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AGAINST DIGITAL CONSTITUTIONALISM

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Petros Terzis*

Abstract

Digital Constitutionalism makes sense. We can all see the problem it tries to solve. And like many other ‘constitutionalisms’, Digital Constitutionalism is a project fuelled by the institutional hope of striking a power equilibrium between competing actors. In seeking this equilibrium in the digital realm, however, important assumptions are made and serious questions are being ignored or oversimplified.

Firstly, Digital Constitutionalism ignores the material reality of digital technologies and their production logics thereby mistaking ‘objects’ with ‘subjects’. Secondly, Digital Constitutionalism’s myopic lenses -almost inevitably- lead to narrations of ‘constitutional moments’ in the digital world caused by *digital* powers and *digital* revolutions, separate from the histories of private corporations in the global stage. Finally, Digital Constitutionalism falsely implies the *absence* of law rather than its presence -or indeed irrelevance- as major contributing factors to this ‘constitutional crisis’. On this account, it seeks to respond to the ‘digital revolution’ with a ‘legal revolution’.

But Digital Constitutionalism may come at the price of exerting disproportionate discursive power in the field of Law and Technology. In an attempt to revert these dynamics, this note invites legal scholars to look back to think differently, and to engage critically with the long evolution of legal regulation that has enabled the emergence of the corporate form and the consolidation of economic and *political* power on the global stage. This historicization, the note concludes, may ultimately lead us to turn inward and reflect on the role of legal experts and professionals in the consolidation of private power in the global political economy. It may even inspire us to break free from restraining mental maps and thinking patterns and to unlock novel intellectual and methodological pathways in the field of Law and Technology.

And if it takes a Digital Constitutionalism to come to this, it will have been worth it.

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I. Introduction

Digital Constitutionalism addresses a fear. The fear that constitutional principles and protections are quickly crumbling under the obscure forces of novel digital technologies and the private entities wielding technological power. And intuitively, the project makes sense. The rise of overly powerful Big Tech, the proliferation of novel technologies and infrastructures of/for surveillance, or the increasing use of artificial intelligence in public decision-making, all seem to present considerable challenges to the core principles of rule of law, separation of powers, democracy, and human rights. The pressure to respond with a ‘new constitutionalism’ thus comes as no surprise. Today, the project has a rapidly growing platform that hosts some excellent contributions, an annual school, an advisory board featuring prominent academics of the field, and a metaverse exhibition.

But the ways in which digital constitutionalists conceptualize the problems that they aim to address are driven by a skewed narration that leads to certain fallacies and ‘false contingencies’.¹ The scope of this note is to expose these fallacies and explain the risks posed by ideas such as that of Digital Constitutionalism to the epistemic field of Law and Technology. It does so by offering an alternative narration of the ‘problem of private power’ in the global political economy and by historicising the rise of digital corporations within the broader chronicle of the consolidation of power of transnational corporations in the global arena. Such historicization allows us to better interrogate the distinction that digital constitutionalists make between the ‘public’ and the ‘private’ and the way they attempt to surpass it. This historicization also allows us to conceptualize differently the ‘problem of private power’ as driven *by law* rather than by its absence. Finally, it allows us to identify the risks of employing the ‘constitutional frame’ as a means through which to address this power.

This note is part of a broader endeavour to critique and move beyond the mainstream pillars that have driven the agenda of technology regulation during the last few decades (i.e. human rights-based approaches, rule of law, Brussels Effect, digital constitutionalism, etc).² However, it is important to clarify that given the tremendous richness of the scholarship on (global) constitutionalism, international political economy, and human rights, some nuance on the foundational pillars of the critique (particularly in relation to the histories and typologies of constitutions) has been consciously and necessarily left out of the present paper for the sake of brevity and the targeted nature of the intervention. The argument is developed in four main parts. Part II offers a descriptive summary of the literature on Digital Constitutionalism, outlining the premises on which this project is based and the fears that it aims to address. This part then provides a brief account of existing critiques of Digital Constitutionalism. It sets the stage for Parts III and IV where the main critique is set by exposing the fallacies of Digital Constitutionalism, explaining its consequences, and suggesting ways to move passed them.

II. The project of Digital Constitutionalism

Digital Constitutionalism is an umbrella term that seeks to encompass a diverse array of legal instruments and political *desiderata*. From declarations of human rights for the Internet or (more recently) national constitutions for the digital world, to international agreements and legislative initiatives for regulating cyberspace, Digital Constitutionalism presents itself both as a descriptive and as a normative device.³ It is descriptive in that it provides the conceptual framework for understanding, encompassing, and analysing both the technologically-driven ‘constitutional crisis’, and the development (particularly in the EU) of legislative approaches for the regulation of the digital economy.

¹ Susan Marks, ‘False Contingency’ (2009) 62 Current Legal Problems 1.

² See, relevantly, Neli Frost, ‘Out with the “Old”, in with the “New”’: Challenging Dominant Regulatory Approaches in the Field of Human Rights’ (2021) 32 European Journal of International Law 507; Barrie Sander, ‘Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law’ (2021) 32 European Journal of International Law 159; Rachel Griffin, ‘Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability’ (2023) 14 Transnational Legal Theory 46.

³ Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) 25.

It is normative in that it aspires to respond to this ‘constitutional crisis’ by structuring legal relationships in particular ways that reflect normative (constitutional) ambitions.⁴ In terms of scope, scholars have argued that constitutionalism is a useful framework insofar as it allows us to encompass and interpret the role of public and private power in shaping the constitutive rules of cyberspace or that of shaping the principles based on which regulation constrains private actors from encoding such rules.⁵ Others have regarded attempts to regulate cyberspace as early evidence of a process of “constitutionalisation”.⁶ By bringing all these accounts together, Celeste concludes that Digital Constitutionalism is a “set of values and ideals that permeate, guide and inform [a] series of [normative] instruments”.⁷

Although early attempts at universalising a vocabulary of rights for the Internet targeted states’ action, technical architecture, and the potential for interference, more recent normative instruments, such as Digital Constitutionalism, have been increasingly focused on human rights and the role of *private* power in shaping the rules and norms of our digital interactions. This shift seems in line with the changes in the political economy of the Internet and the privatisation of its infrastructure and functions.⁸ Digital Constitutionalism is thus a response to shifts in the power structures that control and sustain (what people perceive as) the Internet and attempts to apply the constitutional lens and rule of law constraints to private actors in the digital space (e.g., social media platforms) in order to “assess [their] governance [...] as writers of the rules of participation”.⁹ As such, it invites us to ‘dis-anchor the concept of constitutionalism from the state dimension in order to fully appreciate the emergence of the powers of private actors’.¹⁰ Digital Constitutionalism thus emerges, per de Gregorio, as a third way of governance for the algorithmic society; a method and framework in-between neoliberal, market-driven approaches on the one hand, and state sovereignty on the other.¹¹

This commentary is not the first to explore the gaps, misconceptions, and fallacies of Digital Constitutionalism. Schramm emphasised the role of democratic participation in whatever Digital Constitutionalism aspires to represent;¹² Pollicino highlighted the role of courts in rebalancing the emergence of private power in the digital world as part of the broader movement of Digital Constitutionalism.¹³ Golia challenged core assumptions of the project of Digital Constitutionalism (i.e. the role of the state-centred constitutionalism) and attempted a reapproach of the concept based on lessons drawn from societal constitutionalism.¹⁴ Haggart and Keller drew attention to the project’s

⁴ Francisco de Abreu Duarte, Giovanni De Gregorio and Angelo Golia, ‘Perspectives on Digital Constitutionalism’, *Research Handbook on Law and Technology* (Edward Elgar Publishing 2023).

⁵ 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*; Brian Fitzgerald, ‘Software as Discourse - A Constitutionalism for Information Society’ (1999) 24 *Alternative Law Journal* 144.

⁶ Vaios Karavas, ‘Governance of Virtual Worlds and the Quest for a Digital Constitution’, *Governance of Digital Game Environments and Cultural Diversity* (Edward Elgar Publishing 2010).

⁷ Edoardo Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76, 93.

⁸ 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, 11. See also Claudia Padovani and Mauro Santaniello, ‘Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System’ (2018) 80 *International Communication Gazette* 295; ‘Recommendation CM/REC 4 on the Protection of Human Rights with Regard to Social Networking Services’ (Council of Europe 2012) <<https://www.refworld.org/docid/5069805e2.html>> accessed 29 May 2023.

⁹ Nicolas Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) 4 *Social Media and Society* 4.

¹⁰ Edoardo Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76, 89.

¹¹ Gregorio (n 3) 290–296.

¹² Moritz Schramm, ‘Where Is Olive? Or: Lessons from Democratic Theory for Legitimate Platform Governance’ (*The Digital Constitutionalist*, 23 January 2022) <<https://digi-con.org/where-is-olive-or-lessons-from-democratic-theory-for-legitimate-platform-governance/>> accessed 28 May 2023.

¹³ Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart Publishing 2021).

¹⁴ Angelo Jr Golia, ‘The Critique of Digital Constitutionalism’ (2022), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2022-13

inability to confront the reality that “good-faith actors may interpret [...] high-level rights in radically different ways”.¹⁵ However, and without disregarding the value and importance of the aforementioned critiques, they too rely on the assumptions that Digital Constitutionalism has established. In other words, they are internal critiques which seem to accept the premises of the project and only challenge it by using its native intellectual and normative tools.

Other critiques are closer to this note. Costello, for example, has exposed the normative incoherence of Digital Constitutionalism and warned against the practice of capitalising on constitutionalism’s association with legitimacy and the rule of law without an in-depth analysis of the governance structures required for their materialisation;¹⁶ Similarly, in reviewing Suzor’s book entitled ‘*Lawless: The Secret Rules That Govern Our Digital Lives*’ Maroni warns against the risk of ‘normalising the language of constitutionalism when addressing a context that is not characterised by its traditional (and normative) standards’.¹⁷ Relatedly, Griffin has provided an insightful critique of multistakeholder and rule of law approaches, including Digital Constitutionalism, to social media regulation. Griffin argues that unless the structural pillars of the digital economy are challenged, such approaches risk legitimising power asymmetries and insulating corporate practices from democratic control and accountability.¹⁸ Taking stock of these critiques, this note attempts to expose the fallacies and illusions of the project of Digital Constitutionalism and to suggest alternative scholarly pathways and methodological foundations for a critique of power in the global political economy of technology.

III. The problems with Digital Constitutionalism

Like many other projects, the project of Digital Constitutionalism tells a particular story, narrating the problems that it identifies and aims to address in particular ways that cater to its intended interventions. And like many other ‘constitutionalisms’, Digital Constitutionalism is a project rooted in and fuelled by a kind of institutional hope that seeks to strike a power equilibrium between competing actors in political and economic conflict. In seeking this equilibrium however, crucial assumptions are made, and serious questions are being ignored or oversimplified.

A. *Imagining constituency but ignoring its material reality*

Digital Constitutionalism emerges out of the rising power of private actors in governing and controlling the availability and exercise of human rights in the era of digital technologies where social relations ‘are mediated by a mix of public authorities and private ordering’.¹⁹ Reactionary mechanisms of the private sphere such as the Facebook Oversight Board along with new legal instruments such as the General Data Protection Regulation (GDPR) are all interpreted as examples of the path to constitutionalisation of the digital sphere.²⁰ In this reality, public actors and private legal entities, through the means of law and code respectively, form and produce the ‘constituent power’ of the digital constitution. Political representation by the people (i.e. collective entities or constitutional movements mobilising for the X or Y right and entitlement) in the digital world is either ignored or assumed to be functioning autonomously within the established institutional mechanisms of/political action (i.e. parliament, civil society etc). As a result, no conflict is treated as *political* conflict, unless it transposes to a debate within the legitimate constitutional space. This is because Digital Constitutionalism seems to be premised on the entirely misguided idea that the figure of the traditional subject/actor of a given constitutional order is *analogous* to the regular user of the digital world. But such a similarity can only be purely semantic.

¹⁵ Blayne Haggart and Clara Iglesias Keller, ‘Democratic Legitimacy in Global Platform Governance’ (2021) 45 Telecommunications Policy <<https://www.sciencedirect.com/science/article/pii/S0308596121000562>> accessed 17 February 2023.

¹⁶ Róisín Á Costello, ‘Faux Ami? Interrogating the Normative Coherence of “Digital Constitutionalism”’ (2023) 12 Global Constitutionalism 326.

¹⁷ Marta Maroni, ‘Lawless: The Secret Rules That Govern Our Digital Lives - Review’ (2021) 12 European Journal of Risk Regulation 264.

¹⁸ Griffin, ‘Public and Private Power in Social Media Governance’ (n 2).

¹⁹ Gregorio (n 3) 6.

²⁰ *ibid* 65.

For although the early Internet and its standardisation could -with a stretch of the imagination- perhaps resemble a collective endeavour undertaken by *contributors* to a *commons* or by *prosumers* dedicated to a common goal (end-to-end encryption, freedom of expression etc), the modern methods of material production that sustain our digital infrastructures (cloud infrastructures, data centres, operating systems) is conditioned on treating individual users as the necessary source of (data and computational) labour for their profit-making projects;²¹ a kind of ‘subject’ that does not quite fit the straightjacket of the liberal, autonomous, and rational subject we imagine as foundational pillar of modern democracies.²² By ignoring this dimension and by resembling the passive ‘users’ of online services with citizens bearing norm-shaping potential in a constitutional order, Digital Constitutionalism fails markedly in explaining the ‘subjectivation’ process of its imagined constituency (who is to be treated as constitutional subject and why?). It will thus come as no surprise that the project focuses more on treating and framing the constituent role of corporate power as ‘constitutional’ instead of exploring the extractive nature of the social relations that this form of power congeals and the ‘objectification’ of the individual that it necessarily entails.²³

From there on, almost inevitably, the endeavour to theorise the concept of Digital Constitutionalism is led to the popular normative and descriptive construct of the ‘social contract’. De Gregorio writes: ‘These digital spaces governed by online platforms are [based on] vertical contractual relationships resembling a new *pactum subjectionis* or digital social contract’.²⁴ In the same context, Duarte et al. observe that ‘[liberal, societal, and global] perspectives on digital constitutionalism underline a path towards a new compromise, or social contract, in the digital age where the limitation of organized power and fundamental rights are passed beyond the public-private dichotomy’.²⁵

Social contract thinking has been criticised for distorting the origins of the constitutional society by tracing its lineage to a pre-political and ‘natural’ order.²⁶ But social formation and constitutional order, the argument goes, emerge not from a state of nature but from ‘the convergence of certain political and social forces upon a series of basic political aims and a capacity to affirm them’.²⁷ However, one does not even have to accept the merit of this critique to understand the futility of migrating ‘social contract thinking’ to the digital realm. For contrary to the complex historical, social, and institutional processes that instigate the political dynamics necessary for the striking of compromises as part of the collective negotiation of a social contract, the range of choices that people of the digital world usually have as well as the remit of rights and entitlements that they are expected to enjoy are resolved on the basis of a pre-configured set of options. You can agree, you can disagree, but you cannot push back and challenge the terms and conditions of this contract. Digital constitutionalists seem to be aware that the

²¹ See, generally, Jonathan L Zittrain, ‘The Generative Internet’ (2006) 119 *Harvard Law Review* 1974; Yochai Benkler, *The Wealth of Networks : How Social Production Transforms Markets and Freedom* (Yale University Press 2006); Julie E Cohen, ‘From Lex Informatica to the Control Revolution’ (2022) 36 *Berkeley Technology Law Journal*. For norm-shaping discourses and practices in Internet standardisation see Niels ten Oever, *Wired Norms: Inscription, Resistance, and Subversion in the Governance of the Internet Infrastructure* (University of Amsterdam 2020); Corinne JN Cath and Luciano Floridi, ‘The Design of the Internet’s Architecture by the Internet Engineering Task Force (IETF) and Human Rights’ [2016] *Science Engineering Ethics*; Roxana Radu, *Negotiating Internet Governance* (Oxford University Press 2019).

²² Geoff Gordon, Rebecca Mignot-Mahdavi and Dimitri van den Meerssche, ‘The Critical Subject and the Subject of Critique in International Law and Technology’ (2023) 117 *AJIL Unbound* 134; Marie Petersmann and Dimitri Van Den Meerssche, ‘On Phantom Publics, Clusters, and Collectives: Be(Com)Ing Subject in Algorithmic Times’ (2024) 39 *AI & Society* 107; Fleur Johns, ‘Governance by Data’ (2021) 17 *Annual Review of Law and Social Science* 53, 55.

²³ See also Griffin, ‘Public and Private Power in Social Media Governance’ (n 2).

²⁴ Gregorio (n 3) 114.

²⁵ de Abreu Duarte, De Gregorio and Golia (n 4).

²⁶ Marco Goldoni and Michael A Wilkinson, ‘The Material Constitution’ (2018) 81 *The Modern Law Review* 567, 590.

²⁷ *Ibid* 590-591

unilateral character of this social-contract preformation is a problem.²⁸ But they are wrong in assuming that they can fix it.

Because this is neither a problem to be fixed nor a normative ‘bug’ that can be resolved with better legislation. Vertical contractual relationships of/for capture and dependence form the core legal constructs that drive the economic model of information and computational production forward.²⁹ In other words, what Digital constitutionalists regard as a burgeoning ‘public sphere’ in anticipation of a new social contract amongst its autonomous spheres and subjects, is in fact a very mature and closely monitored line of globalised production that rests on the constitutive reassurance of private contracts to feed on the real-time interaction of its objects.³⁰ Using public-law-thinking to constitutionalise this reality does nothing to empower constitutional subjects but serves -at best- as an institutional stabiliser of the expectations flowing from their decades-long dispossession;³¹ Therefore, any parallel between theories of social contract and the material reality of the social and economic relations forged through modern digital technologies is an erroneous – and, oftentimes, intellectually lazy- oversimplification.

B. The public and the ‘exceptional’ private

Digital constitutionalists assume that there is something special with the power exerted by digital corporations that is distinct from the long history of transnational corporations. This bias is not new, nor is its critique.³² According to this narrative, it is the conditions of the ‘algorithmic society’, the ‘network society’, or the ‘information society’ that create a world in which ‘states are not the only source of concern any longer’.³³ Digital technologies, the argument goes, have ‘vested an extraordinary amount of power in non-state actors [...] to the detriment of traditional constitutional actors like nation states’.³⁴ The challenges to human rights and other fundamental principles that arise from digital power are thus largely couched as an exceptional phenomenon, “a peculiarity of the digital environment”,³⁵ that takes its particular shape from the features of this environment and from the information society that inhabits it.³⁶ The story of Digital Constitutionalism is thus presented as one with a particular history of transformation that begins with the Internet and intensifies with the rise of social media; a ‘digital political economy’ (re)produced by the ‘conflation between a “public sector” driven by digitalized

²⁸ Gunther Teubner and Angelo Jr Golia, ‘Societal Constitutionalism in the Digital World: An Introduction’ (2023) 30 *Indiana Journal of Global Legal Studies* 1, 8.

²⁹ For an introduction on the political economy of the information era see James R Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (Harvard University Press 1986); Philip E Agre, ‘Surveillance and Capture: Two Models of Privacy’ (1994) 10 *The Information Society* 101; Philip E Agre, ‘Real-Time Politics: The Internet and the Political Process’ (2002) 18 *The Information Society* 311.

³⁰ Similarly, Costello argues that contrary to the element of mutual accountability that underpins the state-citizen relationship ‘the foundational dynamic of the relationship between [platforms and users] is driven by a self-empowered and minimally constrained central authority and a consenting subject’, Costello (n 16) 339.

³¹ Dimitri Van Den Meerdsche, ‘Regulatory Integration Across Borders: Public–Private Cooperation in Transnational Regulation’ (2020) 31 *European Journal of International Law* 1561; Geoff Gordon, ‘International Institutions and Information Technologies: Transformations for a Higher Order System’ (2023) 92 *Nordic Journal of International Law* 31.

³² For an overview see Rebecca Crootof and BJ Ard, ‘Structuring Techlaw’ (2021) 34 *Harvard Journal of Law & Technology*; Meg Jones, ‘Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw’ (2018) 2 *Journal of Law, Technology & Policy*; Griffin, ‘Public and Private Power in Social Media Governance’ (n 2) 59.

³³ Gregorio (n 3) 1.

³⁴ Celeste (n 10); Edoardo Celeste, ‘Internet Bills of Rights: Generalisation and Re-Specification Towards a Digital Constitution’ (2023) 30 *Indiana Journal of Global Legal Studies* 25, 25.

³⁵ Celeste (n 10) 15.

³⁶ Celeste mentions that the very phenomenon of human rights violations by private actors is not ‘a novelty generated by digital technology’, and yet treats this phenomenon as exceptional in the case of digital technologies given the “massive diffusion” of these technologies and the dominant role of Big Tech. See also, Fitzgerald (n 5). In a similar spirit, Teubner and Golia write ‘[...] the normative effects stemming from digital technologies and algorithms need to be reconciled with the rule of law in a different way from what happened in “analog” constitutionalism’. See Teubner and Golia (n 28) 16.

power and a “private sector” driven by digitalized profit’.³⁷ It is a story of ‘sudden’ constitutional imbalance and disruption on account of the ‘digital revolution’ and the ‘dramatic growth in importance of the new information economy’.³⁸

Equally sudden then, is the narration of the legal *responses* to these transformations in the vocabulary of a ‘constitutional moment’.³⁹ The notion of a ‘constitutional moment’ originates in the work of Bruce Ackerman, described there as occurring when a political movement galvanizes to transform a political agenda by placing a new problem at its centre.⁴⁰ Constitutional moments are thus an exercise in popular sovereignty in the sense that their occurrence is defined by the success of a *popular* effort—rather than that of juridical or other elites—‘to impress its diagnosis of ‘the public and its problems’ on the on-going debate’.⁴¹ The narrative of a constitutional moment accordingly describes a particular dynamic of immediacy and metamorphosis. This narrative implies, therefore, the past existence of an equilibrium between public and private power that has been disrupted by the advent of digital technologies, and now requires addressing through the means of (constitutional) law. This disruption becomes evident by de Gregorio when he uses the term ‘rule of tech’ to differentiate the normative sphere and impact of AI from that of the ‘rule of law’.⁴²

What factors shape this particular—and quite popular—exceptionalist understanding of present ‘digital’ challenges? One pragmatic explanation might be that contrary to the case of commodity-manufacturing corporations whose effects for human rights appear mainly in postcolonial settings, in the case of digital corporations these effects also reach users in the Global North.⁴³ In other words, ‘digital’ private power triggers our human-rights reflexes because it moves threat closer to home. Methodologically, this exceptionalism may also be rooted in the accepted dialectic distinction between the ‘public’ and the ‘private’ or ‘politics’ and the ‘market’. Put differently, our institutional alarms are activated because the ‘digital private’ has violated the sacrosanct space reserved by ‘our’ rule of law for the state and/or ‘the public’. However, the uncritical acceptance of the ‘public vs private’ division fails to question the extent to which this division holds any true meaning in the global political economy generally, and in the ‘digital world’ in particular.

This is because such an acceptance conditions us to conceptualise agents on either side of this distinction hierarchically, and as having certain, inalienable qualities; the one, for example, seeking power, whereas the other, profit.⁴⁴ But this is too often not the case, especially in the context of the global political economy of technology that renders certain states in demand of labour, investment, and materials from other states and geographies thereby activating a vicious cycle of private ordering that ends up consolidating value-laden productions logics and unequal dynamics of value distribution.⁴⁵ In parallel, digital corporations work closely with state authorities to facilitate and often (re)shape functions that traditionally belong under the auspices of states by leveraging their technological capacity in domains of expertise that are different to theirs.⁴⁶ Private corporations are often regarded through this dialectical lens as purely economic institutions, in spite of the fundamental public regulatory and political functions they assume in influencing the work of governments and in injecting arithmetic

³⁷ Teubner and Golia (n 28) 15.

³⁸ Mark A Lemley, ‘The Constitutionalization of Technology Law’ (2000) 15 Berkeley Technology Law Journal 529, 531.

³⁹ Celeste (n 10) 77; Celeste (n 34) 42.

⁴⁰ Bruce Ackerman, ‘A Generation of Betrayal?’ (1997) 65 Fordham Law Review 1519.

⁴¹ *ibid.*

⁴² Giovanni De Gregorio, ‘The Normative Power of Artificial Intelligence’ (2023) 30 Indiana Journal of Global Legal Studies 55.

⁴³ I owe (particularly) this and other arguments developed in this paper to conversation with Dr Neli Frost.

⁴⁴ Teubner and Golia (n 28) 6.

⁴⁵ Petros Terzis, ‘Law and the Political Economy of AI Production’ (2023) 31 International Journal of Law and Information Technology 302. See, generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

⁴⁶ See for example Tamar Sharon, ‘From Hostile Worlds to Multiple Spheres: Towards a Normative Pragmatics of Justice for the Googlization of Health’ (2021) 24 Medicine, Health Care and Philosophy 315; Tamar Sharon, ‘When Digital Health Meets Digital Capitalism, How Many Common Goods Are at Stake?’ (2018) 5 Big Data & Society.

logics and modes of calculable governance.⁴⁷ The role of technical expertise that sits in-between state and corporation and of generative technologies of ‘form-finding’ and ‘pattern-making’ are crucial in this process as they seek to bring certainty and predictive competence to a market that is -imagined as- inherently uncontrollable, free, and undomesticated.⁴⁸

Scholars in the realm of Digital Constitutionalism are aware of this fallacy but try to remedy it with the wrong tools. Golia was first -within the strand of Digital Constitutionalism- to highlight the methodological problem of assuming a clear-cut distinction between the ‘public and the private’.⁴⁹ Yet in a more recent article entitled ‘*Perspectives on Digital Constitutionalism*’ co-authored with Duarte and De Gregorio, the authors attempt to move beyond the public-private divide and theorise Digital Constitutionalism as a framework capable of encompassing a ‘network system of normativities, producing standards and norms coming from liberal, social and global perspectives’.⁵⁰ In rejecting the rigid public-private divide based on the theory of societal constitutionalism, the authors call for Digital Constitutionalism to encompass the plethora of normativities that arise from ‘autonomous societal orders’ acting within the technology realm. Digital Constitutionalism’s normativity is therefore imagined as a canvas of various principles emerging amongst others from state (and Union) legislation, international treaties, bilateral state agreements, NGO reports, corporate strategies, industry codes of best practices and standards, B2C contracts, privacy policies, ‘terms and conditions’ agreements, decisions made by industry bodies such as the Facebook Oversight Board, and other related documents drafted and promoted by different actors or so-called ‘autonomous systems’ of social ordering.

Lacking a clear identity but sharing the ‘ambition to build legal instruments that protect and constrain the dynamics of the digital code’ Digital Constitutionalism thus becomes what Global Constitutionalism did not manage to transform to.⁵¹ A conceptual framework, a theory of everything, to encompass, and be formed by whatever bears (or resembles) the institutional capacity to produce value orders and normative-like content for the digital world.⁵² Yet, to scholars of the platform economy and the political economy of technology more broadly, the promise of a Habermasian digital world where processes of deliberative practises among different actors will ultimately produce a *whole* that is better from the sum of its parts, may seem -at best- bizarre and -at worst- an opportunistic symbolism that wishes to capitalise on the normative load of concepts such as ‘openness’, ‘inclusion’, and ‘democracy’.

To this end, contrary to what Digital Constitutionalism is premised to assume, those aspects of the digital world that are currently regulable and by extension open to democratic dialogue (whatever this might mean in material terms), are those aspects that public-private actors designate as such.⁵³ For example, we do not get to decide whether we want ad-driven social media but whether this or that content moderation strategy is more effective; we do not get to decide whether we want mobile

⁴⁷ See, indicatively, Agathe Balayn and Seda Gürses, ‘Beyond Debiasing: Regulating AI and Its Inequalities’ (European Digital Rights (EDRi) 2021) <available at: https://edri.org/wp-content/uploads/2021/09/EDRi_Beyond-Debiasing-Report_Online.pdf> accessed 8 November 2023; Tamar Sharon and Raphaël Gellert, ‘Regulating Big Tech Expansionism? Sphere Transgressions and the Limits of Europe’s Digital Regulatory Strategy’ [2023] *Information, Communication & Society* 1; Linnet Taylor, ‘Public Actors Without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector’ (2021) 34 *Philosophy & Technology* 897.

⁴⁸ Poul F Kjaer, ‘The Law of Political Economy: An Introduction’ in Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 22; Luciana Parisi, *Contagious Architecture: Computation, Aesthetics, and Space* (The MIT Press 2022); Fleur Johns and Caroline Compton, ‘Data Jurisdictions and Rival Regimes of Algorithmic Regulation’ (2022) 16 *Regulation & Governance* 63.

⁴⁹ Angelo Jr Golia, ‘Critique of Digital Constitutionalism: Deconstruction and Reconstruction from a Societal Perspective’ [2023] *Global Constitutionalism* (First View) 1.

⁵⁰ de Abreu Duarte, De Gregorio and Golia (n 4).

⁵¹ Teubner and Golia (n 28) 14.

⁵² Isabel Feichtner and Geoff Gordon, ‘Constitutions of Value: An Introduction’, *Constitutions of Value* (Routledge 2023).

⁵³ See, relevantly, Neli Frost, ‘The Global “Political Voice Deficit Matrix”’ (2023) 21 *International Journal of Constitutional Law* 1041.

applications to track us when we browse the web, but whether this or that cookie-banner is compliant with the GDPR; and we do not get to decide whether OpenAI can build a proprietary Large Language Model by monetizing the public domain, but whether people can opt-out from such extraction by filling out a form. And the reason we do not get to decide all these things is because our politics operate in a discursive and normative space whose dialectics is pre-set by its materials (i.e. hardware-software modalities) which are themselves configured by market-driven logics, the dynamics of venture capital, and an uncritical policy fear of stalling whatever can be pitched as ‘innovation’. Because of how commonsensical all these factors have managed to become, generating the preconditions for building computers, smartphones, or data centres differently, always manages to stay ‘unthinkable’. It is as if we are trying to constitutionalise a new polity whilst learning from a slide deck what is ‘constitutionalisable’ and what is not.

This is because the interplay between the ‘public’ and the ‘private’ in the digital world is *by design* of this very world restricted from engaging with questions about the legal and political ways to change and transcend it. To put it differently, societal constitutionalism (and by extension Digital Constitutionalism) would have been a really helpful analytic tool for understanding, shaping, and intervening in the operation and dialectics of various autonomous societal actors of the digital realm, only if these actors were given a seat at the product design table of (indicatively) Google, Apple, Microsoft, Amazon, or Meta; and only if these companies had workers’ councils at place to safeguard mass participation in decision-making; and only if the ownership status of digital infrastructures and the assetification of our data and devices were open to being discussed, challenged, and remade by the citizens-users. Unthinkable, right?

So, if the ‘public vs private’ is legal anachronism and the ‘(beyond) public and private’ leads to theories of everything, what remains? Digital constitutionalists felt so compelled to answer the riddle of the relationship between the public and the private in the digital world, that they forewent to question why answering such question is even necessary, or indeed relevant. For as this note tries to demonstrate the crucial intellectual and normative task shall not be so much about moving *beyond* the ‘public’ and the ‘private’ but about exploring and understanding the influence that such distinction has had on our thinking patterns, mental maps, and regulatory models. To this end, technologies of calculation and measurement have for decades now moulded organisational hierarchies and routines of state and corporate practices that altogether fashioned methods and strategies for/of legibility which were themselves then transformed into modes of (un-)governance and ordering.⁵⁴ Understanding the impact that these modes have had on the ways we think about the problems that law is believed to be destined to solve, precedes any questions of whether a form of power shall be ‘public’ or ‘private’. In other words, studying how we are governed is a necessary precondition of any intellectual endeavour to problematise the public or private destiny of/for such governance. In even less words, the problem with Digital Constitutionalism is that it aspires to develop a theory for governance without having, or knowing how to build a theory of society.

In this direction, the problems of rights that digital constitutionalists aim to address are better situated and understood within a narrative of historical continuity and long struggle rather than one of sudden transformation, compressed timeframes, and (digital) constitutional moments. From this perspective, the challenges faced by the ‘digital society’ are not triggered by technology and technological affordances *in abstracto*, but are rather the outcome of evolving dynamics between states and corporations in the global arena that have quite a lengthy history. This history traces back at least to the co-constituted evolution of international and corporate law in the nineteenth century and connects to the development of the computing industry from within the ‘closed world’ of the Cold War in the twentieth century;⁵⁵ an evolution that included technological innovation alongside and in tandem with

⁵⁴ Dimitri Van Den Meerssche and Geoff Gordon, “‘A New Normative Architecture’ – Risk and Resilience as Routines of Un-Governance” (2020) 11 *Transnational Legal Theory* 267; Johns (n 22); Fleur Johns, ‘From Planning to Prototypes: New Ways of Seeing Like a State’ (2019) 82 *The Modern Law Review* 833. See, generally, James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1999).

⁵⁵ See, indicatively, Paul N Edwards, *The Closed World: Computers and the Politics of Discourse in Cold War America* (MIT Press 1997).

developments in the international law regulating *state* conduct whilst imposing global standards of/for inclusion in the family of ‘civilised nations’ and the transition to private incorporation.⁵⁶ Towards the end of the twentieth century, this power of transnational corporations has sparked heated debates amongst international legal (and relations) scholars on international law’s (in)capacity to hold private corporations accountable for their involvement in human rights violations.

This debate continues to this date, admittedly without much success. Exploring the reasons of these failures instead of reframing the questions for the exceptional sake of the epistemic community of Law and Technology, apart from being necessary, can also prove intellectually revelatory. A possible explanation for this stalemate in the field of international law—which similarly characterizes Digital Constitutionalism—relates precisely to the field’s failure to move beyond a regulatory approach underpinned by traditional distinctions of modes of ordering.⁵⁷ Another, closely linked explanation might be the very idea of the ‘corporate form’ and its natural role in establishing relations of power and organisation in our society.⁵⁸ Whatever its reasons of failure might be, the presumption of states and corporations as different *kinds* of actors has not only set conceptual limits on the ability to view and understand the political and regulatory power of corporations (whether digital or not) in influencing governments and their actions,⁵⁹ but also, masked the historical co-development of, and ‘symbiotic relationship’ between, these two actors as an explanatory force that clarifies the *legal* trajectory of corporations’ consolidation of power on the global stage.⁶⁰ Lacking such historical vision, Digital Constitutionalism ends up -almost inevitably- framing its *problematique* as follows: ‘Digitality itself is the new communicative medium against whose externalities constitutional protection is needed’.⁶¹

C. *The absence of law, its reemergence, and obvious importance*

This brings us to the third and closely linked problem with Digital Constitutionalism, that relates to the assumption that the disproportional power and authority of digital corporations to wield technology in order to determine and shape the rights and interests of individuals, happened in the absence of the law. De Gregorio notes that the fragmentation of legal regimes and the lack of holistic responses “have left enough space for private actors to turn their freedoms into powers based on the processing of vast amounts of personal data on a global scale”.⁶² At the same time, he observes in passive language, that “[t]he power of lawmakers has been scaled back”⁶³ and that “[t]he consolidation of the rule of tech has led to the contraction of the spaces for the rule of law”.⁶⁴ Golia’s more nuanced approach emphasises the normative interplay between code and law but remains anchored in a vision for the transformative potential of the latter within an imaginary ‘conflict-of-law’ between users-subjects and ‘digital ‘governors’ such as Google and Meta’.⁶⁵ Relatedly, strategic litigation (even before Meta’s Oversight Board) is imagined as an integral part of the (digital) constitutionalising process.⁶⁶

The idea that technology evolved in the absence of the law further boosts Digital Constitutionalism’s ambitions on the avalanche of EU’s legislation in the digital realm. In this context,

⁵⁶ Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (Oxford University Press 2020).

⁵⁷ *Ibid.*

⁵⁸ Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill Nijhoff 2019).

⁵⁹ Neli Frost, ‘The Corporate Politicus’ (*Centre for Human Rights and Global Justice*, 5 May 2023) <<https://chrgj.org/2023/05/05/the-corporate-politicus/>> accessed 28 May 2023.

⁶⁰ Doreen Lustig, *The Enduring Charter: Corporations, States, and International Law, in The Law and Logics of Attribution: Constructing the Identity and Responsibility of States and Firms* (Melissa J. Durkee ed, forthcoming)

⁶¹ Teubner and Golia (n 28) 4.

⁶² Gregorio (n 3) 52. Later in his book de Gregorio seems to acknowledge the constructive role of contract law in instituting asymmetric relationships of power but eventually equates this form of power with the discretion that an absolute power can exercise over its subjects. See for example Gregorio (n 3) 116

⁶³ *ibid.* 9.

⁶⁴ De Gregorio (n 42) 16.

⁶⁵ Golia (n 49) 29.

⁶⁶ Angelo Golia, ‘The Transformative Potential of Meta’s Oversight Board: Strategic Litigation within the Digital Constitution?’ (2023) 30 *Indiana Journal of Global Legal Studies* 325.

the AI Act, the Digital Services Act, the Data Act, the Data Governance Act, the Digital Markets Act, and others, are all celebrated as attempts to reclaim that which has been lost and pursue that which we deserve.⁶⁷ De Gregorio writes: ‘[t]he objective [of the AI Act] is not only to promote the development of artificial intelligence technologies in Europe to foster the development of the internal market but also to protect European values’.⁶⁸ Similarly, in a piece entitled ‘Europe’s Digital Constitution’ that weirdly cites none of the scholars that set the agenda of Digital Constitutionalism in motion, Bradford argues that copyright, antitrust, data protection and similar regulations ‘amount to Europe’s digital constitution, designed to steer the digital economy towards European values’.⁶⁹

But contrary to what digital constitutionalists seem to assume, the accumulation and consolidation of power in the hands of multinational corporations did not and does not happen in the absence of (a holistic, non-fragmented) law. Rather, law, including general principles and sector-specific regulations, *by* public institutions plays a central role in it.⁷⁰ To give but a few examples, Google acquired Doubleclick to establish its monopoly in ad-delivery *because* the EU Commission gave the green light;⁷¹ Digital advertisers thrived even (and especially) in the post-GDPR era *because* the regulation explicitly acknowledged ‘direct marketing’ as a legitimate basis for data collection and processing;⁷² commercial value is and will remain the dominant logic of/for content curation and platform visibility *because* of the Digital Services Act;⁷³ Platform workers do not, and will not enjoy a homogenous presumption of employment across the EU *because* of the Platform Directive;⁷⁴ law enforcement is and will remain able to deploy real-time facial recognition almost indiscriminately *because* of the AI Act.⁷⁵

This constitutive role of law in the political economy of technology becomes evident once the phenomenon of digital corporation is historicized as part of a longer chronicle. As Lustig argues, ‘international law doctrines in the context of labour, natural resources, investment, and criminal responsibility directly informed the regulation of the private business corporation in global settings’.⁷⁶ Likewise, according to Cohen in the more recent context of Big Tech, the role of law was, and still is, central and formative in constructing and permitting the proliferation of technologies and business practices that end up institutionalising the standards based on which people eventually negotiate(d) their rights and entitlements.⁷⁷

Apart from constitutive, however, law has been -at times- irrelevant. This is because corporations can afford not to comply with the law. Apple can work around an obligation to allow

⁶⁷ Anu Bradford, ‘Europe’s Digital Constitution’ (2023) 64 *Virginia Journal of International Law* 1; De Gregorio (n 42).

⁶⁸ De Gregorio (n 42) 23.

⁶⁹ Bradford (n 67) 63.

⁷⁰ Amy Kapczynski, ‘The Law of Informational Capitalism’ (2020) 129 *Yale Law Journal* 1460; Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019).

⁷¹ Google/DoubleClick, Case No COMP/M.4731, 927 [2008]

⁷² Regulation (EU) 2016/679, Recital 48

⁷³ Rachel Griffin, ‘The Law and Political Economy of Online Visibility. Market Justice in the Digital Services Act’ (2023) 2023 *Technology and Regulation* 69; Rachel Griffin, ‘EU Platform Regulation in the Age of Neo-Illiberalism’ (29 March 2024) <Preprint available at <https://papers.ssrn.com/abstract=4777875>> accessed 12 April 2024.

⁷⁴ Pieter Haeck, ‘EU Finalizes Gig Work Rules after Countries Back Deal’ *Politico* (11 March 2024) <<https://www.politico.eu/article/european-union-gig-work-labor-estonia-greece-germany-france/>> accessed 12 April 2024.

⁷⁵ ‘EU Set to Allow Draconian Use of Facial Recognition Tech, Say Lawmakers’ (*POLITICO*, 16 January 2024) <<https://www.politico.eu/article/eu-ai-facial-recognition-tech-act-late-tweaks-attack-civil-rights-key-lawmaker-hahn-warns/>> accessed 11 April 2024; ‘EU Parliament Votes on AI Act; Member States Will Have to Plug Surveillance Loopholes’ (*AlgorithmWatch*) <<https://algorithmwatch.org/en/eu-parliament-votes-on-ai-act/>> accessed 11 April 2024.

⁷⁶ Doreen Lustig, ‘The Enduring Charter: Corporations, States, and International Law’ (30 August 2021) <<https://papers.ssrn.com/abstract=3933506>> accessed 28 May 2023.

⁷⁷ Cohen (n 70); Kapczynski (n 70).

different App stores and make it exceptionally hard for users to download alternative marketplaces despite what the Digital Markets Act aspires to achieve;⁷⁸ Microsoft can scrap copyrighted material from -literally- the entire web reassured by the plausibility of an *ex post* claim for ‘fair use’ or ‘no actual damages suffered’.⁷⁹ Google can build its new ChatGPT-like search engine without paying too much attention on how model memorisation will impact the exercise of the right to be forgotten.⁸⁰ In such cases, law remains not just an afterthought, but an almost reassured future supplement of technological projects pending the market success of a particular application. Nowhere else is this reality better captured than the ChatGPT-4’s foundational paper (‘System Card’) which explicitly acknowledges that at the time of release ‘many risks still remain’.⁸¹

Coupled with that, due to the framing of some problems as ‘technical’ matters to be dealt with by ‘coding experts’, ‘technical’ changes in the hardware and software stack of our devices and digital environments, are being rolled out without any kind of legal considerations thereby fixing realities that states then have to respond to. For example, a smartphone model shipped with proximity-tracing sensors or the launch of an API that controls access to information and computational resources, both install and encode novel generative capabilities for its operators whilst creating novel questions of legitimacy and power.⁸² This form of infrastructural power cannot be theorised and challenged in its totality with the intellectual and normative toolkit of platform governance, let alone that of Digital Constitutionalism. Castells calls this the ‘network-making power’ in communications and, building on it, Cohen demonstrates how corporate actors use their network-making power to “reinforce their dominance over the conditions of data collection and knowledge production”.⁸³ The power of (re)programming the rules and capabilities of a global network of information and computation formed by constantly-on personal devices and cloud ecosystems is normatively significant but mainstream legal and policy thinking does not seem to be able -or willing- to challenge it in any way or form.⁸⁴

Facing this reality should give a moment of pause and reflection to whomever envisions all-encompassing legal frameworks for the regulation of the digital society. For if traditional legal tools and thinking models for regulating technology have contributed (or did not bother to) to the situation we are in, perhaps then adding another ‘traditional’ layer on top might not be, theoretically and methodologically, the best way forward.

IV. The price of Digital Constitutionalism

The problem with Digital Constitutionalism is that it makes sense; we can all somehow see the problem it tries to solve. It is almost natural for people to start thinking about ways to deal with the power of digital corporations by utilising frameworks and concepts that they are familiar with. ‘We tend

⁷⁸ Callum Booth, ‘A First Look at Europe’s Alternative iPhone App Stores’ (*The Verge*, 3 April 2024) <<https://www.theverge.com/24100979/altstore-europe-app-marketplace-price-games>> accessed 12 April 2024.

⁷⁹ Cade Metz, ‘OpenAI Says New York Times Lawsuit Against It Is “Without Merit”’ *The New York Times* (9 January 2024) <<https://www.nytimes.com/2024/01/08/technology/openai-new-york-times-lawsuit.html>> accessed 12 April 2024; ‘OpenAI Claims New York Times “Hacked” ChatGPT to Build Copyright Lawsuit’ *The Guardian* (27 February 2024) <<https://www.theguardian.com/technology/2024/feb/27/new-york-times-hacked-chatgpt-openai-lawsuit>> accessed 12 April 2024.

⁸⁰ Valentin Hartmann and others, ‘SoK: Memorization in General-Purpose Large Language Models’ (arXiv, 24 October 2023) <<http://arxiv.org/abs/2310.18362>> accessed 15 March 2024; Dawen Zhang and others, ‘Right to Be Forgotten in the Era of Large Language Models: Implications, Challenges, and Solutions’ (arXiv, 21 September 2023) <<http://arxiv.org/abs/2307.03941>> accessed 12 April 2024.

⁸¹ OpenAI, ‘GPT-4 Technical Report’ (arXiv, 16 March 2023) <<http://arxiv.org/abs/2303.08774>> accessed 22 March 2023.

⁸² See, indicatively, Petros Terzis, ‘Building Programmable Commons’ (2023) 15 *Law, Innovation and Technology* 583.

⁸³ Manuel Castells, *Communication Power* (Second Edition, Oxford University Press 2013); Cohen (n 70) 235.

⁸⁴ For a discussion on programmability and computational infrastructures see Seda Gürses and Roel Dobbe, ‘Programmable Infrastructures’ (*TU Delft*) <<https://www.tudelft.nl/tbm/programmable-infrastructures>> accessed 12 April 2024; Seda Gürses and Val Joris Hoboken, ‘Privacy after the Agile Turn’ in Jules Polonetsky, Omer Tene and Evan Selinger (eds), *Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2017); Martha Poon, ‘Corporate Capitalism and the Growing Power of Big Data: Review Essay’ (2016) 41 *Science, Technology, & Human Values* 1088; Terzis (n 82).

to fill voids with what we know’ writes Krisch in order to explain the gravitational pull of the similar project of *global* constitutionalism, and the—almost natural—tendency of lawyers to chart unfamiliar territory with analogies and concepts they know.⁸⁵

Teubner and Golia argue that ‘one of the most important and challenging tasks of digital constitutionalism is to make visible the convergence of different strands of scholarship that deal with the impact of digital technologies on fundamental rights, democracy and the rule of law’ especially for those cases which do not speak the language of constitutionalism.⁸⁶ But the framing concepts and ideas we choose matter because they serve as the vernaculars through which other people seek to (co-)think and (co-)act. From people spending their finite time to read, develop, and critique, to institutions deciding to channel human and financial capital to ideas they perceive as worth pursuing, the sad truth of the matter, and one that the tech sector has experienced first-hand, is that framing concepts and ideas can, first and foremost, not only inspire, but also stall. Remember MIT’s Moral Machine?⁸⁷ That unscientific experiment that made headlines, whilst shaping discourses and funding projects for quite some time, merely by creating a gamified experiment out of the ‘trolley problem’;⁸⁸ or the entire ‘AI Safety’ and ‘Superintelligence’ discourses that have been sucking up discursive space, airtime, policy attention, and intellectual and research capital for their purely theoretical and speculative agendas at the expense of ideas rooted in the lived reality of being harmed by technologies? Besides, framing concepts serve as powerful representations, shaping the way people talk and think *about* and *with* them. As such, material experience (i.e. the extractive nature of the digital economy sustained by always-on devices) can be elbowed aside or come to seem as the natural order of things; an order of things that, in the case of Digital Constitutionalism, is structured and supported by a broad range of actors and institutions that is -in theory- open and accessible to all.

Precisely because of the performative and representational power of the concept of ‘constitutionalism’ (especially in Europe) and its strong potential to assert discursive power in the epistemic and policy field of Law and Technology, digital constitutionalists shall critically reflect on the history of other ideas in the field of Law and Technology and their impact. Because, if they do not do so, Digital Constitutionalism may come at the price of smoothing out the dialectics of the field for the sake of developing a false sense of homogeneity and unity rooted in legitimised symbolisms. That is, people might end up discussing -just like Teubner and Golia presage- the ‘public-private’ divide; or the changing media landscape in Europe; or jurisprudence and code-driven law; or the regulation of AI and online platforms *in the context of*, and *with reference to* the a-historical project of Digital Constitutionalism thereby reinforcing its shaky foundations and wrong assumptions.⁸⁹ Indicatively, a recent report for the European Parliament entitled ‘European Declaration on Digital Rights and Principles’ builds on, and extensively cites Digital Constitutionalism as a framework to understand the

⁸⁵ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (1st edn, Oxford University Press 2010) 28.

⁸⁶ Teubner and Golia (n 28) 14.

⁸⁷ Available at <https://www.moralmachine.net/>

⁸⁸ For an excellent critique see Abby Everett Jackques, ‘Why the Moral Machine Is a Monster’, *WeRobot* (2019).

⁸⁹ For example, Zalnieriute’s holistic critique of the self-regulatory characteristics and nature of Digital Constitutionalism along with the author’s set of progressive policy proposals for democratisation of digital infrastructures, are made as a call for a ‘digital constitution’ freed from an overreliance on procedural matters as imagined by mainstream Digital Constitutionalism. See Monika Zalnieriute, ‘Against Procedural Fetishism: A Call for a New Digital Constitution’ (2023) 30 *Indiana Journal of Global Legal Studies* 227. Similarly, albeit with no explicit link to Digital Constitutionalism but published in the context of a related conference, Vatanparast insightfully and persuasively presents the case for digital money as a polycentric tool for achieving social and distributive justice by drawing upon lessons from societal constitutionalism. See Roxana Vatanparast, ‘Digital Monetary Constitutionalism: The Democratic Potential of Monetary Pluralism and Polycentric Governance’ (2023) 30 *Indiana Journal of Global Legal Studies* 165.

shift ‘from a market- to a value-based approach’ in digital transformation as envisioned by the European Commission.⁹⁰

But as this note tries to highlight, Digital Constitutionalism’s language, grammar, and aura are highly misleading as analytical descriptors of, and compasses for the political economy of technology. For despite its holistic approach, Digital Constitutionalism fails spectacularly in promising different visions for our digital future(s) and channels intellectual capital and resources towards an inherently limited agenda. De Gregorio argues that Digital Constitutionalism as a frame of principles centred on human dignity ‘would not mean intervening in the market’.⁹¹ Instead, the *locus* of enquiry should be, the argument goes, on the role of private actors in governing social infrastructures, rather than their ‘bigness’.⁹² Golia on the other hand, who represents a more ‘social(ist)’ approach to Digital Constitutionalism, calls for more interventionist approaches (including taxes on data collection, and corporate governance strategies that will allow collective co-decisioning).⁹³

Whatever the result of its inner contradictions, Digital Constitutionalism ends up a framework where legal and institutional conflicts over ideas, rights, and entitlements represent at best a negotiation of interests within an already prescribed political order rather than a deep-seated clash of ideas over the kind(s) of the digital world(s) people imagine and the kind(s) of computation(s) people want to see materialising in the world. In other words, instead of interrogating the very embeddedness and entrenchment of the power of corporations to materially and daily influence people’s lives (much like governments), the frame of Digital Constitutionalism does not only accept these power structures as a given, but also risks dragging in its shifting sands transformative projects and politics in the process. Yet, as David Kennedy helpfully concludes: ‘Calling a result of struggle ‘constitutional’ may also help make it so. Constitutionalisation – locking some things in, locking some actors out – is as much a strategy of engagement as a map or foundation for government’.⁹⁴

V. Moving forward: The payoffs of historicizing and contextualizing

That being said, one thing for which Digital Constitutionalism deserves merit is its intended scope. Within an overspecialised epistemic field and a fast-paced and agile industry ecosystem, Digital Constitutionalism seems to represent an intellectual endeavour to ‘thing big and ahead’ and see the larger picture. It promotes fundamental planning over legal reactionism, and foundational thinking over a culture of ‘legal sandboxing’. But for reasons explained above, the assumptions and methods that drive this endeavour forward require an intellectually generative antagonism.

Controlling the power of transnational corporations that develop information and computational technologies whilst keeping for themselves the privilege of updating their affordances, requires the creation of normative and intellectual tools capable of encompassing and confronting the power of programmability that these entities currently monopolise. Crucially, if one is serious about constitutionalising the framework within which powerful public and corporate actors decide and organise the features and functionalities of their infrastructures, one will necessarily need a seat at the product design table and their production logics. This, of course, is unrealistic because Big Tech will not allow it. But if getting a seat at their constitutive table seems unrealistic, radical, or unthinkable, digital constitutionalists need to think about the conditions under which they invite them to theirs. Because if they do not, and if they ignore (or accept as given) their standard-setting and capability-enabling power, then however a Digital Constitution might look like, it will end up freezing power asymmetries and immunising standards of corporate ordering from popular control and contestation. It

⁹⁰ Polona Car, ‘European Declaration on Digital Rights and Principles’ (European Parliamentary Research Service 2022) 6

<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733518/EPRS_BRI\(2022\)733518_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733518/EPRS_BRI(2022)733518_EN.pdf)>.

⁹¹ Gregorio (n 3) 294.

⁹² *ibid* 293, 294.

⁹³ Golia (n 49) 24.

⁹⁴ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016) 198.

will legitimise a decision-making table whose shape and seating order are already set without challenging its structural pillars or questioning how it was made, by whom, and to whose appetite. And this is so, without even getting to discuss the ontological possibility of a having a ‘constitutional table’ at the first place.

Paraphrasing Rose et al. what remains challenging is not so much an analytical project hooked on grand-theory, the state, globalisation and a few other catchwords, but to understand ‘how we are governed in the present, individually and collectively, in our homes, workplaces, schools, and hospitals, in our towns, regions, and nations’.⁹⁵ Contextualizing the problems that digital constitutionalists face within the broader arena of value chain capitalism and its infrastructures, its histories, and the professional practice that sustains them, helps us break free from the narrative of the public/private distinctions and the false imaginaries they spur.⁹⁶ This history testifies to the emergence of private transnational corporations on the world stage and the entrenchment of their position as disproportionately powerful economic and political actors that are mostly immune to constitutionalist interventions of the type now in vogue.⁹⁷ In reframing what is continuous, emphasis is placed on the role of law as a constant of ‘form-giving’ and form-shaping’ mechanism in the long-standing dynamics of ‘private’ and ‘public’ power, whereas the Internet and digital platforms are viewed as another means through which to observe and study these relations of power.⁹⁸ This view allows us to move from asking ‘Who has the power?’ to asking ‘Who makes power, for whom, and how?’. In other words, it allows us to better trace and map out relations of power in the global arena, to critically evaluate whether—as a fundamental matter—these relations of power should exist to begin with, and eventually, to contemplate the ontological possibility of surpassing them.

This is not to say, however, that Big Tech is just another group of transnational corporations acting across continents and jurisdictions. On the contrary, these entities and the infocomputational infrastructures they control have unique characteristics. From being able to roll out human-rights-relevant functionalities in our smartphones overnight, to determining through hardware-software assemblages the generative means and ends of computational production worldwide (meaning what people will be able to build with computers and what they will not), Big Tech’s development strategies pose questions and challenges that are quite novel even for the slightly older field of transnational/global law. Yet the methods for analysing and theorising their power in today’s political economy is not a simple matter or one to be dealt with by using misleading metaphors and false analogies. Instead, it requires a rigorous attention to the ways and logics based on which these corporations build and optimise their products, the value chains they control to sustain their operations, their organisational power and logistics, and -eventually- their political leverage.⁹⁹

⁹⁵ Nikolas Rose, Pat O’Malley and Mariana Valverde, ‘Governmentality’ (2006) 2 *Annual Review of Law and Social Science* 83, 100–101.

⁹⁶ A good starting point is perhaps Beniger (n 29). See also *Handbook on Global Value Chains* (Edward Elgar Publishing 2019); Horatia Muir Watt and others (eds), *Private International Law and Global Governance* (Oxford University Press 2014); Avner Offer, *Understanding the Private–Public Divide: Markets, Governments, and Time Horizons* (Cambridge University Press 2022); Ioannis Kampourakis, ‘The Market as an Instrument of Planning in Sustainability Capitalism’ [2023] *European Law Open* 1; Benedict Kingsbury and Nahuel Maisley, ‘Infrastructures and Laws: Publics and Publicness’ (2021) 17 *Annual Review of Law and Social Science* 353.

⁹⁷ Lustig (n 56).

⁹⁸ Kjaer (n 48); Geoff Gordon, Bernhard Rieder and Giovanni Sileno, ‘On Mapping Values in AI Governance’ (2022) 46 *Computer Law & Security Review* 105712, 5.

⁹⁹ Fenwick McKelvey and others, ‘Optimising Our Network Lives’ [2020] *AoIR Selected Papers of Internet Research*; Gürses and Dobbe (n 84); AI Now Institute, ‘ChatGPT And More: Large Scale AI Models Entrench Big Tech Power’ (*AI Now Institute*, 11 April 2023) <<https://ainowinstitute.org/publication/large-scale-ai-models>> accessed 11 August 2023; Jai Vipra and Sarah Myers West, ‘Computational Power and AI’ (*AI Now Institute*, 27 September 2023) <<https://ainowinstitute.org/publication/policy/compute-and-ai>> accessed 13 November 2023; Klaas Eller, ‘Transnational Contract Law’, *The Oxford Handbook of Transnational Law* (Oxford University Press 2020); Terzis (n 45).

In parallel, Tzouvala's exploration of international law as a field of study can serve as an exceptionally pertinent example of the formative role of legal tools, such as that of 'constitutionalism', in shaping the dialectics of the game as well as the role of lawyers as intellectuals of global capitalism at a time of shifts in the political economy of the digital world.¹⁰⁰ Lawyers in the field of Law and Technology shall critically reflect on their role and that of the discipline more broadly in today's extractive digital world and resist the temptation of uncritically recycling old concepts, thinking patterns, and mental maps of the existing, over-specialised legal profession. To do so, instead of following normalised professional and epistemic orbits, this notes argues that scholars in the field of Law and Technology shall engage in the hard task of understanding and theorising power in the digital world as part of the broader, and long-standing power asymmetries in the global economy with their attendant logics and forces and gravitate legal analysis towards more historical and material analyses of the modes of ordering that both law and technology transpire. Greta Baars observation for the field of international law is also relevant for the field of Law and Technology and as such worth citing in full:¹⁰¹

'Legal scholarship and practise have aided capital through the creation of epistemological separations (shielding) of certain issues-areas of law from others, through fragmentation, and the creation of public international law and a private international law realm in [international law]. The public has come to be governed by the logic of peace, and the private by the logic of the market, a situation that has come to appear self-evident and unproblematic'

Therefore, without disregarding potential benefits of cross-disciplinary interactions, this note suggests that perhaps what we need is not an amalgamation of various over-specialised lawyers under a new 'holistic' umbrella-term, as much as we need 'new' lawyers; lawyers that are willing to unlearn doctrines and explore histories of law that cemented power through techno-legal and infrastructural forms of professional practice in emerging contexts.¹⁰² In this direction, understanding political conflicts and economic asymmetries inscribed in law and code as struggles among different professionals and sources of expertise may inspire 'a personal encounter with incommensurate difference and a loss of confidence in the availability of resolution within the canons of acceptable professional discussion';¹⁰³ a form of intellectual reflection that will allow us to confront the failure of doctrinal coherence and to open up places and spaces for politics in the regulation and governance of our digital worlds; a mode of practice that will suggest when Law and Technology are relevant for dealing with a particular problem and -more importantly- when they are not.¹⁰⁴

Only then will we manage to see these worlds and our collective futures as open to being remade, with or without law's contribution. In the grand scheme of things, if viewed as the last attempt of mainstream legal thinking to hook onto something and claim its relevance in a (digital) world whose driving powers have for a long time now mastered the ability to win and avoid battles, Digital Constitutionalism will indeed be something worth (co-)thinking about.

¹⁰⁰ Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (Cambridge University Press 2020). For an insightful review, see Andrea Leiter, 'Perimeters of Possibility: Legal Imagination and Structural Indeterminacy in International Legal Thought' (2023) 14 *Transnational Legal Theory* 100.

¹⁰¹ Baars (n 58) 77.

¹⁰² Gordon, Rieder and Sileno (n 98) 7; Irina Domurath, 'The Politics of Interdisciplinarity in Law', *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022).

¹⁰³ Kennedy (n 94) 65.

¹⁰⁴ See, generally, Marija Bartl and Jessica Lawrence, *The Politics of European Legal Research: Behind the Method* (Edward Elgar Publishing 2022).