumptions. All they see are your words'.⁷⁰

However, this framework of anonymity and decentralisation has not been an obstacle for public actors that have increasingly relied on the digital environment as an instrument of surveillance.⁷¹ The case of Snowden has been just one example not only of the consolidation of a surveillance society,⁷² but also of the invisible handshake characterising the cooperation between the public and private sectors in the field of data surveillance.⁷³

The paradigmatic idea of a public panopticon can be considered one of the primary concerns in the algorithmic society.⁷⁴ However, similarly to the case of freedom of expression, public actors have not been the only source of concerns for privacy and personal data. At the end of the last century, the development of new processing technologies driven by neoliberal narratives has allowed the rise of new business models based on the processing of multiple kinds of information, including personal data, which are increasingly collected, organised and processed not only by public actors pursuing public tasks but also by businesses seeking profit. The processing of personal data has already highlighted serious constitutional challenges at the beginning of this century,⁷⁵ especially with the evolution of profiling technologies.⁷⁶ As observed by Nissenbaum, 'in a flourishing online ecology, where individuals, communities, institutions, and corporations generate content, experiences, interactions, and services, the supreme currency is information, including information about people'.⁷⁷

In this framework, online platforms play a critical role due to the vast amount of data they process and organise. Even if not exclusively, their

(14 December 2000) www.nytimes.com/2000/12/14/technology/cartoon-captures-spirit-of-the-internet.html accessed 21 November 2021.

⁷⁰ Turkle (n. 23), 184–5.

⁷¹ Neil M. Richards, 'The Dangers of Surveillance' (2013) 126 Harvard Law Review 1935.

⁷² David Lyon, *Surveillance after Snowden* (Polity 2015).

⁷³ Micheal Birnhack and Niva Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment' (2003) 8 Virginia Journal of Law and Technology 6.

⁷⁴ Michel Foucault, *Discipline and Punish: The Birth of a Prison* (Penguin 1991).

⁷⁵ A. Michael Froomkin, 'The Death of Privacy?' (2000) 52 Stanford Law Review 1461.

⁷⁶ Steve Lohr, *Data-Is: The Revolution Transforming Decision Making, Consumer Behavior, and Almost Everything Else* (Blackstone 2015).

⁷⁷ Helen Nissenbaum, 'A Contextual Approach to Privacy Online' (2011) 140(4) *Daedalus* 32, 33.

business model is based or highly relies on the processing of data for profiling purposes to make profits from advertising revenues, targeted services or analysis of data. As in the field of content, the value of data in the algorithmic society can be understood by focusing on artificial intelligence systems providing opportunities for extracting value from the processing of vast amounts of (personal) data.⁷⁸ The development and implementation of algorithmic technologies have increased the concerns for the protection of privacy and personal data subject to ubiquitous forms of control answering to the logic of accumulation, prediction and behavioural influences.⁷⁹ The consequences of this discretion leads to consequences for individuals who are subject to discrimination outcomes,⁸⁰ as particularly shown by the case of search engines.⁸¹ Besides, the Cambridge Analytica scandal showed how these constitutional challenges do not just affect individual rights but also collective interests and, more in general, democratic values.⁸² This framework at the intersection between public and private powers highlights the logic of information capitalism and explains why users experience a 'modulated democracy'.⁸³

Since data and information constitute the new non-rival and non-fungible resources of the algorithmic society,⁸⁴ their accumulation and processing by private actors has complemented the economic with the political power. Technological evolutions, combined with a liberal constitutional approach across the Atlantic at the end of the last century, has led online platforms to set their standards and procedures on a global scale and erode areas of powers traditionally vested in public authorities. Digital firms are no longer market participants, since they

⁷⁸ Solon Barocas and others, 'Governing Algorithms: A Provocation Piece', SSRN (4 April 2013) <https://ssrn.com/abstract=2245322> accessed 21 November 2021; Caryn Devins and others, 'The Law and Big Data' (2017) 27 *Cornell Journal of Law & Public Policy* 357.

⁷⁹ Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization' (2015) 30(1) *Journal of Information Technology* 75; Mireille Hildebrandt and Serge Gutwirth (eds.), *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer 2008).

⁸⁰ Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown Pub 2016).

⁸¹ Safiya U. Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York University Press 2018).

⁸² Brittany Kaiser, *Targeted: The Cambridge Analytica Whistleblower's Inside Story of How Big Data, Trump, and Facebook Broke Democracy and How It Can Happen Again* (Harper Collins 2019).

⁸³ Julie E. Cohen, 'What Privacy Is For' (2013) 126 *Harvard Law Review* 1904.

⁸⁴ Michele Loi and Paul-Olivier Dehayé, 'If Data Is the New Oil, When Is the Extraction of Value from Data Unjust?' (2018) 7(2) *Philosophy & Public Issues* 137.

'aspire to displace more government roles over time, replacing the logic of territorial sovereignty with functional sovereignty'.⁸⁵ These actors have been already named 'gatekeepers' to underline their high degree of control in online spaces.⁸⁶ As Mark Zuckerberg stressed, '[i]n a lot of ways Facebook is more like a government than a traditional company'.⁸⁷

By implementing Terms of Service and community guidelines, platforms unilaterally establish the grounding values of the community and what rights users have within their digital spaces. Formally, these documents are private agreements between users and platforms. However, substantially, these instruments reflect a process of constitutionalisation of online spaces,⁸⁸ made by instruments of private ordering shaping the scope of fundamental rights and freedoms of billions of people by adopting a rigid top-down approach.⁸⁹ Online platforms can autonomously decide not only how people interact but also how they can assert their rights (and what those rights are) by privately regulating their digital infrastructure.

Online platforms do not impose limitations just to set the standards of protection of their digital spaces. They also embody other functions and tasks normally vested in public authorities, like courts or other jurisdictional bodies. The Facebook's Oversight Board is a paradigmatic example not only of a system of private adjudication,⁹⁰ but also of the institutionalisation of digital private powers. These dynamics lead to the

⁸⁵ Frank Pasquale, 'From Territorial to Functional Sovereignty: The Case of Amazon' *Law and Political Economy* (6 December 2017) <https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon> accessed 20 November 2021.

⁸⁶ Emily B. Laidlaw, 'A Framework for Identifying Internet Information Gatekeepers' (2012) 24(3) *International Review of Computer Law and Technology* 263; Jonathan Zittrain, 'History of Online Gatekeeping' (2006) 19(2) *Harvard Journal of Law & Technology* 253; Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal Governance' (2005) 30 *Australian Journal of Law and Policy* 30.

⁸⁷ Franklin Foer, 'Facebook's War on Free Will' *The Guardian* (19 September 2017) www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will accessed 19 November 2021.

⁸⁸ Edoardo Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2018) *International Review of Law, Computers and Technology* www.tandfonline.com/doi/abs/10.1080/13600869.2018.1475898 accessed 20 November 2021; Luca Belli and Jamila Venturini, 'Private Ordering and the Rise of Terms of Service as Cyber-Regulation' (2016) 5(4) *Internet Policy Review* <https://policyreview.info/node/441/pdf> accessed 20 November 2021.

⁸⁹ Tomer Shadmy, 'The New Social Contract: Facebook's Community and Our Rights' (2019) 37 *Boston University International Law Journal* 307.

⁹⁰ Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129(8) *The Yale Law Journal* 2232;

privatisation of fundamental rights protection.⁹¹ While public enforcement has been for a long time the default option, based on the role of public authorities as monopoly holders in the context of fundamental rights adjudication, private enforcement has recently emerged as a new trend, when it comes to protecting fundamental rights in the digital realm.⁹² Such privatisation of the protection of rights and liberties is just one of the countless processes underlining how constitutional democracies delegate public enforcement to private entities,⁹³ which then consolidate their powers by developing autonomous functions.

This form of technological regulation is different from legal regulation. As Hildebrandt underlined, technological regulation is not the result of a democratic process, excludes disobedience and does not allow being contested due to lack of transparency and accountability of decision-making.⁹⁴ The spread of automated decision-making systems makes the public and private powers even more opaque, and, therefore, unaccountable. Increasingly, private actors exercise their influence over decisions on the development of these technologies promising to globally affect society, even in the public sector. These private determinations are usually based on their own economic, legal and ethical frameworks.⁹⁵ Operational parameters for processing information and data are programmed by developers and, then, implemented by private entities which are not obliged to pursue any public interest and respect fundamental rights in the lack of any regulation or contractual arrangement.

The entire framework is even more multifaceted when observing that public actors rely on the private sector as a proxy in the digital environment.⁹⁶ The Pentagon's request to Amazon, Google, Microsoft

Evelyn Douek, 'Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility' (2019) 21(1) North Carolina Journal of Law & Technology 1.

⁹¹ Marco Bassini, 'Fundamental Rights and Private Enforcement in the Digital Age' (2019) 25(2) European Law Journal 182; Rory Van Loo, 'The Corporation as Courthouse' (2016) 33 Yale Journal on Regulation 547.

⁹² Giovanni De Gregorio, 'From Constitutional Freedoms to Powers: Protecting Fundamental Rights Online in the Algorithmic Society' (2019) 11(2) European Journal of Legal Studies 65.

⁹³ Jody Freeman and Martha Minow (eds.), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press 2009).

⁹⁴ Mireille Hildebrandt, *Smart Technologies and the End(s) of Law* (Edward Elgar 2016).

⁹⁵ Brent Mittelstadt and others, 'The Ethics of Algorithms: Mapping the Debate' (2016) 3 Big Data & Society <https://journals.sagepub.com/doi/pdf/10.1177/2053951716679679> accessed 23 November 2021.

⁹⁶ Niva Elkin-Koren and Eldar Haber, 'Governance by Proxy: Cyber Challenges to Civil Liberties' (2016) 82 Brookling Law Review 105.

and Oracle for bids on cloud contracts is a clear example of the critical role of public-private partnership where public and private values inevitably merge in a hybrid contractual framework.⁹⁷ Likewise, public actors usually rely on the algorithmic enforcement of individual rights online, as in the case of India ordering the removal of content during the pandemic.⁹⁸ In other words, the increasing intersection between public and private values could expose public actors to the charm of technological solutionism driven by private business interests.⁹⁹

The consolidation of private powers in the algorithmic society does not only challenge the protection of individual fundamental rights, such as freedom of expression, privacy and data protection but also democratic values from two perspectives.

Firstly, democracy and fundamental rights are intimately intertwined. Among different angles, it is worth observing that, when digital technologies raise threats for fundamental rights, especially civil and political liberties, they also raise concerns for democratic values. Without expressing opinions and ideas freely, it is not possible to define a society as democratic. Likewise, without rules governing the processing of personal data, individuals may not express their identity if they fear a regime of private surveillance and they could not rely on a set of accountability and transparency safeguards to avoid marginalisation of individuals in opaque spheres of data ignorance.

Secondly, the consolidation of private powers is a troubling process for democracy. Even if, at first glance, democratic states are open environments for pluralism flourishing through fundamental rights and freedoms, at the same time, their stability can be undermined when those freedoms transform into new founding powers overcoming basic principles such as the respect of the rule of law. In this situation, there is no effective form of participation or representation of citizens in determining the rules governing their community and oversight on the exercise of private powers. The creation of private legal frameworks

⁹⁷ Jordan Novet, 'Pentagon Asks Amazon, Google, Microsoft and Oracle for Bids on New Cloud Contracts' CNBC (19 November 2021) www.cnn.com/2021/11/19/pentagon-asks-amazon-google-microsoft-oracle-for-cloud-bids.html accessed 20 November 2021.

⁹⁸ Kim Lyons, 'India reportedly orders social media platforms to remove references to "Indian variant" of COVID-19' The Verge (23 May 2021) www.theverge.com/2021/5/23/22449898/india-social-media-platforms-remove-indian-variant-covid-19-coronavirus accessed 20 November 2021.

⁹⁹ Evgeny Morozov, *To Save Everything, Click Here: The Folly of Technological Solutionism* (Public Affairs 2013).

outside any representative mechanism undermines the possibility for citizens to participate in the democratic designing of the rules governing the digital environment. In other words, the algorithmic society challenges one of the pillars of democratic systems, namely making laws chosen by the people.

Within this framework, individuals find themselves in a situation which resembles that of a new digital *status subjectionis*. Online platforms offer their services to billions of individuals by defining the contractual rules of the game. When users enter into an agreement with platforms, they have limited power of negotiation. They accept to relinquish their rights and freedoms while legitimising platforms as authorities to manage those rights, in a manner similar to the stipulation of a private social contract. The primary concern is that, unlike democratic countries, online platforms exercise this power without following any democratic procedures but, conversely by exercising an absolute authority. Even if these actors take decisions that affect fundamental rights and democratic values, users have little possibility of making their voices heard. It is precisely here that private freedoms tend to transmute to (unaccountable) powers.

1.4 The Forgotten Talent of European Constitutionalism

The research angle offered by digital constitutionalism can be considered a way to test the talent of European constitutional law to react against these challenges. The Union is a paradigmatic example of the constitutional reaction to the challenges of the algorithmic society. From a liberal imprinting at the end of the last century, the policy of the Union in the field of digital technologies has shifted to a constitutional-based approach. As explained in Chapter 2, this change of heart has been primarily driven by transnational corporations performing quasi-public functions on a global scale, thus competing with public actors and imposing their standards of protection.

Although the implementation of digital technologies by public actors also raises serious constitutional concerns, the rise of European digital constitutionalism is primarily the result of the role of online platforms, which, although vested as private actors, increasingly perform quasi-public tasks. The freedom to conduct business enshrined in the Charter of Fundamental Rights (Charter) has now turned into a new

dimension,¹⁰⁰ namely that of private power, which brings significant challenges to the role and tools of constitutional law. If Google and Facebook can rely on financial resources more than entire states or rely on algorithmic technologies to gather information and data from billions of users, they can exercise functions which can compete with, if not overcome in some cases, the power of public authorities. If these actors can establish standards of protection of users' rights on a global scale, the principle of the rule of law and democratic values would be increasingly shaped, and maybe replaced, by market logic.

It is not by chance that the constitutional reaction to platform powers occurred in Europe. This shift of paradigm, which has been triggered by the talent of European constitutional law to react against the emergence of powers in the algorithmic society, is the result of a peculiar sensitivity of European constitutionalism that does not tolerate abuse of rights and aims to protect human dignity. Neoliberal approaches or excessive democratic tolerance which contribute to transforming freedoms into powers cannot be exploited to destroy democracy itself.¹⁰¹ Since the horrors of the Second World War, European states started to incorporate and codify human dignity within its founding values.¹⁰² The post-War scenario was a decisive moment for the emergence of dignity as a European constitutional principle,¹⁰³ thus elevating it to 'cornerstone of the postwar constitutional state'.¹⁰⁴ Besides, dignity is not an isolated concept but a foundational principle connected with the values and aspirations shaping European constitutionalism. Also driven by the international framework, human dignity has started to emancipate the eastern side of the Atlantic from the western where the liberal imprinting of constitutional law still remains the primary foundation of fundamental rights and liberties.¹⁰⁵ The consolidation of human dignity at the international level is evident even when focusing on the

¹⁰⁰ Charter of Fundamental Rights of the European Union (2012) OJ C 326/391.

¹⁰¹ Christine Duprè, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015).

¹⁰² Paolo Becchi, 'Human Dignity in Europe: Introduction' in Paolo Becchi and Klaus Mathis (eds.), *Handbook of Human Dignity in Europe* (Springer 2019).

¹⁰³ James Q. Whitman, 'On Nazi "Honour" and the New European "Dignity"' in Christian Joerges and Navraj Singh Ghaleigh (eds.), *The Darker Legacies of Law in Europe* 243 (Hart 2003).

¹⁰⁴ Lorraine Weinrib, 'Human Dignity as a Rights-Protecting Principle' (2004) 17 *National Journal of Constitutional Law* 330.

¹⁰⁵ Giovanni Bognetti, 'The Concept of Human Dignity in European and U.S. Constitutionalism' in Georg Nolte (ed.), *European and US Constitutionalism* 95 (Cambridge University Press 2005).

European Convention on Human Rights (Convention).¹⁰⁶ The Strasbourg Court considers human dignity as underpinning values protecting all the other rights of the Convention.¹⁰⁷

The influence of the Council of Europe and Member States can also be understood when moving to the framework of the Union. In *Omega*, the European Court of Justice (ECJ) held that ‘the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law’.¹⁰⁸ Likewise, the ECJ recognised human dignity as part of the Member States’ public security and order.¹⁰⁹ The recognition of human dignity as a general principle of law before the entry into force of the Charter is an evident example of the consolidation of the process of European constitutionalisation to which the ECJ opened the door since *Stauder*,¹¹⁰ as also evolved in *Internationale Handelsgesellschaft* and *Nold*.¹¹¹ In other words, the ECJ has played a primary role in the constitutionalisation of the European dimension even before the Charter.¹¹²

In addition, human dignity has been established as the first and autonomous fundamental right in the Charter. Its primacy and autonomy would suggest its role as an overarching principle but also as a fundamental right which does not leave room for any interference. Human dignity is not just enshrined in the preamble of the Charter, but it is protected as an autonomous and inviolable fundamental right.¹¹³ Even if the Charter provides the possibility to limit fundamental rights,¹¹⁴ a systematic interpretation reveals that this does not apply to human rights with absolute protection as those protected by the ECHR.¹¹⁵ Therefore, even in the lack of accession of the Union’s system

¹⁰⁶ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *European Journal of International Law* 655.

¹⁰⁷ *Pretty v. United Kingdom* (1997) 24 EHRR (1997) 423, 65.

¹⁰⁸ Case C-36/02, *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* (2004) ECR I-9609, 34.

¹⁰⁹ Joined Case C-331/16 and C-366/16, *K. v. Staatssecretaris van Veiligheid en Justitie and H. F. v. Belgische Staat* (2018), 47.

¹¹⁰ See Case 29/69, *Erich Stauder v. City of Ulm – Sozialamt* (1969).

¹¹¹ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970); Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Ruhrkohle Aktiengesellschaft* (1977).

¹¹² Marta Cartabia, ‘Europe and Rights: Taking Dialogue Seriously’ (2009) 5 *European Constitutional Law Review* 5.

¹¹³ Charter (n. 100), Art. 1. See also Arts. 25, 31.

¹¹⁴ *Ibid.*, Art. 52.

¹¹⁵ *Ibid.*, Art. 52(3).

to the ECHR, it is still possible to define an intimate bundle which characterises human dignity as the overarching principle of European constitutionalism.

Together with democracy, the rule of law and the protection of human rights, the Lisbon Treaty has recognised the role of human dignity as a pillar of European constitutionalism. Even if the preamble of the Treaty of the European Union (TEU) just mentions human rights and the inalienable rights of human persons,¹¹⁶ human dignity has been enshrined as one of the primary common values of the Union.¹¹⁷ The position in EU primary law is not neutral but constitutes a legal obligation to respect this human right for public actors and an objective driving all of the activities of the Union. Besides, the recognition of the Charter as a source of EU primary law has led to the consolidation of the European constitutional framework with the result that human dignity has become a mandatory point of reference.

Within this framework, dignity is not only an objective or a fundamental right but a promise for democracy after a phase of dehumanisation. Human dignity as a constitutional foundation is the result of the process of the European experience whose values aim to foster a vision of democracy where human beings can take decisions on their life and shape collective decisions. Human dignity is not just avoiding torture or ensuring equality, but it is the constitutional foundation of European democratic values.

Therefore, human dignity also aims to achieve a utopian goal while driving European constitutionalism towards individuals as the core of fundamental rights protection and critical part of democracy. As observed, 'there is no foolproof constitutional design that can immunise liberal democracy from the pressures of backsliding. At best, constitutional design features serve as speed bumps to slow the agglomeration and abuse of political power; they cannot save us from our worst selves completely'.¹¹⁸ This risk does not concern only political or external forces which aim to overthrow democratic safeguards but also the interferences of private powers whose activities are backed by a liberal constitutional approach. In the algorithmic society, the predominance of digital capitalism leads human dignity to express its role as the beacon and the overarching framework of the European

¹¹⁶ Treaty on the European Union (2012) OJ 326/13, preamble 2, 4.

¹¹⁷ *Ibid.*, Art. 2.

¹¹⁸ Tom Ginsburg, Aziz Z. Huq and Mila Versteeg, 'The Coming Demise of Liberal Constitutionalism?' (2018) 85(2) *The University of Chicago Law Review* 239, 253.

constitutional systems. Therefore, the rise of European digital constitutionalism should not be seen as a mere answer, but rather as a long-term strategy to protect constitutional values from the interferences of private powers in the digital age. Put another way, rather than just a firm reaction, it is also a proactive approach calling the Union and Member States to intervene to mitigate the threats to democratic values.

Nonetheless, the European constitutional reaction to the challenges raised by private actors is not the general rule. While the Union framework is at the forefront of a new constitutional approach to the challenges of the algorithmic society, the United States seem to be following an opposite path. In the last twenty years, the US policy has adopted an 'omissive' approach based on a First Amendment dogma. Still, the responsibilities of platform activities are based on a legal framework adopted at the end of the last century based on immunity and exemption of liability.¹¹⁹ In the field of data, apart from some national attempts,¹²⁰ there is not a harmonised approach at the federal level to privacy and data protection. Moving from the Congress to the Supreme Court, even in this case, there has been a restrictive approach towards any public attempt to regulate the digital environment,¹²¹ or horizontal extension of constitutional rights.¹²²

These non-exhaustive considerations on the constitutional approaches of the other side of the Atlantic would confirm that digital constitutionalism is not a unique expression. It is intimately connected with the constitutional framework of each legal and political system as intertwined with the alternative process of constitutionalisation. The rise of digital constitutionalism across the Atlantic is the result of paths guided by different constitutional premises. In the last twenty years, the US framework has not reacted to the rise of private powers but has highly defended the concept of liberty as set in stone within the First Amendment. The liberal approach of the United States could also be considered another expression of digital constitutionalism showing the different talent of US constitutional law which looks at online platforms as an enabler of liberties and democracy rather than a threat to such values. Such a framework of liberty has been increasingly abandoned on the eastern side of the Atlantic where the different constitutional humus

¹¹⁹ Communications Decency Act (1996), Section 230; Digital Millennium Copyright Act (1997), Section 512.

¹²⁰ See, e.g., California Consumer Privacy Act (2020).

¹²¹ See, e.g., *Packingham v. North Carolina*, 582 U.S. ____ (2017).

¹²² See, e.g., *Manhattan Community Access Corp. v. Halleck*, No. 17-1702, 587 U.S. ____ (2019).

based on human dignity has paved the way towards a new constitutional phase.

Looking at the eastern side of the Atlantic, the challenges raised by the power of private actors in the digital environment leads to questioning the traditional boundaries of European constitutional law to understand to what extent it is possible to remedy the current situation of threat for fundamental rights and democracy. The research angles of European digital constitutionalism can contribute to defining the instruments to deal with platform powers as well as the guiding principles and remedies to restore the constitutional equilibrium. The primary mission of European digital constitutionalism consists of limiting the abuse of powers by framing and extending constitutional values in the algorithmic society.

1.5 Investigating European Digital Constitutionalism

This book aims to capture the emergence of a new phase of European constitutionalism in the algorithmic society defined as digital constitutionalism. This new moment is examined in a twofold way. Firstly, this work investigates the reasons leading to this new constitutional phase in Europe. Secondly, it provides a normative framework analysing how and to what extent European constitutional law can remedy the imbalances of powers threatening fundamental rights and democracy in the digital age. By focusing on fundamental rights and powers, this descriptive and normative framework provides a picture representing the role of European constitutionalism in the algorithmic society. The implied goal of this research is to fill an important gap concerning the role of constitutional law in the digital age, underlining the dynamic dialectic between constitutionalism and digital technologies. The book aims to create a bridge between the studies in constitutional and public law with the debates on technology, media and policy.

Within this framework, the first question to answer is: what are the reasons for the rise of European digital constitutionalism? Digital constitutionalism has been portrayed as the rise of a new constitutional moment,¹²³ analysed by mapping bills of rights and legislative attempts concerning the relationship between Internet and constitutions,¹²⁴ and

¹²³ Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorization' (2019) 33 (1) *International Review of Law, Computers and Technology* 76.

¹²⁴ Dennis Redeker and others, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2018) 80 *International Communication Gazette* 302;

examined in specific cases.¹²⁵ At the end of the last century, Fitzgerald stressed that the exercise of power is shared between public and private actors in the information society.¹²⁶ Indeed, the mediation between powers and freedom involves the relationship between both sides of the same coin. The characteristics of the digital environment promoted a system in search for a balance between public intervention and private self-regulation. The idea of Fitzgerald is that ‘information constitutionalism’ should delimit the boundaries of self-regulation through which private actors determine their standards manipulating software (*rectius* technological architecture). In this view, private law is called to step in and solve the challenges of the digital age through the guide of constitutional values.

Moreover, Berman acknowledged the role of private actors in defining and using the code of the cyberspace to regulate the digital environment.¹²⁷ Berman proposed an approach towards ‘constitutive constitutionalism’ consisting of the possibility to open constitutional adjudication to private actors as a means to overcome the vertical dimension of the state action in US constitutional law and allow judges and individuals to address these pressing issues. Lessig also has tried to underline the challenges of digital technologies for constitutional law by looking not only at the role of technological architecture but also at that of courts.¹²⁸ Boyle questioned liberal approaches to the cyberspace as potentially leading to the consolidation of private powers.¹²⁹ Likewise, Netanel questioned the self-governance model and the underlined the challenges of private ordering from the perspective of democracy.¹³⁰ Pernice provided an analysis of the relationship between global constitutionalism and

Mauro Santaniello and others, ‘The Language of Digital Constitutionalism and the Role of National Parliaments’ (2018) 80 *International Communication Gazette* 320.

¹²⁵ Monique Mann, ‘The Limits of (Digital) Constitutionalism: Exploring the Private Security (Im)balance in Australia’ (2018) 80 *International Communication Gazette* 369.

¹²⁶ Brian Fitzgerald, ‘Software as Discourse – A Constitutionalism for Information Society’ (1999) 24 *Alternative Legal Journal* 144.

¹²⁷ Paul S. Berman, ‘Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation’ (2000) 71 *University of Colorado Law Review* 1263.

¹²⁸ Lawrence Lessig, ‘Reading the Constitution in Cyberspace’ (1996) 45(3) *Emory Law Journal* 869.

¹²⁹ James Boyle, ‘Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors’ (1997) 66 *University of Cincinnati Law Review* 177.

¹³⁰ Neil W. Netanel, ‘Cyberspace Self-Governance: A Skeptical View from the Liberal Democratic Theory’ (2000) 88 *California Law Review* 401.

Internet underlining the challenges relating to the democratic deficit and global regulation.¹³¹ Besides, Guimarães addressed the role of Google as a global private power and its relationship with the Union.¹³² Suzor underlined that the power relationships in the digital age should be governed by public principles and platform legitimacy should be assessed through the lens of the rule of law.¹³³ According to Suzor, the project of digital constitutionalism is ‘to rethink how the exercise of power ought to be limited (made legitimate) in the digital age’.¹³⁴

Building on this framework, for the first time, this research would implement a comprehensive digital constitutional analysis within a specific constitutional legal order, precisely the European context. The goal is to shed light on the role of European constitutional law as a shield against the exercise of powers in the algorithmic society. The aforementioned debate neglected the role of European constitutionalism as a shield against emerging digital powers. This lack of attention is also the heritage of a debate which primarily focused on the regulatory powers of states over the Internet. Rather than understanding the influence of constitutional systems and values in the digital environment, libertarian and paternalistic answers focused more on how to ensure an effective regulation looking at the technological dimension outside any specific constitutional framework of reference. Even if there are several works addressing the impact of digital technologies over human and fundamental rights,¹³⁵ still, there is not a systematic constitutional perspective on how to address the challenges of the algorithmic society.

Investigating the rise and consolidation of European digital constitutionalism cannot neglect the analysis of online platform powers. This is

¹³¹ Ingolf Pernice, ‘Global Constitutionalism and the Internet. Taking People Seriously’ HIIG Discussion Paper Series Discussion Paper (10 March 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576697 accessed 20 November 2021.

¹³² Guilherme C. Guimarães, *Global Technology and Legal Theory: Transnational Constitutionalism, Google and the European Union* (Routledge 2019).

¹³³ Nicolas Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) 4(3) *Social Media + Society* <https://journals.sagepub.com/doi/pdf/10.1177/2056305118787812> accessed 20 November 2021.

¹³⁴ *Ibid.*, 4.

¹³⁵ See, e.g., Mireille Hildebrandt and Kieron O’Hara (eds.), *Life and the Law in the Era of Data-Driven Agency* (Edward Elgar 2020); Ben Wagner and others (eds.), *Research Handbook on Human Rights and Digital Technology: Global Politics, Law and International Relations* (Edward Elgar 2019); Pollicino and Romeo (n. 31); Mathias Klang and Andrew Murray (eds.), *Human Rights in the Digital Age* (Cavendish 2005).

why the second research question is: what are the characteristics and the limits of platform powers in the digital environment? Answers to this question are still fragmented, and there is a lack of attention to the notion of ‘platform power’ from the standpoint of constitutional law. So far, scholars have focused on powers from different perspectives. This term has been interpreted as market power in the context of competition law,¹³⁶ imbalances of power in the field of consumer law,¹³⁷ and even ‘data power’ in the field of data protection.¹³⁸

The way in which these three areas look at the notion of power is not homogenous. Power is defined from an economic perspective which fails to provide a constitutional analysis of the threats coming from the consolidation of freedoms increasingly turning into powers. Competition law, contract law and consumer law only provide one side of the debate, especially that of the internal market. Indeed, they fail to picture the evolution of the constitutional dimension of the Union,¹³⁹ and the consolidation of a polity.¹⁴⁰ In other words, the lens of the internal market fails to address the other side of the coin which is represented by digital constitutionalism. This shift of attention does not imply that the internal market perspective does not participate in the puzzle of platform powers. Nonetheless, competition law or consumer law cannot be left without the guidance of constitutional law any longer.

¹³⁶ See, e.g., Nicolas Petit, *Big Tech and the Digital Economy: The Molligopoly Scenario* (Oxford University Press 2020); Viktoria H. S. E. Robertson, ‘Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data’ (2020) 57(1) *Common Market Law Review* 161; Damien Geradin, ‘What Should EU Competition Policy do to Address the Concerns Raised by the Digital Platforms’ Market Power?’ (2018) TILEC Discussion Paper No. 2018-041 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011188 accessed 20 November 2021; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data As Essential Facility* (Wolters Kluwer 2016); Angela Daly, *Private Power, Online Information Flows and EU Law: Mind the Gap* (Hart 2016); Daniel Zimmer, ‘Digital Markets: New Rules for Competition Law’ (2015) 6(9) *Journal of European Competition Law & Practice* 627.

¹³⁷ See, e.g., Christoph Busch and others, ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’ (2016) 5 *Journal of European Consumer and Market Law* 3.

¹³⁸ Carissa Veliz, *Privacy Is Power: Why and How You Should Take Back Control of Your Data* (Bantam Press 2020); Orla Linskey, ‘Grappling with “Data Power”’: Normative Nudges from Data Protection and Privacy’ (2019) 20(1) *Theoretical Inquiries in Law* 189.

¹³⁹ Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015); Joseph H. H. Weiler and Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press 2003); Joseph Weiler, *The Constitution of Europe* (Cambridge University Press 1999).

¹⁴⁰ Massimo Fichera, *The Foundations of the EU As a Polity* (Edward Elgar 2018).

This research aims to fill this gap. Precisely, platform powers are analysed from two perspectives, namely the indirect delegation of powers by public authorities and the autonomous powers which platforms exercise as resulting from the exploitation of private law and digital technologies based on the liberal constitutional approach adopted by the Union at the end of last century.

This constitutional analysis of platform powers is conducted at least from a regional perspective since constitutional law reflects the values and principles of a certain society. The focus on the European framework is critical for this research not only to anchor the analysis to a specific constitutional area but also for answering the third research question: which remedies can European constitutional law provide to solve the imbalances of power in the algorithmic society and mitigate the risks for fundamental rights and democratic values? This question concerns how European constitutionalism protects fundamental rights and democratic values such as the rule of law and democratic participation. While from a constitutional law perspective power has traditionally been vested in public authorities, a new form of (digital) private power has now come into play determining standards of protection and procedures based on their social, legal and ethical framework.

This research argues that the protection of rights and freedoms in the algorithmic society cannot just be based on the expansionistic rhetoric of constitutional safeguards. The quantitative perspective has shown its failure in the last years when looking at the attempts to codify Internet constitutions. Many propositions have been made in this respect, particularly in Brazil and Italy.¹⁴¹ The failure to establish a general right to Internet access at the constitutional level is a clear example of the instruments that constitutional law could provide to lawmakers and judges.¹⁴² Besides, these calls for new forms of constitutional protection

¹⁴¹ Marco Civil da Internet, Law no. 12.965 (2014); Dichiarazione dei diritti in Internet (2015).

¹⁴² Oreste Pollicino, 'Right to Internet Access: Quid Iuris?' in Andreas von Arnould, Kerstin von der Decken and Mart Susi (eds.), *The Cambridge Handbook on New Human Rights. Recognition, Novelty, Rhetoric* 263 (Cambridge University Press 2019); Stephen Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14(2) *Human Rights Law Review* 175; Paul De Hert and Darek Kloza, 'Internet (Access) As a New Fundamental Right: Inflating the Current Rights Framework?' (2012) 3(2) *European Journal of Law and Technology* www.ejlt.org/index.php/ejlt/article/view/123/268 accessed 23 November 2021; Nicola Lucchi, 'Freedom of Expression and the Right to Internet Access' in Monroe E. Price, Stefaan G. Verhulst and Libby Morgan (eds.), *Routledge Handbook of Media Law* (Routledge 2013).

have not led to concrete solutions to face the constitutional challenges of the algorithmic society. Traditional bills of rights limit public powers, and do not provide instruments to remedy the transparency and accountability gap among private actors.

Therefore, this research does not propose to introduce new constitutional rights but to focus on the 'quality' of protection. It is not the first time that scholars have looked at the ability of private actors to interfere with individual fundamental rights. A traditional answer given to this challenge has been the horizontal effects doctrine,¹⁴³ or state action doctrine in the US framework.¹⁴⁴ The background idea is to extend the scope of application of the existing bills of rights and human rights covenants between private parties to avoid freedoms turning to a justification to express hidden forms of power which do not reflect constitutional values. In the case of online platforms, the horizontal effect doctrine could look like a potential leeway to require these actors to comply with constitutional safeguards.¹⁴⁵ Nevertheless, even if the horizontal application could be a first step to protect individual rights, it could not provide a systematic solution due to its case-by-case structure which is likely to undermine the principle of legal certainty if extensively and incoherently applied by judicial bodies, especially in civil law countries where there is not a system based on the common law principle of *stare decisis*.

Nonetheless, there is a way to fill the gap of the horizontal effect doctrine, precisely by looking at another constitutional trigger: the positive obligations of states to protect fundamental rights and democratic values. Scholars have tried to deal with this constitutional angle,¹⁴⁶ but the debate still lacks constitutional guidance to deal with

¹⁴³ Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (European Law Publishing 2016); Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38(3) *European Law Review* 479; Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21(5) *European Law Journal* 657.

¹⁴⁴ Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1(1) *International Journal of Constitutional Law* 79; Stephen Gardbaum, 'The Horizontal Effect of Constitutional Rights' (2003) 102 *Michigan Law Review* 388.

¹⁴⁵ Jonathan Peters, 'The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms' (2018) 32 *Berkeley Technology Law Journal* 988. See also Berman (n. 127).

¹⁴⁶ Barrie Sander, 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law' (2021) 32(1) *European Journal of*

the challenges of the algorithmic society in the next decades. For instance, scholars have focused on the right not to be subject to an automated decision-making process,¹⁴⁷ established by the General Data Protection Regulation (GDPR),¹⁴⁸ particularly focusing on the meaning and effectiveness of this data subject right.¹⁴⁹ Nonetheless, the issue of the right to explanation is only one of the issues questioning how fundamental rights and democratic values are conceived and protected in the algorithmic society. This research aims to fill this gap by underlining how European constitutional law can lead to a more systematic strategy.

To complete the analysis of European digital constitutionalism, it is worth looking at the road ahead by focusing on a fourth research question: which paths does the consolidation of European digital constitutionalism open to the Union in the next years? The rise of the algorithmic society has already highlighted some constitutional challenges that the Union will be called to address in the near future. The rise of European digital constitutionalism is still at the beginning of a long path to address the challenges raised by digital capitalism.

Firstly, it is worth questioning how to strike a fair balance between innovation in the internal market and the protection of fundamental rights and democratic values. To answer this question, the research will focus on understanding if the path of European digital constitutionalism will turn back to a neoliberal free-market approach as that dominating at the beginning of this century, following the promises of digital capitalism, or if this phase will design a constitutional path and

International Law 159; Aleksandra Kuczerawy, 'The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression' (2017) 3 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 182.

¹⁴⁷ Andrew D. Selbst and Julia Powles, 'Meaningful Information and the Right to Explanation' (2017) 7 *International Data Privacy Law* 233; Margot E. Kaminski, 'The Right to Explanation, Explained' (2019) 34 *Berkeley Technology Law Journal* 189.

¹⁴⁸ Regulation (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) OJ L 119/1.

¹⁴⁹ Sandra Wachter and others, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76; Gianclaudio Malgieri and Giovanni Comandè, 'Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 234; Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a "Right to an Explanation" Is Probably Not the Remedy You Are Looking For' (2017) 16 *Duke Law & Technology Review* 18.

a cautious strategy aimed to protect individual rights and freedoms towards digital humanism. The Union has already shown its intention to focus on ethics and a human-centric approach in the field of artificial intelligence.¹⁵⁰ This political crossroads deserves particular attention in this research since this choice will be critical not only for the growth of the internal market but also for the protection of constitutional values, especially human dignity, in the long run.¹⁵¹

A second point that is worth exploring focuses on the dilemma between public authority and private ordering. This point leads to wondering which of these approaches can better ensure the implementation of public policies online guaranteeing innovation while protecting fundamental rights and democratic values. Under the Digital Single Market strategy, the Union has already implemented hard and soft legal measures to deal with the challenges raised by online platforms.¹⁵² Nevertheless, it would be naïve to believe that the Union has abandoned (digital) internal market goals. Digitisation is one of the primary pillars of the strategy to shape the European digital future,¹⁵³ and the role of online platforms will be relevant in this transition. Therefore, it is critical to understand whether the promises of digital capitalism will indirectly force the Union to rely on self-regulation or de facto dilute the scope of hard regulation in order not to hinder the development of these technologies. In other words, the primary point is to understand whether European digital constitutionalism could provide instruments and procedures to bind forces with increasingly political power coming from a combination of economic and technological power.

Thirdly, the transnational dimension of these challenges leads to focusing on the extraterritorial scope of European constitutional values as shown in the field of data.¹⁵⁴ The clash among constitutional values

¹⁵⁰ High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (8 April 2019) https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419 accessed 24 November 2021.

¹⁵¹ White Paper, 'On Artificial Intelligence – A European Approach to Excellence and Trust' COM(2020) 65 final.

¹⁵² Oreste Pollicino and Giovanni De Gregorio, 'A Constitutional-Driven Change of Heart: ISP Liability and Artificial Intelligence in the Digital Single Market' (2019) 18 *The Global Community Yearbook of International Law and Jurisprudence* 237.

¹⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Shaping Europe's digital future*, COM(2020) 67 final.

¹⁵⁴ Paul De Hert and Michal Czerniawski, 'Expanding the European Data Protection Scope Beyond Territory: Article 3 of the General Data Protection Regulation in its Wider Context' (2016) 6(3) *International Data Privacy Law* 230, 240; Christopher Kuner,

could be the result of constitutional imperialism where models of digital sovereignty compete to shape the principles of the algorithmic society. Nonetheless, the trend towards constitutional imperialism is not the only consequence of how digital constitutionalism provides answers to the challenges of the algorithmic society. Indeed, conflicts resulting from an expansion of constitutional values could also be the reason for the rise of constitutional protectionism justified by the interest in shielding regional or local values from external influences. Therefore, understanding extraterritorial constitutional conflicts is crucial to underline the potential path of European digital constitutionalism.

To answer these research questions, this book follows a precise methodology. Firstly, in terms of the territorial scope of the research, the focus is on the European framework, precisely investigating digital constitutionalism within the framework of the Union and the Council of Europe. This research also takes into account the role of Member States at the national level within the supranational analysis. Likewise, a comparative approach with the US framework is also embedded in this research without, however, losing its European focus. The reference to the US legal framework is critical to this research due to the influence and interrelation between the two constitutional systems in the algorithmic society.

Secondly, regarding the material scope, another methodological pillar consists of taking the challenges for freedom of expression, privacy and data protection in the algorithmic society as paradigmatic examples. This twofold analysis characterises the entire research examining private powers through two of the most critical fundamental rights in the digital age. As already stressed, this choice should not surprise since freedom of expression and data protection are two democratic cornerstones. Without expressing ideas and opinions openly or accessing instruments of transparency and accountability concerning the protection of personal data, democracy is just a label failing to represent a situation of veiled authoritarianism.

Thirdly, the research addresses the topic of digital constitutionalism from a descriptive to a normative perspective. The mix between these two standpoints provides the grounding framework on which, then, the normative argument is built. Describing the reasons leading to the rise of European digital constitutionalism becomes a preliminary basis to

'Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law' (2015) 5(4) *International Data Privacy Law* 235.

address the normative part of the research, precisely looking at the remedies European constitutional law provides to address the challenges of the algorithmic society.

1.6 Research Structure

This research is articulated into four parts. After this introductory chapter, Chapters 2 to 4 describe the path leading to the rise of digital constitutionalism in Europe, the ability of platforms to exercise delegated and autonomous powers as well as the intimate relationship between expressions and personal data in the digital environment. This descriptive frame provides the grounds on which the normative claims are supported in Chapters 5 and 6. In particular, this part focuses on how to address the challenges raised by the private powers to freedom of expression, privacy and data protection by analysing the constitutional challenges of content moderation and the processing of personal data based on automated decision-making technologies. Chapter 7 provides the possible paths of European digital constitutionalism, precisely underlining three critical challenges raising questions whose answers can be found through the digital constitutional lens provided by this research.

Chapter 2 focuses on the rise of digital constitutionalism in Europe. It analyses the evolution of the European approach to regulate the flow of expressions and data online since the end of the last century. This path is described in three constitutional phases: digital liberalism, judicial activism and digital constitutionalism. The first phase illustrates how, at the end of the last century, the liberal approach concerning online intermediaries and data protection was rooted in the fear to slow the development of new digital products and services which promise to promote the economic growth of the internal market. The end of this first phase was the result of the emergence of the Nice Charter as a bill of rights and new challenges raised by private actors in the digital environment. In this phase, the ECJ has played a pivotal role in moving the European standpoint from fundamental freedoms to fundamental rights. This second phase has only anticipated a new phase of European constitutionalism (i.e. digital constitutionalism) based on codifying the ECJ's case law and limiting online platform powers within the framework of the Digital Single Market.

Chapter 3 examines the characteristics of platform powers. The reasons for the rise of European digital constitutionalism cannot be

understood without explaining how platforms perform functions mirroring public powers. This chapter divides platform powers into two categories: delegated powers and autonomous powers. Despite the distinction, these two forms of power are interrelated. The first category includes functions which platforms exercise according to the delegation of public authorities, particularly legislative and judicial delegation of powers. For instance, the recognition of the role of tackling illegal content or the enforcement of the right to be forgotten online are just two examples of how powers have shifted from the public to the private sector. This process does not show a new trend since public actors increasingly rely on the private sector to perform public services. However, in this case, the primary concern is related to the lack of safeguards in the delegation of these powers. This limitless delegation has contributed to promoting an extension of private functions into forms of autonomous powers. In these cases, platforms have demonstrated their power to define and enforce the rule of their communities while also exercising a balancing activity between the fundamental rights at stake. These autonomous powers contribute to defining a para-constitutional framework where users are subject to a new *status subjectionis* in relation to private powers which do not ensure the separation of functions or democratic processes, and thus resemble authoritarian regimes.

Before focusing on the challenges of content moderation and automated decision-making in the field of data, Chapter 4 deals with another crucial piece of the puzzle: the intimate relationship between content and data in the algorithmic society. This chapter underlines how these two fields are not isolated but overlap. There is an intimate connection between the legal and technological regime governing content and data. These fields have been conceived as parallel tracks at the end of the last century. Nonetheless, the rise of the algorithmic society has blurred this traditional gap, thus increasing the technological convergence between content and data, despite the legal divergence of these two fields. From a merely passive role, online platforms such as search engines and social networks have acquired an increasingly active role in managing online content. At the same time, their role in deciding how to process personal data has transformed these actors from data processors to controllers. This evolving framework from passive to active intermediaries has led to the technological and legal convergence of parallel tracks which have started to overlap. In other words, the rise of the algorithmic society has contributed to reducing the technological distance between content and

data, while increasing the need to increase the legal convergence to protect democratic values against abuses of powers.

Chapter 5 introduces the normative part of this research, analysing the challenges of content moderation. Although freedom of expression is one of the cornerstones on which democracy is based, this statement firmly clashes with the troubling evolution of the algorithmic society where algorithmic technologies govern the flow of information online according to opaque technical standards established by social media platforms. Therefore, the chapter argues that the liberal paradigm of protection of the right to free speech is no longer enough to protect democratic values in the digital environment, since the flow of information is actively organised by business interests, driven by profit-maximisation rather than democracy, transparency or accountability. Although the role of free speech is still paramount, it is necessary to focus on the positive dimension of this fundamental right by introducing procedural safeguards in online content moderation to shield platform business interests from fragmentation and uncertainty while protecting democratic values and fostering a new form of media pluralism online based on transparency and accountability.

Chapter 6 deals with the field of data and, in particular, with the use of artificial intelligence systems to process personal data. The chapter underlines how the characteristics of algorithmic technologies highly challenge the primary pillars on which the protection of personal data is based. The chapter firstly describes the clash between data protection principles and artificial intelligence systems, and then it proposes a constitutional-oriented interpretation. The chapter unveils the constitutional underpinning values of the GDPR, in particular the principles of human dignity, proportionality and due process. Unlike the field of content, in this case, the primary issue does not relate to the introduction of procedural safeguards but to their interpretation, which should look at the protection of democratic values while supporting the growth of the internal market.

Once described the reasons for the rise of European digital constitutionalism and the constitutional remedies to address platform powers, Chapter 7 focuses on the potential path of European digital constitutionalism by analysing three constitutional challenges: digital humanism versus digital capitalism; public authority versus private ordering;

constitutional imperialism versus constitutional protectionism. This chapter does not focus on these poles as trade-offs but underlines how the characteristics of European digital constitutionalism would lead to a sustainable approach characterising the European third way among these global trends. This analysis provides the potential paths of European digital constitutionalism, thus defining the characteristics of this new constitutional phase in the algorithmic society.