I.
Digital Constitutionalism: Theoretical Foundations and Jurisprudential Perspectives

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Conceptual Approaches to Digital Constitutionalism: A Counter-Critique

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Abstract: Over the past decade, the concept of digital constitutionalism has attracted attention from scholars from various disciplines, courts, policymakers, and private companies. This chapter aims to provide a systematic mapping of how this notion has been used and criticised over the past few years. In particular, this work reconstructs how theories of digital constitutionalism have evolved in recent scholarly works. This notion emerged with an innovative and progressive meaning, referring to an expanded constitutional dimension beyond the state. Recent scholarship has proposed a more holistic conception and has simultaneously applied this notion to specific fields or normative sources. The chapter proposes three models of categorisation of the emerging scholarly approaches to digital constitutionalism and presents three categories of critical arguments that have been moved to the theories of digital constitutionalism. The chapter concludes with a personal counter-critique to these views.

A. Introduction

> 'Digital constitutionalism refers to the concept of establishing a set of principles, norms, and rules that govern the use, protection, and regulation of digital technologies within a society. Just as a traditional constitution outlines the fundamental rights, responsibilities, and structure of a nation's governance, digital constitutionalism seeks to provide a framework for how digital technologies are managed and integrated into various aspects of society, including politics, economy, culture, and individual rights.

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> The key elements of digital constitutionalism might include: 1. Digital Rights: […]. 2. Data Protection and Privacy: […]. 3. Internet Governance: […]. 4. Cybersecurity: […]. 5. Digital Economy: […]. 6. Access and Digital Divide: […]. 7. Content Regulation: […]. 8. Algorithmic Transparency and Accountability: […]. 9. International Cooperation: […]. 10. Digital Sovereignty: […].
>
> Digital constitutionalism acknowledges the transformative impact of digital technologies on modern society and aims to establish a legal and ethical framework that respects fundamental human rights while promoting innovation and progress in the digital age. It's an evolving concept, as the challenges and opportunities presented by digital technologies continue to emerge and change over time.'[1]

This is the answer provided in August 2023 by the freely accessible version of ChatGPT (model GPT-3.5, as of August 2023) to the following query: "please define 'digital constitutionalism'". ChatGPT had no hesitations. It resolutely offered us a definition. Digital constitutionalism would consist in establishing constitutional rules for the 'use, protection, and regulation of digital technologies'. We are given even a decalogue of 'key elements of digital constitutionalism', with the caveat -though- that digital technologies continually develop, eventually making digital constitutionalism an 'evolving concept'.[2] It is only when I stubbornly rephrase my question in 'what is digital constitutionalism?' that ChatGPT more humbly admits: 'As of my last knowledge update in September 2021, the term "digital constitutionalism" doesn't have a widely recognized and standardized definition. It is a concept that is still evolving and being discussed within academic, legal, and policy circles. […] For the most current understanding and discussions on this topic, I recommend consulting recent academic literature, policy documents, and expert opinions.'[3] A conclusion that Bard, Google's chatbot whose freely available version continually sources information from the

1 ChatGPT-3.5, answer to 'please define "digital constitutionalism"', https://chat.openai.com/, 8 August 2023.

2 This statement seems to justify why ChatGPT uses a conditional form in 'The key elements of digital constitutionalism *might* include […].

3 ChatGPT-3.5, answer to 'what is digital constitutionalism?', https://chat.openai.com/, 8 August 2023.

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Internet, gave me immediately when prompted with the same questions I asked to ChatGPT.[4]

The absence of consensus of what 'digital constitutionalism' means was what prompted me to publish one of my first works on this topic, entitled "Digital Constitutionalism: A New Systematic Theorisation'.[5] In this article I mapped the existing use of the concept of digital constitutionalism, noticing that very often authors employed this expression without defining it. I then provided a theory to reconcile these various scholarly positions, proposed a definition, and clarified its relationship with the notion of 'constitutionalisation' of the digital society, a term that was often used interchangeably with that of 'digital constitutionalism'.

Over the past few years, this concept has not only attracted attention from scholars from various disciplines, but has also been used by courts, policymakers, and private companies.[6] Generally speaking, this increased use has not added further clarity to the contours of this concept. From a scholarly perspective, we can observe the emergence of distinguishable 'approaches' to the use of digital constitutionalism as well as a series of criticisms to this concept. This chapter aims to focus on the scholarly use of digital constitutionalism and to provide a systematic mapping of how this notion has been used and criticised over the past few years. This work will be structured in four parts. Section B will reconstruct how the use of this concept has evolved in recent scholarly works, complementing my previous mapping exercises.[7] Section C will propose a new categorisation

4 Bard, answer to 'what is digital constitutionalism?', https://bard.google.com/, 8 August 2023: 'Digital constitutionalism is a concept that refers to the adaptation of constitutional values and principles to the digital age. It is a broad term that encompasses a variety of ideas about how to ensure that digital technologies are used in a way that respects human rights, democracy, and the rule of law. […] Digital constitutionalism is a relatively new field, and there is no single agreed-upon definition or set of principles.'.

5 Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation' (2019) 33 International Review of Law, Computers & Technology 76.

6 See, e.g., Gilmar Ferreira Mendes and Victor Oliveira Fernandes, 'Constitucionalismo Digital e Jurisdição Constitucional: Uma Agenda de Pesquisa Para o Caso Brasileiro' (2020) 16 Revista Brasileira de Direito 1; Cristiano Codagnone, Giovanni Liva and Teresa Rodriguez de las Heras Ballell, 'Identification and Assessment of Existing and Draft EU Legislation in the Digital Field' (2022) EU Parliament Study <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703345/IPOL_STU(2022)703345_EN.pdf>; Facebook, 'Global Feedback & Input on the Facebook Oversight Board for Content Decisions' <https://about.fb.com/wp-content/uploads/2019/06/oversight-board-consultation-report-2.pdf>.

7 Celeste, 'Digital Constitutionalism' (n 5).

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of the emerging scholarly approaches to digital constitutionalism. Section D will present three main types of critical arguments that have been moved to the theory of digital constitutionalism. Finally, Section E will conclude with a personal counter-critique to these views.

B. Concept evolution

I. The origins

The notion of digital constitutionalism was first used with its most original and innovative meaning. Firstly, by referring to the idea of applying constitutional norms to private actors, and thus overtaking the traditional anchoring of the constitutional dimension to the State. Secondly, by looking at normative sources that are not traditionally considered as constitutional, including not only legal sources such as private law, but also norms emerging in political discussions or at the level of civil society, and thus often devoid of any binding legal character.

1. Beyond the State

In what we could call the 'first generation' of scholars using the concept of digital constitutionalism – I include in this flexible category works published in the decade from 2009 to 2018 – this notion referred to the idea of applying constitutional rights and principles to multinational tech companies producing and managing digital products and services. Constitutionalism, a concept linked to the idea of establishing and implementing the constitution, intended as the foundational framework – be it codified in a document or not - of a polity, is projected beyond the State, in the realm of private actors. A non-traditional reading of the constitutional dimension, but not a novelty per se. The anchoring of the concept of constitutionalism to the state dimension had already been subverted in the context of international law. Globalisation marked the progressive emergence of issues, ranging from international terrorism to climate change, that required the concerted intervention of a plurality of actors.[8] The State maintains a cen-

8 See Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579.

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tral role but some of its functions shift vertically, in two directions: up, to supranational actors and, down, to multinational non-state actors.[9] In a globalised world, besides regional and international intergovernmental organisations, autonomous private subsystems of society, such as media or sportive organisations, regulate themselves, establish their own constitutional norms.[10] The constitutional dimension expands its perimeter, it becomes 'multi-level' or 'hybrid'.[11] And the initial use of the concept of digital constitutionalism fits this grove, focusing in particular on the dimension of powerful multinational tech companies. As Pereira and Keller have put it more recently, we observe an 'indispensability of constitution to mitigate asymmetries of power even – and mainly – in transformative contexts generated by globalisation'.[12]

The first generation of scholars using this term did not define what actually digital constitutionalism is.[13] They focused more on the underlying phenomenon they wished this concept to denote. There was a lack of consensus in relation to the actors involved and the means adopted to pursue the aims of digital constitutionalism. Suzor was the first one to use this expression consistently to denote the project of limiting the power of private digital companies through the use of constitutional principles, with particular attention to the rule of law.[14] For Suzor, constitutional law has a twofold aim: on the one hand, to circumscribe the perimeter of action of private self-regulation, and, on the other hand, to instil its core principles – traditionally, only articulated with reference to the State – into contract law,

9 See Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010), who speak of an 'erosion of statehood' (pt 1).

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

11 See Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of European Law 349; Gunther Teubner, 'Constitutionalising Polycontexturality' (2010) 20 Social and Legal Studies 210, 246; Mauro Santaniello and others, 'The Language of Digital Constitutionalism and the Role of National Parliaments' (2018) 80 International Communication Gazette 320, 324.

12 Jane Reis Gonçalves Pereira and Clara Iglesias Keller, 'Constitucionalismo Digital: Contradições de Um Conceito Impreciso' (2022) 13 Revista Direito e Práxis 2648, 2652, authors' translation.

13 For a mapping of this first generation of scholars, see Celeste, 'Digital Constitutionalism' (n 5).

14 Nicolas Suzor, 'The Role of the Rule of Law in Virtual Communities' (2010) 25 Berkeley Technology Law Journal 1817; Nicolas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4 Social Media + Society 1.

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the latter at its turn promoting a constitutionally-compliant development of private companies' self-regulation. Similar ideas had been previously expressed by Fitzgerald and Berman using different denominations, respectively 'informational' and 'constitutive' constitutionalism, and stressing, the first one, the constitutionalising role of private law, while, the latter, the centrality of national constitutional principles.[15]

2. Beyond the law

Within this first generation of scholars, some authors go even beyond traditional legal sources, such as constitutional and private law. They use the reference to digital constitutionalism in relation to norms that would traditionally lie outside the legal spectrum because adopted by private companies, promoted in the context of political processes or advocated by civil society actors, and thus not attaining the status of legally binding and generally applicable law.[16]

In the globalised digital society, powerful multinational companies creating, managing and selling digital products and services emerge as dominant actors beside nation States. We observe the emergence of a modern form of digital feudalism, where private rulers dictate the rules of their own virtual fiefs.[17] A stream of legal scholarship on digital technology had already observed the capability of the 'code' to act as the law – even if not in a discursive, i.e. verbal way - of the digital products and services we use.[18] The first generation of scholarship on digital constitutionalism identified another type of law related to this private sphere, this time more akin to the traditional conception of discursive legal rules. Karavas observed a trend in German case-law where the judiciary limited itself to play a guiding – 'maieutic' is the term used by the author – role vis-à-vis

15 Brian Fitzgerald, 'Software as Discourse? The Challenge for Information Law' (2000) 22 European Intellectual Property Review 47; Paul Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 University of Colorado Law Review 1263.

16 Celeste, 'Digital Constitutionalism' (n 4).

17 See Manuel Castells, *The Rise of the Network Society* (2nd edn, Blackwell 2000), who talks of an 'institutional neo-medievalism'; see also Bruce Schneier, 'Power in the Age of the Feudal Internet' [2013] MIND 16.

18 See Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (Basic Books 2006); Joel Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' (1998) 76 Texas Law Review 553.

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a self-constitutionalising power of online platforms in determining their own, private 'lex digitalis'.[19] Going even beyond scholars who recognised the binding, quasi-legal character of the internal rules of social media companies, such as Bygrave who speaks of a 'lex Facebook',[20] I compared social media's Terms of Service to quasi-constitutional instruments, private bills of rights.[21]

National parliaments, which would traditionally be the depositaries of the legislative power, were studied in the context of digital constitutionalism as the promoters of political conversations on digital rights. We speak of political conversations, and not of ordinary stages of the legislative process, because the scholarship focused on outputs of parliamentary works that were the result of ad hoc commissions, often integrated by other societal stakeholders, which were not formally part of parliamentary activities. An example is the adoption of the *Declaration of Internet Rights* that was drafted by an ad hoc committee created by the then President of the Italian Chamber of Deputies and composed of politicians, academics, journalists and industry representatives.[22] Santaniello et al. analysed the specific language and content of various documents issued by similar parliamentary initiatives.[23] In particular, they highlighted that parliaments, in line with their traditional role as strongholds of democracy against the abuse of other State powers, mostly produced norms and principles of 'limitative' nature, which would aim to introduce safeguards against a potential compression of individual rights by other actors.[24] The work of these institutions in the context of digital constitutionalism is considered as a 'political process

19 Vagias Karavas, 'Governance of Virtual Worlds and the Quest for a Digital Constitution' in Christoph B Graber and Mira Burri-Nenova, *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Edward Elgar Publishing 2010); Vagias Karavas and Gunther Teubner, 'Www.CompanyNameSucks.Com: The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law' (2005) 12 Constellations 262.

20 Lee A Bygrave, 'Lex Facebook', *Internet Governance by Contract* (Oxford University Press 2015).

21 Edoardo Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2019) 33 International Review of Law, Computers & Technology 122.

22 Camera dei Deputati, 'Declaration of Internet Rights' <https://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf>; See Oreste Pollicino and Marco Bassini (eds), *Verso Un Internet Bill of Rights* (Aracne 2015).

23 Santaniello and others (n 11).

24 Santaniello and others (n 11) 325 ff.

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of Internet-constitution drafting', which would represent an intermediary discourse linking purely legal and societal normative processes related to the digital field.[25]

Such societal normative processes not only encompass the private law-making of tech companies mentioned above, but scholars also identified a phenomenon related to digital constitutionalism in the emergence of 'Internet bills of rights' promoted by civil society actors. Gill, Redeker and Gasser[26] and Petracchin[27] collected and analysed a number of texts published mainly by civil society organisations that advocate rights and principles addressing the challenges of the digital age. Despite their non-legally binding nature, these initiatives were regarded as a 'proto-constitutional discourse', a gradual intellectual exercise of translation of the core principles of contemporary constitutionalism into norms speaking to the actors of the digital society.[28] Scholars from various disciplines had already started investigating these 'Internet bills of rights' without specifically referring to the concept of digital constitutionalism, but focusing more on the message of this communicative effort carried out by a plurality of individuals and organisations.[29] From this point of view, we could argue that digital constitutionalism is also seen as a sort of 'movement', both of people and of thought.[30] From this perspective, the interdisciplinary character of the scholarship on digital constitutionalism emerges clearly. Digital constitutionalism is not only a legal phenomenon, but also a social and political one. Political both in terms of content, in the sense that it aims

25 Santaniello and others (n 11) 333.

26 Lex Gill, Dennis Redeker and Urs Gasser, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2015) Berkman Center Research Publication No 2015-15 <https://papers.ssrn.com/abstract=2687120>; see also a later version of this paper in Dennis Redeker, Lex Gill and Urs Gasser, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2018) 80 International Communication Gazette 302.

27 Andrea Pettrachin, 'Towards a Universal Declaration on Internet Rights and Freedoms?' (2018) 80 International Communication Gazette 337.

28 Gill, Redeker and Gasser (n 8) 3.

29 See Francesca Musiani, Elena Pavan and Claudia Padovani, 'Investigating Evolving Discourses on Human Rights in the Digital Age: Emerging Norms and Policy Challenges' (2009) 72 International Communication Gazette 359; Rolf H Weber, *Principles for Governing the Internet: A Comparative Analysis* (UNESCO 2015) <https://unesdoc.unesco.org/ark:/48223/pf0000234435>.

30 Cf. Kinfe Micheal Yilma, '"Bill of Rights for the 21st Century: Some Lessons from the Internet Bill of Rights Movement"' [2021] The International Journal of Human Rights 1.

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to tackle 'fundamental political questions', but also in light of the nature of its initiatives, which are 'political interventions', 'pieces of a political conversation'.[31]

II. Development and growth

The first generation of scholarship on digital constitutionalism mainly looked at sources and actors that would not be regarded as traditionally belonging to the constitutional dimension. In this way, they stressed the power of private actors and highlighted the limitations of public power – not to say, of traditional constitutional law itself – to tackle the challenges of the digital society. In the past five years, the concept of digital constitutionalism has attracted the attention of significant number of scholars from various disciplines, giving rise to what Mendes defined a 'dynamic intellectual movement'.[32] This second generation of scholars contributed to add an analysis of more traditional constitutional actors and legal sources. This has been done by widening and further developing the concept of digital constitutionalism and by deepening the analysis of phenomena related to digital constitutionalism within traditional legal areas, such as legislation and case law, as well as in the context of the emergence of new technologies, such as quantum computing.

1. Widening

What we have called the first generation of scholarship on digital constitutionalism analysed a plurality of actors and normative sources where it was possible to observe the emergence of rights and principles targeting issues related to the digital environment. Some of these authors focused on legal sources, such as private law, others on normative instruments emerging within the private realm or simply at political and civil society level, thus devoid of any legally binding value. In light of this plural framework, I proposed a 'systematic' theoretical approach to digital constitutionalism to

31 Claudia Padovani and Mauro Santaniello, 'Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System' (2018) 80 International Communication Gazette 295, 296–297.

32 See *Mendes/Fernandes*.

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reconcile these scholarly positions and offer a wider and more encompassing definition of digital constitutionalism and its related phenomena.[33]

In my view, digital constitutionalism is not exclusively related to the limitation of power of private actors by legal sources acquiring a quasi-constitutional role. Nor does it exclusively denote constitutional discourses emerging in the societal sphere. It encompasses both these dimensions and goes beyond them. Digital constitutionalism is defined as the 'ideology that aims to establish and guarantee the existence of a normative framework for the protection of fundamental rights and the balancing of powers in the digital environment'.[34] In more concrete terms, such an ideology informs a variety of constitutional 'counteractions' that generalise and respecify core principles of contemporary constitutionalism to address the challenges of the digital society.[35] These counteractions, globally regarded, would constitute a composite and multilevel process of 'constitutionalisation' including normative responses emerging both within and beyond the State.[36]

The distinction between the concepts of constitutionalism and constitutionalisation assumes a core conceptual role in the context of this systematic theory, as the previous scholarship often used these two terms interchangeably. Constitutionalisation is defined as the process that is implementing the principles and values of constitutionalism.[37] I argued that a systematic theory allows us to consider the current process of constitutionalisation of the digital society as a multilevel one.[38] Multilevelism does not merely imply a fragmentation of constitutionalising inputs – there is no single constitutional 'father' in the digital society. But it is also possible to

33 Celeste, 'Digital Constitutionalism' (n 5).

34 Celeste, 'Digital Constitutionalism' (n 5) 88.

35 The concept of 'generalisation and re-specification' is borrowed from Teubner: see Teubner (n 10); for an application to the context of digital constitutionalism, see Edoardo Celeste, 'Internet Bills of Rights: Generalisation and Re-Specification Towards a Digital Constitution' (2023) 30 Indiana Journal of Global Legal Studies 25.

36 Celeste, 'Digital Constitutionalism' (n 1); Edoardo Celeste, 'The Constitutionalisation of the Digital Ecosystem: Lessons from International Law' in Angelo Golia, Matthias C Kettemann and Raffaela Kunz (eds), *Digital Transformations in Public International Law* (Nomos 2022).

37 Celeste, 'Digital Constitutionalism' (n 5).

38 Edoardo Celeste, 'The Constitutionalisation of the Digital Ecosystem: Lessons from International Law' in Angelo Golia, Matthias C Kettemann and Raffaela Kunz (eds), *Digital Transformations in Public International Law* (Nomos 2022).

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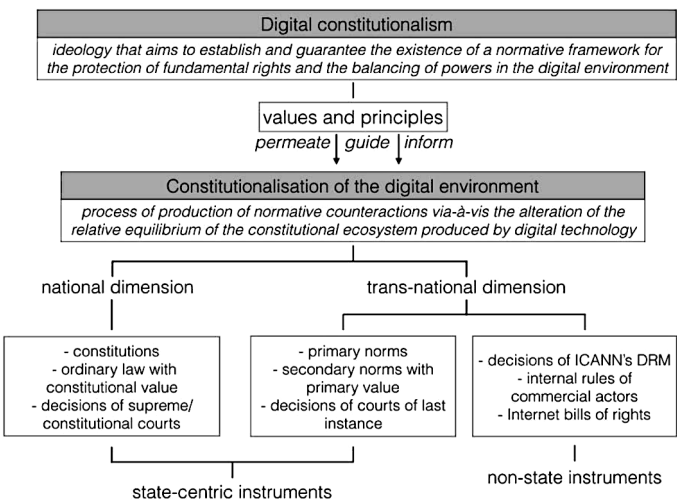
talk of a set of mutually stimulating and compensating impulses.[39] In this way, despite the differences of the various elements of such a process of constitutionalisation, it is possible to recompose the puzzle – or better, to understand the anatomy, the whole significance, of this complex mosaic – by interpreting these various inputs, as if they were elements going in the same direction: each one contributing to translate and implement the core values of contemporary constitutionalism in the context of the digital society.

Fig. 1 – Mapping of the phenomenon of constitutionalisation of the digital environment[40]



An aerial view of this phenomenon allows us to single out constitutionalising inputs that emerge both within and beyond the context of the State, thus encompassing all the normative sources analysed by the first generation of scholarship and even expanding it. Indeed, one has not only to mention the adoption of the whole spectrum of 'traditional' – from a legal perspective – normative sources, such as constitutional amendments, decisions of constitutional courts, or ordinary law playing a constitutional function. One has also to observe the emergence of constitutional stimuli

39 Cf Peters (n 8); see Celeste, 'The Constitutionalisation of the Digital Ecosystem' (n 38).

40 Originally published in Celeste, 'Digital Constitutionalism' (n 5).

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beyond the state dimension. In Figure 1, I listed three examples of what I called constitutional 'counteractions'[41] emerging in non-state-centric contexts: the decisions of the ICANN's Dispute Resolution Mechanism, the internal rules of multinational tech companies and Internet bills of rights.[42]

This multilevel process of constitutionalisation is not merely an academic fiction to make coherence of otherwise fragmented normative scenarios. The tesserae of this complex mosaic are not evolving in airtight silos. They influence each other. They stimulate each other and contribute to the same conversation, albeit using different normative instruments. They are 'communicating vessels'.[43] Interestingly, Internet bills of rights or the internal rules of private tech companies intentionally adopt the specific traditional language of constitutional charters. Preambles, use of the first person plural, present tenses: the constitutional jargon becomes a *lingua franca* that reconnects legal discourses otherwise occurring in contexts without institutionalised connections or ways of communication.[44] As in a puzzle, each counteraction complements each other; the emergence of one normative response can be read as the symptom of a status of 'constitutional anaemia' arising at another level of the constitutional ecosystem.[45] One normative source might struggle to address a problem of the digital environment, so another source proposes a solution, finally stimulating further reactions in the constitutional mosaic.

2. Deepening

The second generation of scholars dealing with digital constitutionalism also deepened the analysis of phenomena and normative trends related to this concept, focusing, on the one hand, on traditional legal actors, such as courts, and, on the other hand, on the latest technological developments, such as quantum computing.

41 Celeste, 'Digital Constitutionalism' (n 5); Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (Routledge 2022).

42 For a more detailed analysis of these three examples, see Celeste, *Digital Constitutionalism* (n 41) ch 4.

43 See Celeste (n 15), who reuses an expression originally employed in Christoph B. Graber, 'Bottom-up Constitutionalism: The Case of Net Neutrality,' Transnational Legal Theory 7 (2016), 524, 551.

44 Celeste (n 15).

45 Celeste, *Digital Constitutionalism* (n 41) 209 ff.

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Pollicino offered a comprehensive reading of recent case law of the Court of Justice of the European Union highlighting its crucial role in protecting digital rights.[46] The subtitle of his book 'Judicial Protection of Fundamental Rights on the Internet: A road towards digital constitutionalism?' exposes the question of whether a form of 'digital constitutionalism' is also achieved through a substantive contribution by the EU judiciary.[47] De Gregorio singled out and analysed a 'European digital constitutionalism', explaining how the European constitutional architecture has been and is being used, especially by courts, to progressively limit the power of private digital platforms.[48] Constitutional values are seen as an instrument to progress from a phase of 'digital liberalism', dominated by the economic interests of European actors, to a stage of digital constitutionalism, more focusing on the protection of fundamental rights in the digital environment, through an intense judicial activism.[49] Finally, this general trend was also observed in the context of specific challenges, such as the regulation of online platforms.[50]

Besides this certainly more orthodox approach to digital constitutionalism focusing on traditional legal actors, we witness a parallel deepening of the scholarship on digital constitutionalism in relation to the development of specific innovative technologies.[51] Wimmer and Moraes analysed the impact of quantum computing on the right to encryption, as emerging and framed in initiatives inspired by digital constitutionalism, with a particular focus on Brazil.[52] In November 2022, the Academy of Sciences of Hamburg, in partnership with a plurality of other European universities and research

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

47 See in particular ibid 5.

48 Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (1st edn, Cambridge University Press 2022).

49 See in particular ibid 2.

50 For an EU-US comparative perspective, see Giovanni De Gregorio, 'Digital Constitutionalism across the Atlantic' (2022) 11 Global Constitutionalism 297; for an analysis from a broader perspective, focusing on issues related to Internet governance, see Giovanni De Gregorio and Roxana Radu, 'Digital Constitutionalism in the New Era of Internet Governance' (2022) 30 International Journal of Law and Information Technology 68.

51 Pereira and Keller first noticed this trend in relation to quantum computing: see Pereira and Keller (n 12).

52 Miriam Wimmer and Thiago Guimarães Moraes, 'Quantum Computing, Digital Constitutionalism, and the Right to Encryption: Perspectives from Brazil' (2022) 1 Digital Society 12.

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institutes, hosted a workshop on 'quantum constitutionalism'.[53] The event aimed to reflect on the implications for the constitutional dimension of a future, more consistent deployment of quantum computing. The concept of digital constitutionalism inspired the whole workshop: the advent of quantum computing was intended as the beginning of a 'post-digital' era that would have produced new issues for contemporary constitutionalism. In other words, 'quantum constitutionalism' would be regarded as the new 'digital constitutionalism': the next challenge, and consequent reaction of the constitutional ecosystem to technological innovation.

C. Approaches

From this mapping of the scholarship on digital constitutionalism, it is possible to understand that in reality the adjective 'digital' does not qualify the substantive 'constitutionalism'; it is rather an adverbial denoting the context and challenges that this strand of contemporary constitutionalism addresses. The constitutional dimension is interpreted in a broad sense. The existing scholarship does not merely focus on constitutional law *stricto sensu*, but looks more generally at the constitutional 'ecosystem', its values, principles, actors, and how it is impacted by the digital revolution.[54] In the previous section, we have used a chronological way of describing the evolution of the scholarship on digital constitutionalism. In this section, we will analyse three potential ways to categorise the conceptual approaches adopted by the existing scholarship on digital constitutionalism.

I. Substantive categorisation

Pereira and Iglesias Keller proposed a 'substantive' categorisation based on the focus adopted by scholars engaging with digital constitutionalism.[55] According to this typology, a first group of scholars looks at digital constitutionalism as a normative phenomenon. It would consist in the emergence

53 See https://www.quantumconstitutionalism.org/.

54 In this sense see Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (Routledge 2022) ch 2.

55 Pereira and Keller (n 12).

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of Internet bills of rights, and, more broadly speaking, of initiatives articulating rights and principles to address the challenges of the digital age.[56] A second group of scholars identifies a 'rearrangement of constitutional protections' following the digital revolution, focusing in particular on the emergence or rearticulation of new rights.[57] In this group we find scholars using these values and principles also to derive criteria for judicial review.[58] This group's view of digital constitutionalism is considered to be compatible with a 'traditional view of constitutionalism', by resulting in simple additions of layers or identification of lenses within contemporary constitutionalism, as it was done with concepts such as environmental constitutionalism.[59] A third group would instead use digital constitutionalism as a 'theoretical framework for state and non-state means of applying the law to digital technologies'.[60] The scholars mentioned in this category mainly deal with mechanisms of limitation of the power of private tech actors, both in terms of state regulation and as a form of self-constitutionalisation.[61]

56 In this group they mention: Dennis Redeker, Lex Gill and Urs Gasser, 'Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights' (2018) 80 International Communication Gazette 302; Claudia Padovani and Mauro Santaniello, 'Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System' (2018) 80 International Communication Gazette 295; Celeste, 'Digital Constitutionalism' (n 5).

57 Pereira and Keller (n 12) 2669; In this group are mentioned: Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road towards Digital Constitutionalism?* (Hart 2021); Wimmer and Moraes (n 52).

58 See Mendes and Oliveira Fernandes (n 6).

59 Pereira and Keller (n 12) 2672, translation by the authors.

60 Pereira and Keller (n 12) 2672.

61 In this group are mentioned: Nicolas Suzor, Tess Van Geelen and Sarah Myers West, 'Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda' (2018) 80 International Communication Gazette 385; Angelo Golia, 'The Critique of Digital Constitutionalism' <https://papers.ssrn.com/abstract=4145813> accessed 14 August 2023; Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (1st edn, Cambridge University Press 2022).

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II. Theoretical categorisation

Duarte et al. proposed to identify three 'theoretical' components of digital constitutionalism: a liberal, a societal and a global one.[62] Rather than a categorisation of existing theories, the authors describe what they call three approaches to digital constitutionalism, which have not to be intended as mutually exclusive, but rather as three layers of the same conceptual architecture. Digital constitutionalism would find its roots into the liberal constitutionalism emerged to protect freedoms against the intrusion of public actors. Duarte et al. rightly notice that the affirmation of private actors as dominant players besides nation States in the digital environment represents a challenge to a *liberal* constitutionalism that is anchored to the state-centric dimension. This part of the digital environment where private actors establish their own 'constitutional' rules and implement them is captured by a *societal* reading of digital constitutionalism, which relies on theories of societal constitutionalism. Within society, state-centred and private-focused constitutional inputs may collide. A way to overtake this problem is to look at digital constitutionalism from a *global* perspective. Relying on multilevel theories, constitutional collisions and different societal input can be regarded comprehensively.

III. Normative categorisation

The substantive categorisation proposed by Pereira and Iglesias Keller is useful to provide an immediate idea of the focal point of the research at stake. It emerges from an empirical analysis of the existing literature on digital constitutionalism and will certainly benefit future attempts of categorising emerging scholarship on this phenomenon, with the caveat that the three groups identified by Pereira and Iglesias Keller are not mutually exclusive. In particular, scholars falling into the third group, who are studying public and private mechanisms to enforce the law in the context of the digital environment, could well analyse how to adjust existing constitutional protections, thus equally involving elements belonging to the second group. Duarte et al.'s theoretical categorisation is equally helpful as it distinguishes the existing scholarship from the point of view of the specif-

62 Francisco de Abreu Duarte, Giovanni De Gregorio and Angelo Golia, 'Perspectives on Digital Constitutionalism' <https://papers.ssrn.com/abstract=4508600> accessed 14 August 2023.

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ic, underlying approach to constitutionalism which is adopted. Once again, however, the three categories proposed are not mutually exclusive; they represent three theoretical layers that can well co-exist, one encompassing another. For example, if one adopts a global constitutionalist approach, one can well still focus their research on aspects related to a liberal conception of constitutionalism, as one assumes the emergence of constitutional responses at various levels of the constitutional ecosystem.

This paper proposes a further categorisation, which can help complement, and can be used in conjunction with, the previous ones. It presents four approaches to digital constitutionalism and it is a 'normative' categorisation. Not normative in the sense that it is prescriptive, but meaning that it is legal or juristic in nature, by distinguishing these four categories based on the normative sources they refer to. This categorisation contributes to the existing literature by isolating positions that are not fully apparent in the previous categorisations and by highlighting aspects that are key to understand some of the criticism that was addressed to the theories of digital constitutionalism. By summarising the previous categorisations and by presenting these four approaches, this paper aims to allow colleagues to position themselves in the current scholarly debate, without having necessarily to look for a univocal definition of the concept of digital constitutionalism, that might even stifle the plural and participative nature of the current academic conversation.

The present categorisation questions which normative source is considered to include elements that translate the core principles of contemporary constitutionalism in light of the challenges of the digital society. This categorisation adopts an empirical approach and disregards the labels that scholars may have adopted for their theories, if any. The first category is represented by the *traditional* constitutionalist approach. This group of scholars adopts a classical conception of the system of legal sources. Analyses related to digital constitutionalism in this first group investigate how constitutional law is reacting to the challenges of the digital revolution. The normative sources examined are those traditionally regarded as possessing a constitutional character and include: constitutions, acts of constitutional nature, decisions of courts possessing constitutional review or interpretation power. These sources can emerge both at national and at supranational level. This approach focuses on state-centric constitutional counteractions and overlaps with Pereira and Iglesias Keller's second group, which focuses on the 'rearrangement of constitutional protections' following the digital

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revolution, and with Duarte's first approach of liberal constitutionalism.[63] Scholars adopting this approach include Pollicino, De Gregorio, Mendes and Oliveira.[64]

The second approach can be defined as 'functional and legal'. In this category we include scholars who looked at norms that belong to the traditional system of legal sources, but lie outside the scope of constitutional law. In this sense, this approach is still legal, but functional: it looks in an empirical way at whether a normative source performs a constitutional function despite being formally devoid of this nature. Authors such as Fitzgerald and Suzor, for example, adopt this approach by highlighting the role that private contract law can play in setting constitutional constraints to the power of private actors.[65] Equally, Floridi points at the constitutionalising role played by a series of pieces of EU regulation – the 'hexagram' in Floridi's words – that represent the pillars of EU digital law.[66] This approach echoes Pereira and Iglesias Keller's third category, which focuses on public and private means of regulating digital technology, but it is not easy to position within Duarte's et al.'s categorisation.

The third category still maintains a functional approach, but articulated in a socio-legal way. Here we go beyond the traditional system of legal sources. Norms of constitutional nature are found beyond the state dimension, in the private rules and enforcement mechanisms established by technology companies, in the decisions of ICANN's dispute resolution mechanisms, in the myriads of Internet bills of rights mainly promoted by civil society actors. This approach can be defined as 'functional and socio-legal' because it empirically looks beyond what is formally constitutional, detecting norms emerging outside the institutionalised, state-centric, legal dimension that produce constitutional counteractions to the challenges of the digital society. This approach reflects Duarte et al.'s layer of societal

63 Pereira and Keller (n 12) 2669.

64 Pollicino (n 57); De Gregorio (n 61); Mendes and Oliveira Fernandes (n 6), who in reality also acknolwedge the role of a plurality of other sources, even those emerging beyond the State, in the framework of digital constitutionalism.

65 Brian Fitzgerald, 'Software as Discourse? The Challenge for Information Law' (2000) 22 European Intellectual Property Review 47; Suzor, 'The Role of the Rule of Law in Virtual Communities' (n 14).

66 Luciano Floridi, 'The European Legislation on AI: A Brief Analysis of Its Philosophical Approach' (2021) 34 Philosophy & Technology 215, 220. With the expression 'hexagram' Floridi refers to the AI Act, the GDPR, the Digital Markets Acts, the Digital Services Act, the Data Governance Act and the European Health Data Space Regulation.

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constitutionalism, while it overlaps with both the first and the third group as identified by Pereira and Iglesias Keller, respectively referring to the category of scholars studying the emergence of Internet bills of rights and that analysing non-state constitutional answers. In this group we can include scholars, such as Padovani, Redeker, Yilma, Celeste, Santaniello, Palladino and Golia.[67]

The fourth approach can be defined as 'holistic'. This category presents the most comprehensive scope of analysis. It encompasses the previous three approaches by arguing that the constitutional ecosystem reacts to the challenges of the digital revolution at multiple levels, with a plurality of counteractions. In this sense, we can observe a multilevel[68] or hybrid[69] process of constitutionalisation of the digital society: new normative responses simultaneously emerge in traditional constitutional sources, in legal sources playing a constitutional role and in a variety of normative instruments arising beyond the State, in the private fiefs of multinational tech companies or at the level of civil society. This holistic approach recognises a degree of complementarity of these normative responses. It does not downplay the importance of norms emerging outside traditional legal instruments. It argues that, like in a puzzle, each source complements each other. There is a mutual stimulation and, taking an aerial view of this phenomenon, it is possible to observe the emergence of a plural, but single-focused conversation on the constitutional answers to the digital revolution. This approach investigates the 'alarm signs' that each normative source is providing to the rest of the constitutional ecosystem. For example, by analysing the content of the multiple Internet bills of rights emerged at the level of civil society it is possible to detect areas of what I called 'constitutional anaemia' within traditional constitutional sources: traditional constitutional instruments struggle to address the challenges of the digital revolution and civil

67 See Musiani, Pavan and Padovani (n 29); Redeker, Gill and Gasser (n 56); Kinfe Micheal Yilma, 'Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts' (2017) 25 International Journal of Law and Information Technology 115; Celeste, 'Terms of Service and Bills of Rights' (n 21); Santaniello and others (n 11); Edoardo Celeste and others, *The Content Governance Dilemma: Digital Constitutionalism, Social Media and the Search for a Global Standard* (Palgrave Macmillan 2023) <https://link.springer.com/10.1007/978-3-031-32924-1> accessed 8 August 2023; Golia (n 61).

68 See Celeste, 'The Constitutionalisation of the Digital Ecosystem' (n 38).

69 See Santaniello and others (n 11).

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society is advocating for an evolution of formal constitutional sources.[70] This approach is at the same time traditional, functional and socio-legal. It encompasses the three groups identified by Pereira and Iglesias Keller, and is in line with the third layer of digital constitutionalism proposed by Duarte et al, which focuses on global constitutionalism. I first proposed this holistic theory in order to offer a theoretical framework to reconcile the existing scholarly positions on digital constitutionalism.[71]

D. Criticism

After a phase of development and growth, the literature on digital constitutionalism has also been subject to criticism. The aim of this section is to systematise the main arguments moved against theories of digital constitutionalism. We can identify three macro-categories of criticism: a conceptual, a cynic and a traditional argument.

I. Conceptual argument

The analysis of the various potential approaches to digital constitutionalism has clearly shown the lack of a dogmatic, univocal definition of this concept. This plurality of views is regarded as an issue related to the clearness of the notion of digital constitutionalism. Some definitions of this concept are criticised to be inconsistent or contradictory. According to Pereira and Iglesias Keller, this is a 'problem of conceptual disarray that weakens the epistemic value of the term and jeopardises current applications'.[72] The concept of digital constitutionalism would be regarded as unclear because it covers a multitude of actors, normative sources and mechanisms.

As a consequence, digital constitutionalism theories might also be accused of lacking a clear positioning within existing constitutional theories. Duarte et al. highlighted the complex mix of constitutionalist theories – liberal, societal and global – underlying the various scholarly visions of digital

70 Celeste, *Digital Constitutionalism* (n 41) ch 13.

71 See Edoardo Celeste, 'Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology's Challenges' (2018) HIIG Discussion Paper Series No 2018-02 <https://papers.ssrn.com/abstract=3219905> accessed 23 August 2018; Celeste, 'Digital Constitutionalism' (n 5).

72 Pereira and Keller (n 12) 2652.

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constitutionalism.[73] Pereira and Keller speak of a 'theoretical matrix' comprising constitutional pluralism, societal constitutionalism, global constitutionalism, and we could add, transnational constitutionalism and multilevel constitutionalism. Two lines of criticism are thus possible in this regard: on the one hand, one might argue that digital constitutionalism does not receive a clear rooting among the theories evoked by scholars engaging with this concept, and on the other hand, it might not be clear how digital constitutionalism stands within recent scholarly debates on the decline of constitutionalism[74] or the emergence of new types of constitutionalism.[75]

Moreover, digital constitutionalism was criticised for its lack of a univocal ideological or political orientation. Golia specifically criticised my use of a 'sanitised' notion of ideology to denote the nature of digital constitutionalism. I indeed defined digital constitutionalism as the 'ideology that adapts the values of contemporary constitutionalism to the digital society', specifying that the notion of ideology here is used in a neutral sense, as a set of ideals and values, and not in the Marxist pejorative sense of set of deceiving beliefs.[76] Along the same lines, Griffin criticizes the absence of a clear political orientation, proposing a 'left-wing normative account of digital constitutionalism' aiming to limit the power of private technology corporations.[77]

Finally, one last critique related to the conceptual boundaries of digital constitutionalism consisted in arguing that this notion engages with new issues that are generated by the advent of the digital revolution, rather than with problems which are connatural to contemporary society.[78] It would be mistaken to think that digital constitutionalism aims to restore a heavenly

73 de Abreu Duarte, De Gregorio and Golia (n 62).

74 See Dobner and Loughlin (n 9).

75 See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007); Stephen Gill and A Claire Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press 2014); Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Routledge 2012); Roberto Gargarella, 'Sobre el "Nuevo constitucionalismo latinoamericano"' (2018) 27 Revista Uruguaya de Ciencia Política 109.

76 Celeste, 'Digital Constitutionalism' (n 5) 77; see also Maurice Cranston, 'Ideology' <https://www.britannica.com/topic/ideology-society> accessed 30 August 2018.

77 Rachel Griffin, 'A Progressive View of Digital Constitutionalism' (*The Digital Constitutionalist*, 14 June 2022) 2 <https://sciencespo.hal.science/hal-03940791> accessed 16 August 2023.

78 Golia (n 61) 12.

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constitutional equilibrium that characterized the analogue society. Digital constitutionalism would rather aim to identify persisting constitutional questions 're-shaped by digitality'.[79]

II. Cynical argument

The second stream of criticism to digital constitutionalism can be named 'cynical' as it questions the sincerity of the reference to the constitutional dimension by private actors. In light of their significant development, social media have been compared with States. Already after half a decade of existence, Mark Zuckerberg could argue that the number of Facebook's users were the same of those of a populated country.[80] Thinking of social media platforms as virtual state entities was not only justified by these figures, but also reinforced by the use of a specific 'constitutional' language in the social media terms of service. For example, Facebook used to call its terms of service 'Statement of Rights and Responsibilities' and the Facebook's Principles used to employ the expression 'every person', which echoes the formulation of constitutional texts.[81] More recently, Facebook introduced the Oversight Board, a private jurisdictional body vested with the function of solve the most complex content moderation cases.[82] This institution has been compared to a private 'supreme court', in any case denoting a trend of institutionalization and judicialization of a private space inspired by state constitutional architecture.[83] In light of this trend, I spoke of a 'constitutional tone' that would justify the question of whether the internal rules of online platforms could be regarded as their 'bills of rights', set of norms playing a de facto constitutional role within the virtual territory of a specific social media.[84]

79 Golia (n 61) 12.

80 Jonathan Zittrain, 'A Bill of Rights for the Facebook Nation' (*The Chronicle of Higher Education*, 20 April 2009) <https://www.chronicle.com/blogs/wiredcampus/jonathan-zittrain-a-bill-of-rights-for-the-facebook-nation/4635> accessed 30 August 2018.

81 See Celeste, 'Terms of Service and Bills of Rights' (n 21) 123.

82 See Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2019) 129 Yale Law Journal 2418; Wolfgang Schulz, 'Changing the Normative Order of Social Media from Within: Supervisory Bodies' in Edoardo Celeste, Amélie Heldt and Clara Iglesias Keller (eds), *Constitutionalising Social Media* (Hart 2022).

83 See Celeste and others (n 67) ch 2.

84 Celeste, 'Terms of Service and Bills of Rights' (n 21).

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These examples show an appropriation of the constitutional language, which is traditionally deployed in the context of nation States, by an environment that is conversely dominated by private actors. The core cynical argument moved to this trend consists in affirming that the use of this constitutional tone is merely superficial, a 'constitutional façade'.[85] Pereira and Keller speak of a 'descriptive' or 'metaphorical' employment of constitutional concepts.[86] Here the traditional language and mechanisms of state constitutional law would be transplanted into private virtual domains without any effort of adapting this normative infrastructure to the peculiarities of the online environment. This repurposed constitutional rhetoric would have a high evocative power, but unclear contours. The idea that what we could call 'constitutional appeal' generates among users would then represent a marketing tool, or in the words of Albert, a 'legal talisman', capable of disguising into constitutional a private setting devoid of basic constitutional guarantees.[87]

Hence the core danger highlighted by this cynical argument. The reference to the constitutional dimension would not only be fake, but essentially dangerous in so far it is instrumentalised to increase the legitimacy of private ruling, which is intrinsically at odds with the principles of constitutional democracy.[88] Pereira and Keller speak of 'constitutions without constitutionalism'.[89] They highlight a risk not only to 'disguise' private power, but also to 'reinforce' it, despite the original intent of digital constitutionalism to introduce limitations to the dominance of online platforms.[90]

85 See Celeste, 'Terms of Service and Bills of Rights' (n 21) 128; Pereira and Keller (n 12) 2651 and 2656, who speak of 'mere rhetorical device', 'semantic or facade constitutions'; Róisín Á Costello, '*Faux Ami?* Interrogating the Normative Coherence of "Digital Constitutionalism"' (2023) 12 Global Constitutionalism 326, 7, who speaks of a 'descriptive rhetoric of constitutionalism' .

86 Pereira and Keller (n 12) 2656.

87 Kendra Albert, 'Beyond Legal Talismans' (Berkman Klein Center for Internet & Society, Harvard University, 10 November 2016) <http://opentranscripts.org/transcript/beyond-legal-talismans/> accessed 21 December 2018; see also Celeste, 'Terms of Service and Bills of Rights' (n 21).

88 See Pereira and Keller (n 12) 2652, who speak of an 'instrumentalization of "constitutionalism" for illiberal purposes and their transposal onto supra-state or even private dynamics' (authors' translation).

89 Pereira and Keller (n 12) 2656.

90 Pereira and Keller (n 12) 2675.

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III. Traditional argument

The third line of criticism moved to theories of digital constitutionalism can be defined as 'traditional', in the sense that it is anchored to a classical conception of constitutionalism and the legal system.

Constitutionalism is traditionally associated with the state dimension. It is an ideology that emerged to limit the power of the State and, subsequently, to legitimise – and by doing so, to *constitute* and organise – the power of the latter stemming from popular sovereignty.[91] Digital constitutionalism theories apply the concept of constitutionalism not only beyond the state dimension, but also to private actors. Technology companies' attempt to establish core values and principles as well as to limit their power by introducing internal control mechanisms is described in terms of 'constitutionalisation' of these private spaces.[92] Such an unorthodox approach would lead to a stretching of the concept of constitutionalism beyond its natural ecosystem. Scholars professing a constitutional purism would consider this concept dilatation as illegitimate or uncanonical per se. Constitutional scholars adopting a more pragmatic approach see here the risk of a contamination, denaturation, not to say a degradation of traditional constitutionalism. Pereira and Iglesias Keller talk of a risk of trivialization or hollowing out the concept of constitutionalism.[93] What in reality is mere private actors' self-regulation cannot be disguised as a form of constitutionalisation. The 'normative core' of constitutionalism is not there.[94] Applying the notion of constitutionalism beyond the State would amount to an offense to the constitutional dimension.

Costello argues that using the language of constitutionalism beyond the State and in the context of private actors may be 'harmful', may lead to 'confusion'.[95] Here we see this line of criticism converging with the cynical

91 See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Amagi, originally published by Cornell University Press, 1947, 2007); András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press 1999); András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017).

92 On the idea of using elements of constitutional law to describe dynamics of private actors see Suzor, 'Digital Constitutionalism' (n 14); Karavas (n 19); Teubner (n 10); Celeste, 'Terms of Service and Bills of Rights' (n 21).

93 Pereira and Keller (n 12) 2676.

94 Costello (n 85) 8 ff.

95 Costello (n 85) 15.

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argument presented above that posits that the appropriation of the constitutional language by private entities conceals the risk of instrumentalising the appeal of constitutionalism to legitimise private practices that are all but in line with constitutional principles and values. Costello's solution is to abandon the expression 'digital constitutionalism', avoid employing the dichotomy between private and public law in this context, but rather refer to the interaction between public and private 'policy'.[96] In relation to this very last point, it is apparent here how this line of traditional criticism highlights a mistaken extension not only the concept of constitutionalism, but also of the boundaries of the legal system itself. It is possible to read a general suffering against a perceived 'pan-constitutionalism', an undue expansion of the constitutional dimension to areas that would be traditionally considered as the realm of other sources of law - such as private law, for instance – or as extra-legal fields – as in the case of private platforms' self-regulation.[97]

Finally, if the critical arguments expressed above relate to the application of constitutional labels beyond the state and in the domain of private actors, there is also a line of criticism that is moved to specific trends that implement the idea of digital constitutionalism. In particular, Yilma points out to a series of risks inherent to the emergence of a significant number of Internet bills of rights.[98] He criticises the fragmented nature of this phenomenon, questions their impact, but also analyses the issue of their 'desirability'.[99] In this regard, we find here a traditional line of criticism as Yilma speaks of a constitutional 'hypertrophy' that would derive from an 'inflation' of rights.[100] The added value of the principles advocated by the plurality of actors that adopt and promote Internet bills of rights documents would be uncertain, if not counterproductive. Traditional constitutional instruments already include general formulations of the rights and principles that can be applied in the digital environment. Therefore, a duplication, especially through non legally binding documents, is unnecessary.

96 Costello (n 85).

97 Here I am re-elaborating with my own words an argument made orally by Prof Alessandro Mantelero at the workshop '*Digital Constitutionalism. A Normative And Institutional Framework For Conflict Solving Under Construction*' (Frankfurt, 3-4 March 2023).

98 Yilma (n 67); along the same lines, see also Yilma (n 30).

99 Yilma (n 67) 125.

100 Yilma (n 67) 126.

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E. A counter-critique

The last section will conclude this chapter with a personal counter-critique to the three streams of criticism moved to theories of digital constitutionalism. The aim of this section is neither to set the final word on this topic nor to defend the normative 'truth' of theories of digital constitutionalism. Further academic discussions on this topic are welcome to enhance the understanding of the phenomena we are living. Current criticism has to be taken into account in a constructive way to further refine existing theories. It is however hoped that this contribution will help calibrate emerging critical lines by relating them to specific aspects of digital constitutionalism theories, rather than negating this concept tout court. The counter-critique will follow the systematisation of the critical lines identified in the previous section.

I. Pluralism, ideological orientation and normative counteractions

The concept of digital constitutionalism was criticised for its lack of clarity and consistency. Taking together the various positions taken by the existing scholarship, we a see that a complex plurality of actors and mechanisms is put under the umbrella of digital constitutionalism. This reconstruction is undoubtedly accurate. However, if on the one hand, this mosaic of theories, viewpoints, actors and mechanisms might generate confusion, on the other hand, it is a living witness of the complexity of the analysed phenomena and of the willingness to explain this trend from a plurality of disciplinary and theoretical perspectives. Such a diversity also means that we are observing a comprehensive scholarly effort to examine the phenomena underlying digital constitutionalism. Not to mention that the underlying concept of constitution, constitutionalism and constitutionalisation have never received a univocal definition. Here, the main counter-critique moves against generalising critical tendencies; arguing that digital constitutionalism theories miss the point does not give recognition to the various approaches that have emerged in this field. It is hoped that this paper will help both scholars supporting and criticising digital constitutionalism theories to better position themselves, to properly distinguish between the concept of constitutionalism and constitutionalisation, to explicitly state which approach they are taking or criticising.

Certainly, an effort that supporters of digital constitutionalism should make is to reconstruct more clearly the relationship between their argu-

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ments and pre-existing theories, which represented one of the shortcomings highlighted by criticists. This will help to clarify that digital constitutionalism is not subverting the DNA of contemporary constitutionalism. When one speaks of digital constitutionalism as an ideology, one refers to a set of values and ideals with a clear ideological positioning. Digital constitutionalism is not a new form of constitutionalism, but rather one of its layers, a development of contemporary constitutionalism. Its scholarly discourse builds and further develops 'analogue' constitutional theory.

When one speaks of constitutional 'equilibrium' before the advent of the digital revolution, one does not imply a status of constitutional heaven, devoid of issues to solve, but one rather refers to the equilibrium between constitutional norms and societal issues. The constitutional ecosystem, at its various levels, provided a *normative* – but not necessarily factual – answer to the issues of the analogue society. The digital revolution has undermined this normative equilibrium. Existing norms no longer fully speak to the variety of social actors, no longer address the multiple issues that characterise the digital society. Hence, a series of normative counteractions are emerging.[101] To allow existing constitutional norms and principles to perpetuate their message in the mutated social reality where we live today. Digital constitutionalism would advocate a translation of the DNA of contemporary constitutionalism into norms that can address the challenges of the digital society. A living constitutional ecosystem, not only understandable by specialised audiences, but clearly providing normative guidance to all involved actors.

II. Constitutionalism as a lens

The lines of criticism that we have defined as 'cynical' questions the application of the language and tools of constitutionalism to private technology companies. These multinational entities would refer to constitutionalism as a marketing tool, to exploit the sense of trust that a 'constitutional appeal' generates in the users. Nothing but a mere constitutional façade would lead to legitimisation of practices and values that are in reality arbitrarily established by private corporations for their own interests.

The application of theories of digital constitutionalism in the domain of private technology companies does not aim to defend or justify their

101 Celeste, *Digital Constitutionalism* (n 41) ch 3 ff.

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practices. Constitutionalism, its values and mechanisms are here used as a 'lens' to perform a 'litmus test' to examine the development of the governance of private platforms against constitutional norms and practices established in the state dimension. These entities have emerged as dominant actors besides nation States. They have the power to similarly affect the exercise of fundamental rights by their users. The concept of constitutionalism is deployed in this domain with much caution. Indeed, one has to distinguish the use of the constitutional machinery done by online platforms themselves and that performed by the scholarship. The first could be regarded as an effort of self-constitutionalisation; platforms would employ the language of constitutionalism in order to use its mechanisms and rely on its principles. However – there is no doubt – this phenomenon also hides a 'marketing' component. Private companies need to show to their users that their platforms are safe, that fundamental rights are respected, that their violations are timely prosecuted. Yet, the scholarship resorts to digital constitutional theories not to justify or legitimise the conduct of multinationals, but rather to understand to what extent these actors are pursuing a path of constitutionalisation, which has been long studied in the context of States, both at national and at supranational level.

Differentiating between the concepts of digital constitutionalism, as a set of values and ideals, and the process of constitutionalisation, which represents the implementation of these principles, is helpful in this context to measure the developments – be they positive or negative – of private platforms. For example, Facebook once announced its willingness to let users vote on its terms of service – a promise that, if maintained, would have certainly represented a step forward in the process of constitutionalisation of this entity.[102] Facebook, once again, introduced an Oversight Board to adjudicate the most complex cases related to online content moderation, an entity that is still subject to the control of the platform, but is at least composed of external international experts. In these contexts, the reference by the scholarship to a constitutionalising trend does not imply a full constitutionalisation of this private space. Conversely, one aims to assess the progress, or lack thereof, made by the platform. The language and mechanisms of constitutionalism, at least in the academic analysis, do not contribute to legitimise arbitrary practices of private companies. Digital constitutionalism is not used as a 'legal talisman' to obfuscate the eyes of the users, as conversely companies themselves might do. The scholarship here

102 See Celeste, 'Terms of Service and Bills of Rights' (n 21).

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refers to constitutional theories as a lens to measure to what extent these new private dominant actors are incorporating mechanisms of protection of fundamental rights by adapting existing constitutional values and tools that have been developed in the context of nation States.

III. New battlefield for old enemies

What in the previous section we called the 'traditional' line of criticism to theories of digital constitutionalism questions an undue stretching of the concept of constitutionalism beyond the State dimension and its unwarranted application to private actors. This circumstance would lead to a denaturation and a voiding of traditional constitutionalism as well as to a hazardous legitimisation of private power. Pereira and Keller themselves however acknowledge that these critical arguments are not new.[103] They had already been moved to the various streams of global and societal constitutionalism as well as to the underlying assumption of constitutional pluralism, which, according to these scholars, represent the 'theoretical matrix' at the basis of digital constitutionalism.[104] In other words, digital constitutionalism becomes the new battlefield of old enemies. Those adopting a traditional approach to constitutionalism reiterate the same types of critiques addressed to scholars supporting an extension of constitutionalism beyond the State.

Digital constitutionalism does not empty or dilute the meaning of constitutionalism when applying a constitutional analysis to the power of private platforms. Firstly, because the constitutional dimension is used as a lens that assess the effectiveness of private norms and mechanisms that play a function that de facto can be considered as constitutional. This does not amount to argue that a copy of what Costello calls the 'normative core' of state constitutionalism is there.[105] On the contrary, state constitutionalism is used as a litmus test to measure the level of progress of the process of constitutionalisation of private actors. State constitutionalism is a model, but this does not imply that the ideal solution would be to replicate in full what constitutionalism has achieved at state level into the realm of private

103 See Pereira and Keller (n 12) 2676 ff.

104 Pereira and Keller (n 12) 2651; for an analysis of international constitutional law, see Celeste, 'The Constitutionalisation of the Digital Ecosystem' (n 38).

105 Costello (n 85) 8.

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platforms. Constitutionalism within and beyond the State can coexist, do not need to perfectly symmetrical, but rather aim to be complementary. Each compensating for the shortcomings of the other.[106]

Indeed, the projection of constitutional theories beyond the State does not negate state constitutionalism. It merely acknowledges the shortcomings of state constitutionalism and the consequent emergence of constitutional patterns beyond the State. If one takes a holistic approach to digital constitutionalism, this is even more apparent. Such a perspective allows the scholar to study the joint action of various constitutional layers that are addressing the challenges of the digital revolution. And this constitutional 'conglomerate' includes both traditional constitutional instruments and constitutional tools emerging beyond the State.[107] Theories of digital constitutionalism, by highlighting the development of a process of constitutionalisation beyond the State, indirectly show areas of constitutional anaemia of traditional state constitutionalism.[108] Failing to acknowledge this dimension would mean adopting a blind posture to existing constitutional issues as well as losing a useful theoretical lens to interpret these phenomena.

Drawing a strict equation between theories of digital constitutionalism and private self-regulation is reductive. As it would be limiting digital constitutionalism to traditional constitutional instruments. As shown in the previous sections, scholars studying digital constitutionalism adopt different perspectives. Each of these analytical angles is not mutually exclusive. And, at the same time, this does not imply a 'pan-constitutional' vision where every legal source is swallowed by the constitutional dimension. Constitutionalism is adopted as a lens beyond the traditional constitutional dimension: private law or the internal rules of private platforms will not become constitutions. However, if one adopts a functional, socio-legal approach, one can argue that they can play a constitutional function.[109] Digital constitutionalism aims indeed to study the limits of traditional constitutional law and how other normative sources are emerging to constitute the right mix that will be able to address the constitutional issues of the digital society. This does not imply a hypertrophic emergence of the constitutional discourse related to digital issues. On the contrary, this pluralism

106 On the notion of 'compensatory' constitutionalism, see Peters (n 8); for an adaptation of this theory to the digital context see Celeste, 'Internet Bills of Rights' (n 35); Celeste, 'The Constitutionalisation of the Digital Ecosystem' (n 38).

107 See Celeste, 'Internet Bills of Rights' (n 35).

108 See Celeste, *Digital Constitutionalism* (n 41) ch 13.

109 See Celeste, *Digital Constitutionalism* (n 41).

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importantly highlights the absence of a single, clear, constitutional pathway to solve the challenges of the digital revolution, the consequent need to have a plural conversation to discuss legal solutions, and – luckily – the willingness of various societal actors to contribute to the conversation on which rights and principles should govern the digital society.

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