

RESEARCH ARTICLE

Digital constitutionalism across the Atlantic

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Abstract

This article examines the reasons for different constitutional approaches to platform governance across the Atlantic. By adopting a comparative perspective under the lens of digital constitutionalism, it analyses the move from converging to diverging strategies of the United States and the European Union to address platform governance. From a liberal approach inspired by the US framework at the end of the last century, the European Union has moved towards a constitutional democratic strategy as demonstrated, for instance, by the launch of the Digital Services Act. On the other side of the Atlantic, the United States has reacted to the consolidation of platform governance by maintaining a liberal approach based on a vertical paradigm driven by the First Amendment. Given these democratic and liberal approaches, this article explains how the different constitutional premises of the United States and the European Union have produced diverging responses to the power of online platforms, thus underlining different expressions of digital constitutionalism across the Atlantic. The first section of the article introduces the rise of digital constitutionalism as the primary research angle to study the trans-Atlantic approaches to platform governance. The second section compares the European and US responses to the rise of platform powers. The third section focuses on the implications of these different constitutional strategies on a global scale.

Keywords: digital constitutionalism; European law; US law; constitutional law; platform governance; comparative law

1. Introduction

The emergence and consolidation of digital technologies have triggered opportunities to exercise fundamental rights and freedoms since the end of the last century.¹ The evolution of the services offered by social media or search engines can be considered part of the technological optimism charactering the advent of the internet.² At first glance, the benefits of this revolution of freedom have provided reasons to overcome the fear of

¹Yochai Benkler, *The Wealth of Networks* (Yale University Press, New Haven, CT, 2007).

²See, e.g., David R. Johnson and David Post, 'Law and Borders: "The Rise of Law in Cyberspace"' (1996) 48(5) *Stanford Law Review* 1367, 1371; John P. Barlow, 'A Declaration of Independence of the Cyberspace', Electronic Frontier Foundation (1996), available at: <www.eff.org/cyberspace-independence>.

public surveillance and censorship online. Nonetheless, the digital environment is not only subject to public control;³ it is also shaped by private ordering driven by the logics of information capitalism,⁴ or surveillance capitalism.⁵ Google, Facebook, Amazon and Apple are paradigmatic examples of new digital forces that compete with public actors in the exercise of powers online,⁶ and the COVID-19 pandemic has underlined the role of online platforms as social infrastructures.⁷ Amazon has allowed products to be delivered during the lockdown phase and Facebook has allowed users to maintain social relationships. In the meantime, Google and Apple have offered their technology to develop contact tracing apps. These actors have promptly provided products and services that other businesses, or even the state, failed to deliver at a time of crisis. The primary role of online platforms has encouraged an assessment of these actors not only as mere business entities, but as critical infrastructures,⁸ public utilities⁹ or essential facilities.¹⁰

Online platforms are critical pieces of the algorithmic society as the new societal background where large, multinational social platforms 'sit between traditional nation states and ordinary individuals and the use of algorithms and artificial intelligence agents to govern populations'.¹¹ The Cambridge Analytica scandal highlighted the role of social media as instruments for interfering in public discourse during elections.¹² Likewise, bans on media outlets implemented by Facebook as a reaction to the Australian Competition and Consumer Commission's News Media and Digital Platforms Mandatory Bargaining Code as well as the de-platforming of Donald Trump are just two examples of the role of online platforms in shaping public policies and decision-making. At first glance, these cases are apparently disconnected; however, a closer observation shows that the consolidation of information capitalism is not only a matter of freedom, but it also leads to the concentration of (private) powers raising constitutional questions for the principle of the

³See, e.g., Blayne Haggart, Natasha Tusikov and Jan Aart Scholte (eds), *Power and Authority in Internet Governance Return of the State?* (Routledge, London, 2021); Giovanni De Gregorio and Nicole Stremmlau, 'Internet Shutdowns and the Limits of Law' (2020) 14 *International Journal of Communication* 1; Justin Clark et al., *The Shifting Landscape of Global Internet Censorship* (Berkman Klein Center for Internet & Society Research, Cambridge, MA, 2017), at: <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:33084425>>; Ronald Deibert et al., *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press, Cambridge, MA, 2008).

⁴Julie E. Cohen, *Between Truth and Power. The Legal Constructions of Informational Capitalism* (Oxford University Press, Oxford, 2020).

⁵Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, London, 2018).

⁶Martin Moore and Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford University Press, Oxford, 2018).

⁷José van Dijck and David Nieborg and Thomas Poell, 'Reframing Platform Power' (2019) 8(2) *Internet Policy Review*, available at: <<https://policyreview.info/articles/analysis/reframing-platform-power>>.

⁸Panos Constantinides, Ola Henfridsson and Geoffrey G. Parker, 'Introduction: Platforms and Infrastructures in the Digital Age' (2018) 29(2) *Information Systems Research* 381; Jean-Christophe Plantin et al., 'Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook' (2018) 20 *New Media & Society* 293.

⁹K. Sabeel Rahman, 'Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities' (2018) 2(2) *Georgetown Law and Technology Review* 234.

¹⁰Nikolas Guggenberger, 'Essential Platforms' (2021) 24 *Stanford Technology Law Review* 237.

¹¹Jack M. Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *UC Davis Law Review* 1149, 1151.

¹²Brittany Kaiser, *Targeted: The Cambridge Analytica Whistleblower's Inside Story of How Big Data, Trump, and Facebook Broke Democracy and How It Can Happen Again* (2019).

rule of law and democracy. If Google and Facebook can set standards to define the protection of rights and freedoms on a global scale based on business purposes, it is not surprising that they can exercise a form of power, or ‘functional sovereignty’, which can compete with, if not overcome, that of public authorities.¹³ The constitutionalization of global private spheres beyond territorial boundaries constitutes one of the primary challenges for constitutional democracies,¹⁴ and this trend is particularly relevant in the digital age.

In the last decades, the constitutional approaches to the rise of platform powers have increasingly become polarized across the Atlantic to address these transnational challenges. From the first period of regulatory convergence based on neoliberal positions at the end of the last century, the United States and the European Union have taken different paths. On the eastern side of the Atlantic, the European Union has slowly abandoned its liberal imprinting to digital technologies, in which it has primarily been influenced by the US legal framework.¹⁵ Whereas at the end of the last century, the European Union was focused mainly on promoting the growth of the internal market, this liberal approach has been enriched (or even overturned) by a constitutional democratic strategy. The adoption of the General Data Protection Regulation (GDPR) has been a milestone in constitutionalizing European data protection following the Lisbon Treaty.¹⁶ The proposals for the Digital Services Act or the Digital Markets Act are other examples showing the paradigm shift in the European Union towards more accountability of online platforms to protect European democratic values.¹⁷

While the European Union is at the forefront of a new constitutional phase addressing the challenges raised by the exercise of private powers in the digital age, the United States has not demonstrated the same concern. It has followed an opposite constitutional path which trusts online platforms as spaces for democracy. For instance, the Communication Decency Act (CDA) still immunizes online intermediaries,¹⁸ including modern online platforms, from liability when moderating users’ content. In the field of data, apart from some national attempts,¹⁹ there is no harmonized approach to privacy and data protection at the federal level. Both in terms of content and data, the US policy is anchored to a digital liberal approach that considers the First Amendment as the primary beacon of the algorithmic society.

Within this framework, this article examines the reasons for, and the consequences of, the shift from converging to diverging constitutional approaches across the Atlantic to address platform governance. By adopting a comparative perspective under the lens of

¹³Frank Pasquale, ‘From Territorial to Functional Sovereignty: The Case of Amazon’, LPE (Dec., 6 2017), <https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon>.

¹⁴Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, Oxford, 2012).

¹⁵George Christou and Seamus Simpson, ‘The Internet and Public–Private Governance in the European Union’ (2006) 26(1) *Journal of Public Policy* 43.

¹⁶Regulation (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 OJ L 119/1.

¹⁷Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM(2020) 825 final; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final.

¹⁸Communications Decency Act (1996), Section 230.

¹⁹See, for example, California Consumer Privacy Act (CCPA) (2020).

digital constitutionalism,²⁰ it explains that the diverging strategies of the United States and the European Union to limit private powers in the digital age are the result of different constitutional premises across the Atlantic. This article thus provides an example of how constitutional democracies do not always adopt the same constitutional strategies but react differently to the same challenges. Therefore, the case of platform governance provides an opportunity to study constitutional nuances in the digital age. The debate has focused mostly on platform governance and digital policies from internal or regional perspectives, and not enough attention has been given to a comparative analysis between the EU and US approaches.²¹

This article provides a constitutional bridge by examining the primary reasons for the European emancipation from the US reluctance to address the consolidation of digital capitalism and the powers of online platforms. From a methodological perspective, it investigates the different approaches of two constitutional democracies which, over the last 20 years, have witnessed a mutual migration of constitutional ideas in terms of digital policies.²² This comparative study underlines how the EU and US answers to platform powers are respective examples of democratic and liberal approaches to the algorithmic society.

To achieve this purpose, the first part of this article introduces the rise of digital constitutionalism, and focuses on the trans-Atlantic dimension. The second part frames digital constitutionalism within the European and US approaches by examining the reactions against the exercise of private powers in the digital environment. The third part compares the two constitutional approaches and underlines the implications of different expressions of digital constitutionalism on a global scale.

II. The rise of digital constitutionalism

The constitutional challenges raised by online platforms are primarily linked to the process of globalization. The cross-border nature of the internet has challenged traditional categories of modern constitutionalism.²³ This new protocol of communication has not only questioned consolidated notions such as sovereignty and power,²⁴ but also enriched the possibility of exercising fundamental rights and freedoms.²⁵ Nonetheless, in addition to other expressions of globalization, the digital environment has put democratic constitutional states under pressure.²⁶ Precisely, in the case of the internet, constitutional

²⁰Giovanni De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (2021) 19(1) *International Journal of Constitutional Law* 44; Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorization' (2019) 33(1) *International Review of Law, Computers & Technology* 76.

²¹Claudia E. Haupt, 'Regulating Speech Online: Free Speech Values in Constitutional Frames' (2021) *Washington University Law Review* 751.

²²Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law', in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Oxford University Press, Oxford, 2007).

²³Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia Journal of International Law* 985; Eric C Ip, 'Globalization and the Future of the Law of the Sovereign State' (2010) 8(3) *International Journal of Constitutional Law* 636.

²⁴Saskia Sassen, 'On the Internet and Sovereignty' (1998) 5(2) *Indiana Journal of Global Legal Studies* 545.

²⁵Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1.

²⁶Oreste Pollicino and Marco Bassini, 'The Law of the Internet Between Globalisation and Localisation', in Miguel Maduro et al. (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, Cambridge, 2014).

democracies found themselves at a crossroads at the end of the last century, trusting the potential of the internet as a democratic force, and thus ensuring a liberal environment, or regulating the online dimension to limit the consolidation and exercise of powers by undermining the same rights and freedoms that the internet promises to enrich on a global scale.

Before this choice, constitutional democracies considered the internet to be the engine of freedom guiding the information society. Both sides of the Atlantic decided to follow the liberal branch of this crossroads, thus limiting their regulatory intervention while also exempting online intermediaries from responsibility. This phase of digital liberalism characterizing the policies of constitutional democracies at the end of the last century does not just reflect the neoliberal position taken by constitutional democracies but also falls within the extensive technological optimism welcoming the advent of the internet.²⁷ This narrative also influenced the reasons to adopt a free-market approach concerning the regulation of the digital environment.²⁸ A paternalistic approach would have hindered the development of new digital services and damaged the growth of the internal market exactly when new technologies were poised to revolutionize the entire society. Digital technologies were far from demonstrating their potential, and the extent to which the digital revolution would affect daily lives by providing new opportunities while introducing complexity in the achievement of the common market could not be predicted. Digital technologies were considered an opportunity to grow and prosper rather than a potential threat to individual rights and freedoms. At that time, there were no reasons to fear the rise of new private powers challenging the protection of fundamental rights and democratic values while competing with states' powers.

Therefore, constitutional democracies have facilitated this process by exempting online intermediaries from secondary liability for unlawful third-party content while providing rules to foster the free circulation of data. Besides, the use of a global communication technology for delivering services without any physical burden, and regardless of their location, have led to new opportunities for the public and private sectors.²⁹ In this liberal framework, new businesses have found a welcoming environment to consolidate their activities, especially through the possibility of collecting vast amounts of information through digital channels without encountering constitutional limits.³⁰ Both public and private actors have started to increasingly collect, organize and process information to pursue public tasks and to earn profits.³¹

The accumulation of data and the consequent extraction of value have enhanced not only public powers, but also first the economic and then the political power of the private sector in the digital age. Even if not exclusively, platform business models are based or highly rely on processing data for profiling purposes to make profits from advertising revenues, targeted services or the analysis of data. By relying on their freedom of contract

²⁷Johnson and Post (n 2); Barlow (n 2).

²⁸Governments such as China and the Arab states have not adopted the same free-market approach to the internet. See Anupam Chander and Uyen P Le, 'Data Nationalism' (2015) 64(3) *Emory Law Journal* 677; Barney Warf, 'Geographies of Global Internet Censorship' (2011) 76 *GeoJournal* 1.

²⁹Jeff Kossseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press, Ithaca, NY, 2016).

³⁰Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1(2) *Social Media + Society* 1.

³¹Luciano Floridi, *The Fourth Revolution How the Infosphere is Reshaping Human Reality* (Oxford University Press, Oxford, 2016).

to determine the boilerplate conditions for their terms of service and community guidelines, platforms have unilaterally established standards of protection online, exercising *de facto* tasks usually vested in public authorities.³² Formally, these private agreements bind users to the platforms. However, these contracts are substantially instruments of private ordering that shape the scope of fundamental rights and freedoms of billions of people by adopting a rigid top-down approach. For example, the process of content moderation underlines the discretion that social media exercise in determining the standard of speech applicable to billions of users on a global scale while monetizing from advertising revenues.³³ Likewise, while platforms such as Airbnb or Uber provide new possibilities to work, they also shape labour rights and, more broadly, contribute to changing the face of (smart) cities.³⁴

As Pasquale observes, digital firms are no longer market participants, since they ‘aspire to displace more government roles over time, replacing the logic of territorial sovereignty with functional sovereignty’.³⁵ These actors have already been named ‘gatekeepers’, which underlines their high degree of control in online spaces.³⁶ The launch of Facebook’s Oversight Board is a paradigmatic example of the consolidation (and institutionalization) of this process.³⁷ While public enforcement has long been the default option, based on the role of public authorities as the monopoly holder in the context of fundamental rights adjudication, private enforcement has emerged as a trend even in the digital age.³⁸ Indeed, such privatization of the protection of rights and liberties is just one of the countless processes underlining a trend of constitutional democracies delegating public enforcement to private entities.³⁹

Therefore, the rise and consolidation of platform capitalism leads to questions about the role of constitutional law in the algorithmic society. Modern constitutionalism has pursued the goal of protecting fundamental rights on the one hand, and limiting the emergence of powers outside any control on the other.⁴⁰ Constitutions are a critical part

³²Edoardo Celeste, ‘Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?’ (2018) 33(2) *International Review of Law, Computers & Technology* 122; Luca Belli and Jamila Venturini, ‘Private Ordering and the Rise of Terms of Service as Cyber-Regulation’ (2016) 5(4) *Internet Policy Review*, <https://doi.org/10.14763/2016.4.441>.

³³Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harvard Law Review* 1598.

³⁴Sofia Ranchordas and Catalina Goanta, ‘The New City Regulators: Platform and Public Values in Smart and Sharing Cities’ (2020) 36 *Computer Law & Security Review* 105375.

³⁵Pasquale (n 13).

³⁶Emily B Laidlaw, ‘A Framework for Identifying Internet Information Gatekeepers’ (2012) 24(3) *International Review of Law Computers & Technology* 263; Jonathan A Zittrain, ‘History of Online Gatekeeping’ (2006) 19(2) *Harvard Journal of Law & Technology* 253; Scott Burris et al., ‘Nodal Governance’ (2005) 30 *Australian Journal of Law and Policy* 30.

³⁷Kate Klonick, ‘The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression’ (2020) 129(8) *Yale Law Journal* 2232 (2020); Evelyn Douek, ‘Facebook’s “Oversight Board”: Move Fast with Stable Infrastructure and Humility’ (2019) 21(1) *North Carolina Journal of Law & Technology* 1.

³⁸Rory Van Loo, ‘The Corporation as Courthouse’ (2016) 33 *Yale Journal on Regulation* 547.

³⁹Jody Freeman and Martha Minow (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, Cambridge, MA, 2009).

⁴⁰Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (2012) New York University Public Law Research Paper, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1>; Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Oxford University Press, Oxford, 2003).

of the social contract, limiting governmental powers and protecting individual freedoms from interference by public authorities.⁴¹ Nonetheless, this mission has traditionally focused on limiting the authority of public actors. Instead, in the algorithmic society, the primary challenge for constitutional democracies no longer comes exclusively from public authorities but stems primarily from the governance of spaces by formally private actors, which exercise functions traditionally vested in public authorities.

This framework underlines the role of digital constitutionalism as a lens to articulate the limits to the exercise of power in a networked society.⁴² 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 organizations'.⁴³ However, this outlook does not imply revolutionizing the grounding roots of modern constitutionalism but reframes the role of constitutionalism in the algorithmic society.

The expression 'digital constitutionalism' refers to two dimensions. The first concerns the focus on digital technologies. Therefore, the frame is focused on the analysis of a specific timeframe in the aftermath of the advent of the internet. The second dimension refers to constitutional theory and law, conceiving powers as the exclusive expression of public authority and rights and freedoms as safeguards against the discretionary exercise of these powers. The mix between the two expressions provides an understanding of how digital technologies and constitutional law affect each other. In this sense, by defining a new theoretical and practical field based on a dynamic dialectic between constitutionalism and technology, digital constitutionalism demonstrates the reactions of constitutionalism to the transformation of power exercised by public and private actors in the digital age. This descriptive goal also leads to a normative approach based on a reframing of the protection of fundamental rights and the exercise of powers in the context of the algorithmic society.

Nonetheless, the normative focus of digital constitutionalism does not lead to a unique approach across constitutional democracies. Digital constitutionalism does not provide a single way to solve the problems of the algorithmic society. On the contrary, rather than just looking at global constitutionalism,⁴⁴ digital constitutionalism reflects the different nuances characterizing constitutional systems. The way in which constitutional law reacts to the challenges of the algorithmic society is still driven by regional and local constitutional traditions and cultures. This relationship is primarily because, even in a phase of internationalization of constitutional law,⁴⁵ constitutions represent the identity and values of a certain community that is connected to traditions and territory. Although the protection of constitutional rights and the rule of law are missions shared by constitutional democracies, nonetheless, the protection of these values depends on the political, institutional and social dynamics of constitutional systems. Therefore, digital constitutionalism should not be considered a monolith but

⁴¹András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, Oxford, 2017).

⁴²Claudia Padovani and Mauro Santaniello, 'Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System' (2018) 80 *International Communication Gazette* 295.

⁴³Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press, Cambridge, 2019), 173.

⁴⁴Antje Wiener et al., 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1.

⁴⁵Sergio Bartole, *The Internationalisation of Constitutional Law* (Hart, Oxford, 2020).

the expression of different constitutional approaches to digital technologies from an internal and external perspective.

In the following sections, the analysis of the European and US approach to digital technologies and platform governance demonstrates how constitutional democracies provide different answers to address the same problem. This analysis underlines how the characteristics of digital constitutionalism across the Atlantic have led the two systems to follow almost opposite directions to solve the common challenges raised by the consolidation of platform capitalism.

III. The path towards European digital constitutionalism

Since the second half of the twentieth century, the goal of the European Union has been oriented towards building a common market.⁴⁶ Until the adoption of the Charter in 2000 and the recognition of its binding effects following the adoption of the Lisbon Treaty, the Union approach was firmly based on this liberal imprinting based on economic pillars, namely the fundamental freedoms.⁴⁷ This liberal goal has also influenced the regulation of the digital environment. Both the Directive 95/46/EC, known as the Data Protection Directive, and Directive 2000/31/EC, or the e-Commerce Directive, are examples of the European liberal bias. These instruments were oriented to ensure the smooth development of the internal market by immunizing online intermediaries and promoting the free flow of personal data in the internal market.⁴⁸

The liberal imprinting of the Union was challenged due to the rampant changes of the digital environment at the beginning of this century. At the very least, two events led to the end of the first (liberal) phase and encouraged the European Court of Justice (ECJ) to play an active role in paving the way towards a new European constitutional strategy. The first event triggering this phase of judicial activism concerned the rise and consolidation of new private actors in the digital environment, and the second involved the recognition of the European Charter of Fundamental Rights (Charter) as a bill of rights of the Union.⁴⁹

The first turning point concerns the role of online intermediaries. At the end of the twentieth century, these entities merely provided access to products and services originated by third parties on the internet or provided internet-based services, such as hosting, to third parties. In other words, online intermediaries were mere service providers or data processors without being involved in the organization or moderation of content or in the determination of data processing purposes. The neoliberal approaches adopted by constitutional democracies have led some hosting providers, such as social media platforms and search engines, to play a more active role since the early 2000s. Unlike

⁴⁶Kamiel Mortelmans, 'The Common Market, the Internal Market and the Single Market: What's in a Market?' (1998) 35(1) *Canadian Modern Language Review* 101.

⁴⁷Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47, Title II and IV.

⁴⁸Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995) OJ L 281/31; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (2000) OJ L 178/1.

⁴⁹Charter of Fundamental Rights of the European Union (2012) OJ C 326/391. Grainne De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168.

traditional access or hosting providers, the primary activities of these actors no longer consist of providing online spaces to host content. Online platforms also set standards and rules to organize their digital spaces, which are driven by the profits coming from the analysis of information and data.

The second driver triggering a new phase characterizing European digital constitutionalism involves the recognition of the binding nature of the Charter and its inclusion in EU primary law.⁵⁰ Even if the role of the Charter is still discussed, particularly in light of member states' national identities,⁵¹ this step has contributed to codifying the constitutional dimension of the European (digital) environment. Prior to the Charter, the protection of freedom of expression, privacy and personal data in the European context was based not only on the domestic level but also on the European Convention on Human Rights (Convention).⁵² The Strasbourg court has played a crucial role in extending the protection of fundamental rights online as well as underlining the constitutional challenges coming from digital technologies.⁵³ For instance, the court has underlined the risks for freedom of expression online.⁵⁴ Likewise, in the field of data, it has underlined the relevance of protecting personal data evolving from the negative framework of privacy.⁵⁵ The Lisbon Treaty has constituted a crucial further step in this process of constitutionalization, allowing the right to freedom of expression,⁵⁶ private and family life,⁵⁷ and the protection of personal data,⁵⁸ as already enshrined in the Charter, to become binding vis-à-vis member states and European institutions,⁵⁹ which can interfere with these rights only according to the Charter.⁶⁰ Moreover, like the Convention,⁶¹ the Charter adds another important piece of the European constitutional puzzle by prohibiting the 'destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein'.⁶²

Within this new constitutional framework, the ECJ started to apply the Charter as a parameter to assess the validity of and to interpret European legal instruments, thus moving from a formal dimension to a substantial application of fundamental rights and freedoms (i.e. constitutional law in action).⁶³ Given the lack of any legislative review of

⁵⁰Consolidated version of the Treaty on European Union OJ C 326/13, Article 6(1).

⁵¹Massimo Fichera and Oreste Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?' (2019) 20 *German Law Journal* 1097.

⁵²European Convention on Human Rights (1950), Articles 8, 10.

⁵³Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road towards Digital Constitutionalism* (Bloomsbury, London, 2021).

⁵⁴*Delfi AS v Estonia* (2015) 62 EHRR 6; *MTE v Hungary* (2016).

⁵⁵*S. and Marper v The United Kingdom* (2008).

⁵⁶Charter (n 49), Article 11(1).

⁵⁷*Ibid.*, Article 7.

⁵⁸*Ibid.*, Article 8(1).

⁵⁹*Ibid.*, Article 51.

⁶⁰*Ibid.*, Article 52. Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2013) 8(3) *European Constitutional Law Review* 375.

⁶¹Convention (n 52), Article 17.

⁶²Charter (n 49), Article 54.

⁶³Nevertheless, this process started even before the Maastricht Treaty entered into force when the fundamental rights started to be applied as limitations for fundamental freedom and common market principles. Precisely, the recognition of fundamental rights as general principles of EU law has opened the door towards a balancing exercise between fundamental freedoms and rights, or between the economic and

either the e-Commerce Directive or the Data Protection Directive, judicial activism has played a critical role in highlighting the challenges for fundamental rights online, thus guiding the transition from a mere economic perspective to a new constitutional phase.

In *Scarlet and Netlog*,⁶⁴ the ECJ has adopted a constitutional interpretative angle in two cases involving online intermediaries and, in particular, the extent of the ban on general monitoring. The ECJ dealt with the complex topic of striking a balance between the fundamental rights of the users, especially the right to data protection and freedom of expression, and the interests of the platforms not to be overwhelmed by expensive monitoring systems. According to the ECJ, an injunction to install a general filtering system would not have respected the freedom of online intermediaries to conduct business.⁶⁵ Moreover, the contested measures could affect users' fundamental rights, namely their right to the protection of their personal data and their freedom to receive or impart information.⁶⁶ As a result, the court held that Belgian content filtering requirements 'for all electronic communications ... which applies indiscriminately to all its customers; as a preventive measure; exclusively at its expense; and for an unlimited period' violate the ban on general monitoring.

Following that decision, the ECJ has relied on the Charter to assess the framework of the e-Commerce Directive. For instance, in *Telekabel* and *McFadden*,⁶⁷ the ECJ addressed two similar cases involving injunction orders on online intermediaries which leave the provider free to choose the measures to tackle copyright infringements while maintaining the exemption of liability showing its duty of care in respect of EU fundamental rights. The ECJ upheld the interpretation of the referring national court on the same (constitutional) basis as argued in *Scarlet and Netlog* by concluding that the fundamental rights recognized by EU law have to be interpreted as not precluding a court injunction such as that of the case in question.

In the field of data, the same shift of paradigm has occurred in *Digital Rights Ireland*,⁶⁸ where the ECJ invalidated Directive 2006/24/EC due to its disproportionate effects over fundamental rights.⁶⁹ By assessing the interferences, and potential justifications, with the

constitutional dimension of the European Union. See, in particular, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (2003) ECR I-905; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (2004) ECR I-9609; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (2007) ECR I-11767; Case C-438/05, *Viking Line ABP v The International Transport Workers' Federation, the Finnish Seaman's Union* (2007) ECR I-10779; Case 29/69, *Erich Stauder v City of Ulm – Sozialamt* (1969); 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).

⁶⁴Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (2011) ECR I-11959; Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (2012).

⁶⁵C-70/10 (n 64).

⁶⁶Charter (n 49), Articles 8, 11.

⁶⁷Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014); Case C-484/14, *Tobias McFadden v Sony Music Entertainment Germany GmbH* (2016).

⁶⁸Cases C-293/12 e C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* (2014).

⁶⁹Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (2006) OJ L 105/54.

rights of privacy and data protection of EU citizens established by the Charter, the ECJ has shown itself to be aware of the risks of technologies for the protection of the fundamental rights of EU citizens.

In *Google Spain*,⁷⁰ the way the ECJ recognized that a search engine like Google falls under the category of ‘data controller’ shows the predominant role of Articles 7 and 8.⁷¹ In other words, considering Google as a mere data processor would not have ensured effective protection of the rights of the data subjects. The same consideration also applies to the definition of establishment as defined by the Data Protection Directive. The ECJ has broadly interpreted the meaning of ‘in the context of establishment’ to avoid fundamental rights to be subject to a disproportionate effect due to a formal interpretation of establishment.⁷² Moreover, the ECJ has entrusted search engines to delist online content from their results even without requiring the removal of the content at stake.⁷³ Such a constitutional-oriented interpretation is considered the expression of a horizontal enforcement of the fundamental rights enshrined in Articles 7 and 8 of the Charter. Despite this high level of protection of fundamental rights and the limitations on private actors’ activities, it is worth observing how the ECJ has delegated to search engines the task of balancing fundamental rights when assessing users’ requests to delist personal data from search results.⁷⁴

The same constitutional approach is engaged in the *Schrems* saga.⁷⁵ In *Schrems I*, the ECJ invalidated Decision 2000/520, which was the legal basis allowing the transfer of data from the European Union to the United States (i.e. the safe harbour).⁷⁶ Even in this case, the ECJ provided an extensive interpretation of the fundamental right to data protection when reviewing the regime of data transfer established by the Data Protection Directive,⁷⁷ to ensure ‘an adequate level of protection’ in the light of ‘the protection of the private lives and basic freedoms and rights of individuals’.⁷⁸ The ECJ has manipulated the notion of ‘adequacy’, which, as a result of this new constitutional frame, has moved to a standard of ‘equivalence’ between the protection afforded to personal data across the Atlantic.⁷⁹ These cases underline the role of the Charter in empowering the ECJ and extending (or adapting) the scope of the Data Protection Directive vis-à-vis the new digital threats coming from the massive processing of personal data both inside and outside European boundaries. This constitutional interpretation has led the ECJ to extend constitutional safeguards to the digital environment, which underlines how the European economic frame could not be considered sufficient to address new digital challenges.

The lesson learnt from judicial activism did not go unnoticed. The European Commission demonstrated its awareness of the new digital framework in the years following

⁷⁰Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2014).

⁷¹*Ibid.*, 34.

⁷²*Ibid.*, 58.

⁷³*Ibid.*, 97.

⁷⁴Jean-Marie Chenou and Roxana Radu, ‘The “Right to Be Forgotten”: Negotiating Public and Private Ordering in the European Union’ (2017) 58 *Business & Society* 74.

⁷⁵Case C-362/14, *Maximilian Schrems v Data Protection Commissioner* (2015).

⁷⁶Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (2000) OJ L 215/7.

⁷⁷Data Protection Directive (n 48), Article 25.

⁷⁸Case C-362/14 (n 75), 71.

⁷⁹*Ibid.*, 73.

the adoption of the Treaty of Lisbon. In the framework of the Digital Single Market strategy,⁸⁰ the Commission underlined the need to ensure that online intermediaries (*rectius* platforms) ‘protect core values’ and increase ‘transparency and fairness for maintaining user trust and safeguarding innovation’.⁸¹ This approach is because of the role of online platforms in giving access to information and contents to society and, as a result, their impact on users’ fundamental rights. As the Commission stressed, this role implies ‘wider responsibility’.⁸² The ECJ’s judicial activism has played a crucial role in underlining the challenges of the algorithmic society, which has triggered a new European constitutional phase towards the injection of democratic values in the digital environment.

This political approach resulted in a new wave of soft and hard law instruments whose objectives have been, *inter alia*, to regulate online platforms’ activities in the field of content and data. To increase the accountability of online platforms, the Commission introduced new obligations to online intermediaries. This approach is evident in the field of content where new safeguards have been introduced by the Directive on Copyright in the Digital Single Market,⁸³ the amendments to the Audiovisual Media Service Directive,⁸⁴ and the Regulation on Terrorist Content.⁸⁵ In the field of data, the GDPR has introduced other safeguards and increased accountability to protect the fundamental rights of data subjects.⁸⁶ Furthermore, the Commission introduced soft-law regulatory solutions through which the Commission is trying to cooperate with platforms in the fight against certain forms of expression (e.g. hate speech).⁸⁷ These measures have anticipated the adoption of the new Digital Services Act and Digital Markets Act, the aim of which is to provide a new legal framework for competition and digital services while also mitigating the constitutional challenges raised by online platforms and protect European democratic values.⁸⁸ In particular, the Digital Services

⁸⁰Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe COM(2015)192 final.

⁸¹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM(2016) 288 final.

⁸²Ibid.

⁸³Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (2019) OJ L 130/92.

⁸⁴Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (2018) OJ L 303/69.

⁸⁵Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online OJ L 172/79.

⁸⁶GDPR (n 16), Recital 1. Raphaël Gellert, *The Risk-Based Approach to Data Protection* (Oxford University Press, Oxford, 2020).

⁸⁷The European Union has adopted different guidelines and code of practices in the field of content. See Code of Conduct on Online Hate Speech (2016), available at: <https://ec.europa.eu/newsroom/just/document.cfm?doc_id=42985>; Code of Practice on Online Disinformation, (2018) <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454>.

⁸⁸European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed (2020/2022(INI)).

Act will provide a horizontal systems of substantive and procedural safeguards limiting platforms' power in content moderation.

Within this framework, European digital constitutionalism should not be considered as a mere reaction, but rather as a long-term strategy to prevent constitutional values from being neglected by unaccountable powers. In other words, it is also a proactive strategy to protect democratic values in the algorithmic society. This European sensitivity also results from a constitutional history recognizing the horizontal and protective dimensions of rights.⁸⁹ This new constitutionally oriented phase triggered by the reaction of the European Union to the emergence of private powers underlines that there is no space in Europe for a neoliberal approach which would lead to destroying democratic values. As observed, 'there is no foolproof constitutional design that can immunize 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.'⁹⁰ This risk does not just concern political or external forces that aim to overthrow democratic safeguards, but also the interferences of unaccountable private powers.

IV. The path of US digital constitutionalism

On the other side of the Atlantic, a neoliberal understanding has driven the US approach to the digital environment. In the field of content, the first regulation addressing online intermediaries introduced statutory immunities concerning tort liability. The CDA does not impose duties or procedural safeguards, and platforms are exempted from liability for hosting third-party content. However, the CDA is not the only instrument expressing the US liberal approach at the end of the twentieth century. The Digital Millennium Copyright Act (DMCA) is considered another legal pillar exempting online platforms from tort liability.⁹¹ Despite the differences between the two instruments,⁹² these statutes consider online platforms as extraneous to the unlawful conduct performed by their users. The DMCA provides a system of exemption of liability based on some conditions – for instance, requiring online intermediaries to remove content once they become aware of their presence in their digital spaces.

Furthermore, unlike in the European framework, the protection of personal data lacks a federal legal framework as well as consistency among sectors. While the protection of privacy and personal data is expressly recognized as a fundamental right and linked to the individual rights of dignity and autonomy,⁹³ the US protection of these rights is not linked

⁸⁹Dieter Grimm, 'The Protective Function of the State' in *European and US Constitutionalism*, edited by Georg Nolte, 101–28. Cambridge University Press, Cambridge, 2005).

⁹⁰Tom Ginsburg and others, 'The Coming Demise of Liberal Constitutionalism?' (2018) 85(2) *University of Chicago Law Review* 239, 253.

⁹¹Digital Millennium Copyright Act (1996), section 512.

⁹²Salil K. Mehra and Marketa Trimble, 'Secondary Liability, ISP Immunity, and Incumbent Entrenchment' (2014) 62 *American Journal of Company Law* 685. See also Danielle K. Citron and Benjamin Wittes, 'The Problem Isn't Just Backpage: Revising Section 230 Immunity' (2018) 2 *Georgetown Law Technology Review* 453.

⁹³Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 *Philosophy & Technology* 307; James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1153.

to the individual but rather to a mosaic theory under the Fourth Amendment,⁹⁴ and it is considered from a consumeristic rather than constitutional standpoint.⁹⁵ Even if data privacy regulation at national level, such as the California Data Privacy Regulation, has represented important steps forward, the focus of this instrument is still far from the European constitutional model.⁹⁶

Given the lack of a solid data protection law framework in the United States, the possibility to regulate online platforms firmly depends, even if not exclusively, on how broadly the right to free speech is protected. A regulation that requires private actors to comply with monitoring or removal obligations of online content is likely to be invalidated under the strict scrutiny test applied by the US Supreme Court. Therefore, the material and subjective scope of the First Amendment contributes to defining the boundaries of platform governance. It is because of the scope and interpretation of the First Amendment that online platforms have found a constitutional area to profit without responsibility.

The First Amendment has been interpreted extensively since the beginning of the twentieth century.⁹⁷ In *Schenck v United States*, Justice Holmes emphasized how freedom of expression can be restricted and outlined the doctrine of ‘clear and present danger’.⁹⁸ In *Abrams v United States*,⁹⁹ he also dissented with the majority opinion defining the bases of the free marketplace of ideas, as also named by Justice Douglas in *United States v Rumely*.¹⁰⁰ This metaphor frames the right to a free speech within a firm negative dimension that characterizes the liberal values of the nineteenth century. In other words, this image extends the neoclassic economic theory to the field of ideas.¹⁰¹

Therefore, outside the scope of a ‘clear and present danger’, the free marketplace of ideas limits any attempt to restrict free speech which is subject to strict scrutiny. The US Supreme Court applied, and even extended, this frame in different cases.¹⁰² However, the scope of the First Amendment could not be understood without focusing on hate speech and the doctrine of ‘imminent lawless action’ as defined in *Brandenburg v Ohio*.¹⁰³ By clarifying the notion of ‘clear and present danger’ in *Schenck v United States* and overruling *Whitney v California*,¹⁰⁴ the Supreme Court defined that the First Amendment protection does not cover expressions whose intention is to incite an imminent and likely violation of the law.¹⁰⁵ Although hate speech is one of the most extremist forms of expression, the court set a high standard for limiting this kind of expressions.

⁹⁴Orin S Kerr, ‘The Mosaic Theory of the Fourth Amendment’ (2012) 111 *Michigan Law Review* 311.

⁹⁵Paul M Schwartz and Karl-Nikolaus Peifer, ‘Transatlantic Data Privacy Law’ (2017) 106 *Georgetown Law Journal* 115.

⁹⁶Anupam Chander et al., ‘Catalyzing Privacy Law’ (2021) 105 *Minnesota Law Review* 1733.

⁹⁷Elisabeth Zoller, ‘The United States Supreme Court and the Freedom of Expression’ (2009) 84 *Indiana Law Journal* 885.

⁹⁸*Schenck v United States* 249 US 47 (1919).

⁹⁹*Abrams v United States* 250 US 616 (1919).

¹⁰⁰*United States v Rumely* 345 US 41 (1953).

¹⁰¹Ronald Coase, ‘Markets for Goods and Market for Ideas’ (1974) 64(2) *American Economic Review* 384.

¹⁰²See, e.g., *Miller v California* 413 US 15 (1973); *New York Times v Sullivan* 376 US 254 (1964). See also *Roth v United States* 354 US 476 (1957); *Ginsberg v New York* 390 US 629 (1968). *New York v Ferber* 458 US 747 (1982). See also the set of the ‘minimum contact test’ in *Calder v Jones* 465 US 783 (1984).

¹⁰³*Brandenburg v Ohio* 395 US 444 (1969).

¹⁰⁴*Whitney v California* 274 US 357 (1927).

¹⁰⁵William B. Fisch, ‘Hate Speech in the Constitutional Law of the United States’ (2002) 50 *American Journal of Company Law* 463.

This broad frame of protection has also been extensively applied to the digital environment. At the end of the twentieth century, the Supreme Court had already dealt with the limits of the regulatory intervention in the field of free speech. In *Reno v ACLU*,¹⁰⁶ the court considered unconstitutional the provisions of the CDA concerning the criminalization of presenting obscene or indecent materials to any person under 18. The court distinguished traditional media and the internet by providing larger protection based on the idea that ‘the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material’.³¹ Not surprisingly, Justice Stevens underlined that the internet is the ‘new marketplace of ideas’ observing that ‘the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship’.¹⁰⁷ This position also led the Supreme Court to consider other legal measures as unconstitutional, thus making the First Amendment the bastion against any form of online speech regulation.¹⁰⁸ This judicial approach was also aligned with the liberal positions of those who considered the internet as a framework resisting the intervention of public actors.¹⁰⁹ It is thus thanks to the First Amendment – constitutional law rather than self-regulation – that public powers have been limited in the digital environment. The self-regulatory model of the cyberspace was generally questioned by scholars who have already underlined the law as a regulatory force of the digital environment,¹¹⁰ as also demonstrated by the enforcement of public policies online.¹¹¹

This frame has not changed so far. The US Supreme Court has maintained, if not reinforced, its liberal approach to free speech online as shown in *Packingham v North Carolina*.¹¹² In a case involving a statute banning registered sex offenders from accessing social networking services to avoid any contact with minors, the court defined that the ‘most important places (in a spatial sense) for the exchange of views’ are not only the ‘vast democratic forums of the Internet’ but also ‘social media in particular’.¹¹³ This ruling is another piece of the vast constitutional protection on which social media can rely against users’ claims. They can seek refuge in a safe constitutional area of protection under the First Amendment, which in the last 20 years has constituted a fundamental ban on any regulatory attempt to regulate speech online.

If the First Amendment achieves its purpose to limit the powers exercised by public actors, it fails to limit private abuses of freedoms. Together with the legal shields provided by constitutional and tort law, even the underpinning values of US contract law answer to the logic of digital liberalism and separation between public authority and private ordering. The principle of autonomy and the notion of consent are the basic pillars of US contract law, but they are also tools for governing private relationships when parties

¹⁰⁶*Reno v American Civil Liberties Union* 521 US 844 (1997).

¹⁰⁷*Ibid.*

¹⁰⁸See, in particular, *Ashcroft v American Civil Liberties Union* 535 US 564 (2002); *Ashcroft v Free Speech Coalition* 535 US 234 (2002).

¹⁰⁹Johnson and Post (n 2).

¹¹⁰Lawrence Lessig, *Code 2.0* (Basic Books, New York, 2006).

¹¹¹Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press, Oxford, 2006); Joel R Reidenberg, ‘States and Internet Enforcement’ (2004) 1 *University of Ottawa Law and Technology* 213.

¹¹²*Packingham v North Carolina* 582 US ____ (2017).

¹¹³*Ibid.*

do not enjoy the same contractual position.¹¹⁴ Already in 1943, Kessler tried to argue that freedom of contract is not a monolith notion but 'Its meaning must change with the social importance of the type of contract.'¹¹⁵ Precisely, he observed that contracts are tools through which entities can rebuild a feudal order and 'legislate in a substantially authoritarian manner without using the appearance of authoritarian forms'.¹¹⁶ Slawson supported a democratic view of contract law. He argued that contract law should take into account consumer protection, thus proposing a new scheme challenging traditional categories of contract law.¹¹⁷ Likewise, according to Rakoff, the legal system should establish the terms and conditions for each transaction. He does not exclude that this process could be long and challenging, but it would lead to relying on a set of standards that does not suffer absolute private determinations.¹¹⁸

This imbalance of power is particularly relevant in the relationship between platforms and users accepting that private agreements define a different standard of protection of their constitutional rights.¹¹⁹ These principles build a barrier around the responsibilities of online platforms, leading to a process of 'democratic degradation'.¹²⁰ In other words, the mix between constitutional, statutory and contract shields makes platforms the governors of the online environment; this made Silicon Valley possible,¹²¹ and it expresses platform values.¹²²

Online platforms are among those that benefit the most from this legal framework. The First Amendment can be considered the constitutional legitimation of online platforms and, at the same time, a barrier against regulatory intervention. The relevance of the First Amendment has prevented most attempts of the US constitutional framework to react against the challenges raised by private powers online. In this sense, the US approach can be considered stagnant. The vertical and negative nature of liberties is still interpreted as a limit to the coercive power of the state. As a result, constitutional liberties apply vertically only to public actors to ensure the liberty and autonomy of individuals. In *Civil Rights Cases*, the Supreme Court clarified that the 14th Amendment limits 'state action' and not 'individual invasion of individual rights'. Therefore, US constitutional law tends to consider state action as the only source of concern for fundamental rights and democratic values. When governments censor speech, users can rely on their First

¹¹⁴Louis L. Jaffe, 'Law Making by Private Groups' (1937) 51(2) *Harvard Law Review* 201.

¹¹⁵Friedrich Kessler, 'Contracts of Adhesion: Some Thoughts About Freedom of Contract' (1943) 43 *Columbia Law Review* 629, 642.

¹¹⁶*Ibid*, 640.

¹¹⁷W. David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harvard Law Review* 529.

¹¹⁸Todd D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173.

¹¹⁹Brittany Scott, 'Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract' (2019) 46 *Hastings Constitutional Law Quarterly* 451; Alan E. Garfield, 'Promises of Silence: Contract Law and Freedom of Speech' (1998) 83 *Cornell Law Review* 261, 265. The Supreme Court has not banned waiver of constitutional rights including First Amendment speech rights. See *Curtis Publ'g Co. v Butts* 388 US 130, 135 (1967); *Johnson v Zerbst* 304 US 458, 459 (1938), including not through contractual arrangements. See, in particular, *Cohen v Cowles Media Company* 501 US 663 (1991); *Snepp v United States* 444 US 507 (1983).

¹²⁰Margaret J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, Princeton, NJ, 2013).

¹²¹Anupam Chander, 'How Law Made Silicon Valley' (2014) 63(3) *Emory Law Journal* 639.

¹²²Jillian C. York, *The Future of Free Speech Under Surveillance Capitalism* (Verso, New York, 2021).

Amendment rights since constitutional law applies vertically. This guarantee does not occur when online platforms, as private actors, make decisions on freedom of expression like in the case of content removal.

The rigid distinction between public and private actors can be examined by looking at a recent case involving the Twitter account of the former President of the United States, Donald Trump. In *Knight First Amendment Inst. at Columbia Univ v Trump*,¹²³ some social media users were blocked from posting their comments on the tweets of the account *@realDonaldTrump* by Trump or his staff. In this case, the court recognized that ‘the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees’.¹²⁴ This decision is coherent with the idea that the person who manages the account of the President of the United States should be considered a public actor bound by the First Amendment obligations.

The outcome of the case would have been the opposite if Twitter had removed users’ comments since Twitter, as a private actor, is not bound by constitutional obligations. The case of the deplatforming of the former President Trump could be considered an example. In this case, it is important to stress the difference between the framework of social media platforms and that of Donald Trump’s individual account. Only the latter is considered a public forum and, therefore, its censorship is equivalent to offline government restrictions. As observed by the court, a public and governmental figure’s use of social media transforms a private space into a public forum. This decision is not an exception, but should be considered within an increasing established case law concerning the nature of private forums of social media.¹²⁵

However, there is an exception to this rigid structure: the ‘state action doctrine’, also known as the horizontal effect of fundamental rights. According to this doctrine, the constitutional obligation to respect fundamental rights extends to private parties, breaking the separation between public and private actors. This extension is because it is possible to detect a state action. Generally, the horizontal effect can result from constitutional obligations on private parties to respect fundamental rights (i.e. direct effect) or the application of fundamental rights through judicial interpretation (i.e. indirect effect). Only in the first case would a private entity have the right to rely directly on constitutional provisions to claim the violation of its rights vis-à-vis other private parties.

In the second case, the application of fundamental rights between private actors would be mediated. According to Gardbaum, ‘These alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal)’.¹²⁶ As Tushnet argues, if the doctrine of horizontal effect is considered ‘a response to the threat to liberty posed by concentrated private power, the solution is to require that all private

¹²³*Knight First Amendment Inst. at Columbia Univ v Trump*, No. 18-1691-cv (2d Cir. 2019).

¹²⁴*Ibid.*

¹²⁵See, for instance, *Brittain v Twitter, Inc.* WL 2423375 (N.D. Cal. 2019); *Fyk v Facebook, Inc.*, No. C 18-05159 JSW (N.D. Cal. 2019); explicitly about the refusal of the application of the state action doctrine, see *Johnson v Twitter, Inc.* no. 18ECG00078 (Cal. Superior Ct. 2018) and *Williby v Zuckerberg* 3:18-cv-06295-JD (N.D. Cal. 2019).

¹²⁶Stephen Gardbaum, ‘The Horizontal Effect of Constitutional Rights’ (2003) 102 *Michigan Law Review* 388.

actors conform to the norms applicable to governmental actors'.¹²⁷ Together with Peller, they have proposed to reject the distinction between public and private actors since, as they observe, any exercise of rights in a liberal system is highly subject to 'the potential exercise of state power to prevent other private actors from interfering with the rights holder'.¹²⁸ In other words, this distinction is not useful if fundamental rights are considered in need of protection, even from a horizontal perspective through regulation. Moreover, the low degree of judicial coherence around state action would limit any rational and consistent application.¹²⁹

However, within the US framework, the Supreme Court has usually applied the vertical approach and the application of the horizontal approach would be considered the exception.¹³⁰ Consequently, US constitutional rights would generally lack horizontal effect not only *in abstracto* but also in relation to online platforms.¹³¹ Therefore, given the lack of any regulation that translates constitutional rights into statutory norms, online platforms cannot be required to comply with First Amendment safeguards. Even lower courts have stressed that social media neither exercise exclusive public functions nor perform the activities of a company town. It is not by chance that users' judicial attempts to challenge online platforms for the constitutional violation of their rights may have failed since the end of the last century.¹³² Private actors do not qualify as state actors, and therefore they are not subject to First Amendment scrutiny. The fact that online platforms allow the use of their network to the public is not enough to extend the public forum doctrine or generally subject them to the First Amendment safeguards.

By analogy, a recent case of the US Supreme Court confirms the rigid vertical approach to free speech in the social media framework. In *Manhattan Community Access Corp. v Halleck*,¹³³ the Supreme Court lost an opportunity to provide a broader interpretation of the state action doctrine. Precisely, the court determined that the discretion of a non-profit corporation designated by New York City to run a public access television

¹²⁷Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1(1) *International Journal of Constitutional Law* 79.

¹²⁸Gary Peller and Mark Tushnet, 'State Action and a New Birth of Freedom' (2004) 92 *Georgetown Law Journal* 779, 789.

¹²⁹Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 *Northwestern University Law Review* 503, 505.

¹³⁰Mattias Kumm and Victor Ferreres Comella, 'What is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect', in *The Constitution in Private Relations: Expanding Constitutionalism*, edited by Andras Sajó and Renata Uitz, 241 (Chicago: Eleven International Publishing, 2005).

¹³¹Jonathan Peters, 'The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms' (2018) 32 *Berkeley Technical Law Journal* 988; 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* U1263.

¹³²*Prager Univ v Google LLC*, No. 17-CV-06064-LHK, (N.D. Cal. Mar. 26, 2018); *Nyabwa v Facebook*, No. 2:17-CV-24, (S.D. Tex. Jan. 26, 2018); *Quigley v Yelp, Inc.*, No. 17-cv-03771-RS, (N.D. Cal. July 5, 2017); *Buza v Yahoo!, Inc.*, (N.D. Cal. Oct. 24, 2011); *Young v Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 (N.D. Cal. Oct. 25, 2010); *Estavillo v Sony Comput. Entm't Am. Inc.*, No. C-09-03007 RMW, 2009 (N.D. Cal. Sept. 22, 2009); *Jayne v Google Internet Search Engine Founders*, 63 Fed. Appx. 268, 268 (3d Cir. 2008); *360Insight, LLC v Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008); *Langdon v Google, Inc.*, 474 F. Supp. 2d 622, 631-32 (D. Del. 2007); *Green v Am. Online (AOL)*, 318 F.3d 465, 472 (3rd Cir. 2003); *Nat'l A-I Advert. v Network Solutions, Inc.*, 121 F. Supp. 2d 156, 169 (D.N.H. 2000); *Cyber Promotions v Am. Online*, 948 F. Supp. 436, 445 (E.D. Penn. 1996).

¹³³*Manhattan Community Access Corp. v Halleck*, No. 17-1702, 587 US ____ (2019).

network limits free speech and violates First Amendment rights. In its ideological five to four ruling, the court determined that the television station was not considered a state actor, so it could not scrutinize the violation of the First Amendment. Notwithstanding that this case concerned public access channels, the property-interest arguments could have led to a broad impact on the protection of social media speech. The relevance of this decision is demonstrated by the fact that national case law has already relied on this decision to ban interference with platforms' rights, as in *PragerU v YouTube*.¹³⁴ The Supreme Court not only clarified the three traditional means by which a private entity can be a state actor, but it also outlined how the power should have been exercised in order to be considered a state actor – precisely a power traditionally and exclusively performed by the government.¹³⁵ Given the precedents, most of the cases were limited to few functions,¹³⁶ mainly relating to elections or the organization of a company town.¹³⁷ An opposite decision would subject private actors to the First Amendment whenever they offer their property spaces for the exercise of the right to freedom of expression. The Supreme Court has already banned such extension in *Hudgens v NLRB*.¹³⁸

Nonetheless, in the past, the court has extended the scope of the state action doctrine. In *Marsh v Alabama*,¹³⁹ the Supreme Court upheld that a privately owned company town was subject to the First Amendment. As observed by Justice Black, 'The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.'¹⁴⁰ The words of Justice Black seem to extend well beyond the narrow approach of the Supreme Court in *Halleck*, which assesses the substantive effect rather than formal ownership. A broad interpretation of *Halleck* explains why users failed to challenge social media for violation of their First Amendment rights due to the removal of online content. Nonetheless, *Marsh* opens some leeway towards the extension of constitutional obligations to social media when they remove content. In other words, the two ideological approaches represent the tension between the vertical and horizontal application of fundamental rights in US constitutional law.

The vertical approach to constitutional rights in the US framework is still a barrier for regulating platform power. The rigidity of the public/private divide, which is also reflected in US contract law, leaves the private sector free to self-regulate spaces despite their public relevance. Market and democracy almost fully overlap in the US constitutional system, thus not promoting a move from a neoliberal approach to a democratic strategy. In this context, online platforms are free to perform their business, as engines of democracy, thus setting standards of protection without infringing constitutional rights. This liberal imprinting, also rooted in the quasi-absolute protection of the First Amendment, is considered one of the paradigmatic expressions of US digital constitutionalism.

¹³⁴*Prager University v Google LLC*, No. 18-15712 (9th Cir. 2020).

¹³⁵*Jackson v Metropolitan Edison Co.* 419 U. S. 345, 352.

¹³⁶*Flagg Bros., Inc. v Brooks* 436 U. S. 149, 158 (1978).

¹³⁷*Terry v Adams* 345 U. S. 461, 468–470 (1953); *Marsh v Alabama* 326 U. S. 501, 505–509 (1946); *Smith v Allwright* 321 U. S. 649, 662–666 (1944); *Nixon v Condon* 286 U. S. 73, 84–89 (1932).

¹³⁸*Hudgens v NLRB* 424 US 507 (1976).

¹³⁹*Marsh v Alabama* 326 US 501 (1946).

¹⁴⁰*Ibid.*

V. Digital constitutionalism across the Atlantic and beyond

When considering digital constitutionalism on both sides of the Atlantic, the European and US models represent two diverging examples of how constitutional democracies address the challenges of the algorithmic society. Precisely, while the rise and consolidation of online platforms is considered an expression of freedoms according to the western side of the Atlantic, this trend would be considered as a threat to constitutional democracy from the European perspective.

The lack of horizontality in US constitutional law is not the rule for other constitutional democracies. On the other side the Atlantic, this general trust of a vertical paradigm of free speech seems to be mitigated. In Europe, the protection of freedom of expression does not enjoy the same degree of protection.¹⁴¹ Some member states even ban some forms of speech, as demonstrated in the case of *Yahoo v Licra*.¹⁴² Unlike the US Supreme Court, European courts have often adopted a frame of risk rather than opportunity when addressing the protection of the right to freedom of expression in the digital environment.¹⁴³ Moreover, even the doctrine of horizontal effects is considered under a different (and more extensive) constitutional light.¹⁴⁴ Also considering the role of the positive obligation of the state to respect and protect human rights as deriving from the framework of the Council of Europe,¹⁴⁵ this European constitutional framework demonstrates why the European Union has not found high barriers to mitigate platform powers.

The European approach to private powers is one example of the constitutional reactions against the challenges of the algorithmic society. While the implementation of digital technologies by public actors raises serious concerns, the rise of platform powers has been one of the primary drivers leading the European Union to abandon its digital liberal approach and adopt a democratic-oriented strategy. Economic freedoms are morphing into a new dimension, namely that of private power, which brings significant challenges to the role and tools of European constitutional law.

Given these challenges, the European Union reacted against platform power, thus emancipating itself from the US liberal approach. Although they are private actors, online platforms increasingly perform quasi-public powers that, given the lack of safeguards, are unaccountable, thus undermining individual rights and freedoms as well as democratic values. This approach is deeply rooted in the characteristics of European constitutionalism, where fundamental rights and freedoms interact with each other in a dialectic relationship of balancing. European constitutionalism does not tolerate granting absolute protection to a single right when this axiology could lead to the destruction of other fundamental interests, effectively undermining their constitutional relevance.¹⁴⁶

¹⁴¹Oreste Pollicino and Marco Bassini, 'Free Speech, Defamation and the Limits to Freedom of Expression in the EU: A Comparative Analysis', in *Research Handbook on EU Internet Law*, edited by Andrej Savin and Jan Trzaskowski, 508–42 (Edward Elgar, Cheltenham, 2014).

¹⁴²*Licra et UEJF v Yahoo Inc and Yahoo France TGI Paris 22 May 2000; Yahoo!, Inc. v La Ligue Contre Le Racisme* 169 F Supp 2d 1181 (N.D. Cal 2001). See Joel R Reidenberg, 'Yahoo and Democracy on the Internet', 42 *Jurimetrics* 261 (2001/2002).

¹⁴³Pollicino (n 53).

¹⁴⁴Eleni Frantziou, *A Constitutional Analysis. The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press, Oxford, 2019).

¹⁴⁵Aleksandra 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.

¹⁴⁶*Ibid*, Article 54; Convention (n 52), Article 17.

Likewise, the positive obligation for public actors to protect fundamental rights and freedoms is another example of the horizontal extension of European fundamental rights,¹⁴⁷ and it is another expression of the different understanding of the role of dignity on the eastern side of the Atlantic.¹⁴⁸

After the horrors of World War II, European states began to incorporate and codify human dignity within their founding values.¹⁴⁹ The post-war scenario was a decisive moment for the emergence of dignity as a European constitutional principle,¹⁵⁰ and it was elevated to ‘cornerstone of the postwar constitutional state’.¹⁵¹ Moreover, dignity is not an isolated concept, but a foundational principle connected to the values and aspirations shaping European constitutionalism. It is not merely enshrined in the preamble of the Charter, but is protected as a separate and inviolable fundamental right.¹⁵² The Lisbon Treaty has also recognized the role of human dignity as a pillar of European constitutionalism. Even if the preamble of the Treaty of the European Union only mentions human rights and the inalienable rights of human persons,¹⁵³ human dignity is enshrined as the primary common value of the European Union.

Therefore, human dignity as a constitutional foundation is the result of the process of the European experience, the values of which aim to foster a vision of democracy in which human beings can take decisions about their life and shape collective decisions. European digital constitutionalism does not allow the asymmetry of power between online platforms and individuals to put the latter in the hands of the former, which contributes to shaping the protection of rights and freedoms in the algorithmic society. Based on such constitutional framework, the rise of European digital constitutionalism is considered a reactive emancipation of the European Union to address the challenges raised by the consolidation of digital private powers.

Nonetheless, the European reactive approach is not the rule across the Atlantic. The United States has adopted an opposite approach that has not been reactive, but rooted in a phase of digital liberalism since the end of the twentieth century. Rather than being born out of chance, this outcome is precisely the result of different constitutional premises. The rise of the European approach has resulted from the intolerance of European constitutionalism to the disproportionate interferences with individual rights and democratic values as well as the marginalization of public authorities in the protection of these values. Alternatively, the framework of liberty characterizing US constitutionalism, constitutes the primary beacon guiding the approaches to the digital environment, and US digital constitutionalism.

¹⁴⁷Daniel Augenstein and Lukasz Dziedzic, ‘State Responsibilities to Regulate and Adjudicate Corporate Activities Under the European Convention on Human Rights’, EUI Working papers (2017), available at: <https://cadmus.eui.eu/bitstream/handle/1814/48326/LAW_2017_15.pdf?sequence=1&isAllowed=y>.

¹⁴⁸Catherine Duprè, *The Age of Dignity. Human Rights and Constitutionalism in Europe* (Bloomsbury, London, 2016).

¹⁴⁹Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer, Dordrecht, 2019).

¹⁵⁰James Q. Whitman, ‘On Nazi “Honour” and the New European “Dignity”’, in *The Darker Legacies of Law in Europe*, edited by Christian Joerges and Navraj Singh Ghaleigh, 243 (Bloomsbury, London, 2003).

¹⁵¹Lorraine Weinrib, ‘Human Dignity as a Rights-Protecting Principle’ (2004) 17 *National Journal of Constitutional Law* 330.

¹⁵²Charter (n 49), Art 1. See also Articles 25, 31.

¹⁵³Treaty on the European Union (2012) OJ 326/13, preamble 2, 4.

The United States still assesses the challenges raised by new private powers online under the lens of digital liberalism. Online platforms are considered an engine of liberty rather than a threat to individual rights and democratic values. Even if online platforms increasingly perform functions traditionally held by public authorities, these actors are not bound to respect constitutional obligations, given the lack of any regulation requiring them to do so. This approach entails a liberal view of social relationships where the primary threats to fundamental rights and freedoms come from public actors rather than the private sector. The discretion that online platforms enjoy in performing their business is the result of a constitutional approach oriented to protecting the private sector from public interferences, thus maintaining a rigid separation between public and private actors. In the last 20 years, the US framework has not reacted to the rise of private powers, but has highly defended the concept of liberty written in stone in the protection of the First Amendment. The liberal approach of the United States may also be considered another expression of digital constitutionalism that demonstrates how, under US constitutional law, online platforms are considered enablers of liberties and democracy rather than a threat to these values.

The executive order to prevent online censorship provided an opportunity to reflect this constitutional tension.¹⁵⁴ Although the Biden administration revoked this act, the order is still an example of the constitutional deadlocks in the field of platform governance. While, in the last 20 years, nothing has changed in terms of regulating online platforms on the western side of the Atlantic,¹⁵⁵ this reaction is a reminder that states can impose their sovereign powers (and their values) online, thus underlining the connection between internet governance and constitutionalism. This presidential move resulted in a constitutional paradox.¹⁵⁶ Beyond the constitutional issues involving the separation of powers between the executive and legislative powers, as the former has no power to amend the work of the latter, the order is incoherent when considering how the First Amendment protects online intermediaries.¹⁵⁷ This eventual turning point in the US approach is also surprising when considering the legislative inertia of the US Congress in the last 20 years.

Likewise, moving from the legislative to the judicial power, this order would also be against the judicial orientation of the US Supreme Court. Without examining national case law such as *Lewis v YouTube*,¹⁵⁸ the Supreme Court defined social media as the vast democratic forum of the Internet in *Packingham v North Carolina*.¹⁵⁹ The order also refers to *Pruneyard Shopping Center v Robins* to argue that, although social media platforms are private actors, they provide a public forum online. Nonetheless, these cases deal with the banning of national law that introduces a prior restraint over free speech.¹⁶⁰

¹⁵⁴Executive Order on Preventing Online Censorship (28 May 2020) <<https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship>>.

¹⁵⁵See the proposal on The Platform Accountability and Consumer Transparency (PACT) Act (2020).

¹⁵⁶Giovanni De Gregorio and Roxana Radu, 'Trump's Executive Order: Another Tile in the Mosaic of Governing Online Speech', *MediaLaws*, 6 Jun 2020, available at: <<http://www.medialaws.eu/trumps-executive-order-another-tile-in-the-mosaic-of-governing-online-speech>>.

¹⁵⁷Daphne Keller, 'Who Do You Sue? State and Platform Hybrid Power Over Online Speech, Hoover Institution', Aegis Series Paper No. 1902 (2019), available at: <https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf>.

¹⁵⁸*Lewis v YouTube*, 197 Cal. Rptr. 3d 219 (Cal. Ct. App. 2015).

¹⁵⁹582 US ___ (2017) (n 112).

¹⁶⁰*Pruneyard Shopping Center v Robins*, 447 US 74 (1980).

These cases should have been enough to impede the public interferences to free speech that this executive order introduces. Moreover, in *Manhattan Community Access Corp. v Halleck*,¹⁶¹ the Supreme Court closed the door to a potential extension of the state action doctrine. Furthermore, in *Gomez v Zuckenburg*,¹⁶² the court rejected a user's complaint by recognizing that the order was not intended to, and did not, create any right or benefit, substantive or procedural, enforceable by law or in equity by any party against the United States or its departments, agencies, entities, officers, employees or agents. Therefore, this executive order was a small drop in the sea of platform regulation and governance, and this case confirms the path of US digital constitutionalism oriented to digital liberalism. Within this framework, the move of Donald Trump to sue online platforms has not changed this picture.¹⁶³

There is a debate about whether to resort to the figure of common carriage or as an alternative to places of public accommodation – especially in the aftermath of Justice Thomas's concurring opinion in *Biden v Knight First Amendment*,¹⁶⁴ concerning Donald Trump's moderation of speech by his Twitter followers. In the US framework, Crawford underlines that common carriage concerns would lead to overcoming First Amendment protection without requiring undue speech restraints.¹⁶⁵ Similarly, in the field of search engines, Pasquale underlines the threats beyond individual privacy, including range of biased and discriminatory information results.¹⁶⁶ However, these solutions seem distant in a system that seems to exclude any intervention that could reduce the freedoms of digital platforms.¹⁶⁷ The Executive Order on Promoting Competition in the American Economy adopted by President Biden is an example of how the US model is going back to competition, and the market, to remedy the power of online platforms.¹⁶⁸ This trend would also suggest why, despite their relevance, converging attempts to mitigate platform powers across the Atlantic, such as the EU–US Trade and Technology Council,¹⁶⁹ are likely to face the constitutional distance of the European and US models.

The different expressions of digital constitutionalism across the Atlantic demonstrate not only how the questions around platform governance are constitutional, but also how these diverging approaches also lead to different strategies to express (digital) sovereignty on a global scale.¹⁷⁰ Constitutional law indeed influences how power is exercised and the

¹⁶¹587 US ____ (2019) (n 133).

¹⁶²*Gomez v Zuckenburg*, 2020 US Dist. LEXIS 130989 (N.D.N.Y. July 23, 2020).

¹⁶³David Smith, 'Trump Says He will Sue Social Media Giants Over "Censorship"', *The Guardian*, 7 July 2021, available at: <<https://www.theguardian.com/us-news/2021/jul/07/donald-trump-facebook-twitter-google-lawsuit>>.

¹⁶⁴*Biden v Knight*, First Amendment Institute at Columbia University, 593 U.S. ____ (2021).

¹⁶⁵Susan Crawford, 'First Amendment Common Sense' (2014) 127 *Harvard Law Review* 2343.

¹⁶⁶Frank Pasquale, 'Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines' (2008) *University of Chicago Legal Forum* 263.

¹⁶⁷See, e.g., M. Feeney, 'Are Social Media Companies Common Carriers?' *Cato*, 24 May 2021; Eric Goldman, 'Are Social Media Services "State Actors" or "Common Carriers"?' *Technology & Marketing Law Blog*, 12 February 2021.

¹⁶⁸Executive Order on Promoting Competition in the American Economy (9 July 2021), available at <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>>.

¹⁶⁹EU–US Trade and Technology Council Inaugural Joint Statement (29 September 2021), available at <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_4951>.

¹⁷⁰Luciano Floridi, 'The Fight for Digital Sovereignty: What It Is, and Why It Matters, Especially for the EU' (2020) 33 *Philosophy & Technology* 369.

scope of constitutional rights. When dealing with the transnational dimension, constitutionalism tends to expand its reach beyond territorial boundaries.

The US neoliberal approach does not suggest a specific path to express public powers over the digital environment. The First Amendment has provided a shield against any public interference, leading US companies to extend their powers and standards of protection beyond a state's territory. Nonetheless, even such a liberal approach hides an indirect way to exercise powers in the digital environment. Rather than intervening in the market, the United States has not changed its role and has observed its rise as the liberal hub of global tech giants. Regulating online platforms in the United States could affect the smooth development of the leading tech companies in the world, while also increasing the transparency of the cooperation between the government and online platforms in certain sectors such as security, thus unveiling the invisible handshake.¹⁷¹ The Snowden revelations have already underlined how far governments rely on internet companies to extend their surveillance program and escape accountability.¹⁷² In other words, the US strategy counts on the ability of the private sector to exercise powers on a global scale while benefiting from invisible cooperation with these actors.

While the United States seems to export its constitutional values through private actors operating on a global scale, given the lack of any regulation, the European Union is proposing a democratic model to address digital capitalism, and the consolidation of platform powers. More broadly, the Democracy Action Plan is the expression of the values that the European Union wants to promote transnationally.¹⁷³ Rather than adopting a mere neoliberal approach or supporting the development of its (authoritarian) model of the Internet, the Union is opting for a third way to ensure the protection of fundamental rights and democratic values from the interferences of private powers on a global scale.

The European Union has already demonstrated its ability to influence global dynamics, and scholars have referred to such attitude as the 'Brussel effect'.¹⁷⁴ The European Union is increasingly aware of its 'regulatory soft power', influencing the policy of other areas of the world in the field of digital technologies. It has also started to build its narrative about digital sovereignty.¹⁷⁵ As underlined by the Commission, 'European technological sovereignty starts from ensuring the integrity and resilience of our data infrastructure, networks and communications', aimed at mitigating 'dependency on other parts of the globe for the most crucial technologies'.¹⁷⁶ This understanding does not entail closing European boundaries to a form of constitutional protectionism, but ensuring Europe's ability to define its own rules and values in the digital age. Since 'European technological

¹⁷¹Niva Elkin-Koren and Eldar Haber, 'Governance by Proxy: Cyber Challenges to Civil Liberties' (2016) 82 *Brookings Law Review* 105; Michael D. Birnhack and Niva Elkin-Koren, 'The Invisible Handshake: The Re-emergence of the State in the Digital Environment' (2003) 8 *Virginia Journal of Law & Technology* 6.

¹⁷²David Lyon, *Surveillance After Snowden* (Polity Press, Cambridge, 2015).

¹⁷³Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan COM(2020) 790 final.

¹⁷⁴Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, Oxford, 2020). See also Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2018) 62 *American Journal of Comparative Law* 87.

¹⁷⁵Communication 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, 2.

¹⁷⁶*Ibid.*

sovereignty is not defined against anyone else, but by focusing on the needs of Europeans and of the European social model',¹⁷⁷ as a result 'the EU will remain open to anyone willing to play by European rules and meet European standards, regardless of where they are based'.¹⁷⁸ These statements suggest that the European Union is defining a path towards serving a leading role in regulating the digital environment. Rather than only focusing on promoting the industry within its borders, the European Union is positioning itself as a global standard maker that is cooperative rather than adversarial.

The proposal for the Artificial Intelligence Act is an example of this trend.¹⁷⁹ On the one hand, the scope of the proposal extends to 'providers placing on the market or putting into service AI systems in the Union, irrespective of whether those providers are established within the Union or in a third country', thus providing a broader territorial coverage to ensure that European standards are taken seriously on a global scale. On the other hand, this instrument is considered an expression of constitutional protectionism based on European (constitutional) values. The top-down approach of the European Union, which aims to leave small margins to self-regulation, is an attempt to protect the internal market from technological standards that do not comply with the European standard of protection of European values, and therefore fundamental rights and democracy. Rather than making operators accountable for developing and implementing artificial intelligence systems, the regulation aims to prevent the consolidation of standards that, even if far from European constitutional values, could find a place in the internal market.

Even more clearly, the GDPR provides another example of the intention of the European Union to rise as a global regulator. The European framework of data protection has been a model for other legislations around the world,¹⁸⁰ and the UN Secretary-General has welcomed the European approach by underlining how this measure is inspiring for other countries and has encouraged the European Union and its member states to follow this path.¹⁸¹ Furthermore, the adoption of the GDPR has led a growing number of companies to voluntarily comply with some of the rights and safeguards even for data subjects outside the territory of the European Union because protecting privacy and personal data has become a matter of reputation due to the increasing amount of data processed by public and private actors.

The recent spread of the pandemic has underlined the relevance of data protection safeguards for constitutional democracies when dealing with contact tracing applications or other forms of public surveillance.¹⁸² Moreover, the GDPR has not only become a model at the global level, but also provides a scope of application that extends beyond the

¹⁷⁷Ibid.

¹⁷⁸Ibid.

¹⁷⁹Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts COM(2021) 206 final.

¹⁸⁰Graham Greenleaf, 'Global Data Privacy Laws 2019: 132 National Laws & Many Bills' (2019) 157 *Privacy Laws & Business International Report* 14.

¹⁸¹Address of the UN Secretary-General to the Italian Senate (18 Dec. 2019), available at: <<https://www.un.org/press/en/2019/sgsm19916.doc.htm>>.

¹⁸²Oreste Pollicino, 'Contact Tracing and COVID-19: Commission and Member States Agree on Specifications', EU Law Live (16 Jun 2020), available at: <<https://eulawlive.com/contact-tracing-and-covid-19-commission-and-member-states-agree-on-specifications>>.

territory of the EU. Precisely, even though a data controller is established outside the European Union, EU law is nevertheless applicable if its processing activities are related either to the offering of goods and services in the European Union, or to people in the European Union, as well as the monitoring of the behaviour of data subjects in the European Union.¹⁸³

The long arm of European data protection law has been highlighted in the framework of the Data Protection Directive,¹⁸⁴ which has also been defined the ‘global reach of EU law’.¹⁸⁵ This over-reaching scope could affect free speech and financial interests of other countries and their citizens,¹⁸⁶ and decrease the degree of legal certainty leading to a binary approach that is not scalable.¹⁸⁷ The GDPR has also been criticized for its ‘privacy universalism’.¹⁸⁸ Proposing the GDPR as a global model entails exporting a Western conception of privacy and data protection that could clash with the values of other areas of the world, especially the Global South. Although other scholars do not share the same concerns, they have observed that ‘The result – conflicts of jurisdiction – may put an excessive burden on the individual, confuse him or her, and undermine the individual respect for judicial proceedings and create loss of confidence in the validity of law’.¹⁸⁹

The ECJ has also underlined these challenges in two decisions addressing the territorial scope of the right to be forgotten online,¹⁹⁰ and the global removal of online content.¹⁹¹ In these cases, even if the ECJ did not exclude the possibility of global delisting, it left this decision to national courts, which are required to take into account the impact of removal on international law. These decisions underline the limits of extending constitutional values beyond territorial boundaries, and the openness of member states to international law could slow down the extension of the European regulatory model on a global scale. However, the influence of the European model does not only relate to the scope of EU law but also to the ability of the European Union to propose an alternative to neoliberal and authoritarian models of internet governance.

Such a third way, focused on the protection of fundamental rights and democracy on a global scale, is the result of the role of European digital constitutionalism, which has demonstrated how rights and freedoms cannot be frustrated only by formal doctrines

¹⁸³GDPR (n 16), Article 3(2).

¹⁸⁴Lokke Moerel, ‘The Long Arm of EU Data Protection Law: Does the Data Protection Directive Apply to Processing of Personal Data of EU Citizens by Websites Worldwide?’ (2011) 1(1) *International Data Privacy Law* 28.

¹⁸⁵Christopher Kuner, ‘The Internet and the Global Reach of EU Law’, in *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, edited by Marise Cremona and Joanne Scott, 112–45 (Oxford University Press, Oxford, 2019).

¹⁸⁶Dan J.B. Svantesson, ‘A ‘Layered Approach’ to the Extraterritoriality of Data Privacy Laws’ (2013) 3 (4) *IDPL* 278.

¹⁸⁷Christopher Kuner, ‘Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law’ (2015) 5(4) *International Data Privacy Law* 235.

¹⁸⁸Payal Arora, ‘GDPR – a Global Standard? Privacy Futures, Digital Activism and Surveillance Cultures in the Global South’ (2019) 17(5) *Surveillance & Society* 717.

¹⁸⁹Paul 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.

¹⁹⁰Case C-507/17, *Google Inc. v Commission nationale de l’informatique et des libertés* (CNIL) (2019).

¹⁹¹Case C-18/18, *Eva Glawischnig-Piesczek v Facebook* (2019).

based on territory and establishment. By extending the scope of its policies even outside the European framework, the European Union seems to adopt a mix of constitutional imperialism and protectionism by imposing its own legal standard of protection on a global scale. The consolidation of European digital constitutionalism is proposing a political and normative model as an alternative to neoliberal and authoritarian approaches. Rather than governing or neglecting market dynamics, the European Union is tailoring its role in between, to protect fundamental rights and democratic values in the algorithmic society.

VI. Conclusions

The consolidation of the algorithmic society has provided opportunities while challenging the protection of individual rights and freedoms as well as democratic values. This situation has led constitutional democracies across the Atlantic to adopt different approaches characterized by the predominance of diverging constitutional narratives.

Within this framework, the European Union has moved from a digital liberal approach to a constitutional democratic strategy to face new private forms of authority based on the exploitation of new automated technologies for processing content and data on a global scale. Judicial activism has played a critical role in shifting the approach from economic freedoms to fundamental rights. The translation into a normative framework of hard and soft law measures is observed in the reaction of European digital constitutionalism to the challenges raised by platform powers.

On the other side of the Atlantic, the US framework has not reacted to the rise of private powers; instead, it has highly defended the concept of liberty based on the protection of the First Amendment. The US liberal approach can be considered another expression of digital constitutionalism, showing how online platforms are enablers of liberties and democracy rather than a threat to such values. Still, the same liberal approach taken to dealing with online intermediaries at the end of the last century represents the US strategy to address the power of online platforms in the algorithmic society.

This framework of liberty has been increasingly left aside (or complemented) on the eastern side of the Atlantic, where the different constitutional premises based on human dignity have paved the way to a new constitutional approach. Despite its market orientation, the increasing relevant dimension of European constitutionalism has mitigated the goals of the internal market and the predominance of self-regulation. Unlike the United States, the European constitutional dimension does not allow the logics of digital capitalism to prevail over the social dimension of the European market.

When considering the consequences of different expressions of digital constitutionalism on a global scale, it is possible to observe how digital liberalism still characterizes the US approach, which relies on its digital platforms to export constitutional values while benefiting from their control through an invisible handshake. Instead, the European Union is rising as a global regulator that does not aim to follow a liberal approach or promote its digital business sector, but rather to become a standard maker for the protection of fundamental rights and democratic values on a global scale.

These constitutional approaches across the Atlantic show that, as an expression of modern constitutionalism, digital constitutionalism should not be considered a monolith. It is intimately connected with the constitutional framework of each legal and political system. Therefore, the European and US reactions to platform powers are expressions of digital constitutionalism reflecting diverging paths guided by different constitutional premises.