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Digital Constitutionalism: Contradictions of a Loose Concept

Constitucionalismo Digital: contradições de um conceito impreciso

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Abstract

This paper maps the uses of the expression digital constitutionalism, as employed in recent debates about digital technologies regulation (in particular, digital platforms). Our goal is to highlight discrepancies and risks implied in the dilatation of the term "constitutionalism" to encompass the normative phenomena that run under this label. In light of the understanding of traditional constitutionalism as a political and institutional phenomenon, we identify the theories that precede digital constitutionalism as contemporary formulations aimed at explaining changes in the functioning of powers and normative systems that transcend or overlap the nation-state and its territorial boundaries (i.e., constitutional pluralism, societal constitutionalism, and global constitutionalism). Based on the literature's criticism of this theoretical matrix, digital constitutionalism is problematized as a term epistemically impaired by the diversity of applications and the potential to legitimize concentrations of private powers.

Keywords: Digital constitutionalism; Platform regulation; Internet; Societal constitutionalism; Legal pluralism; Global constitutionalism.

Resumo

O presente artigo mapeia os usos da expressão constitucionalismo digital, empregada nas discussões recentes de regulação de tecnologias digitais e, em especial, plataformas de Internet. Nosso objetivo principal é indicar as contradições e riscos colocados na dilatação do termo “constitucionalismo” para englobar os fenômenos normativos que hoje correm sob o rótulo. À luz da compreensão do constitucionalismo tradicional como fenômeno político e institucional, são identificadas as teorias que precedem o constitucionalismo digital como formulações contemporâneas que visam explicar as mudanças no funcionamento dos poderes e sistemas normativos que ultrapassam ou sobrepõem o estado-nação e seus limites territoriais (i.e., pluralismo constitucional, constitucionalismo societal e constitucionalismo global). A partir das críticas da literatura a essa matriz teórica, o constitucionalismo digital é problematizado como termo epistemicamente prejudicado pela diversidade de aplicações e pelo potencial de legitimação de concentração de poderes privados.

Palavras-chave: Constitucionalismo digital; Regulação de plataformas; Internet; Constitucionalismo societal; Pluralismo constitucional; Constitucionalismo global.

Introduction

Although constitutionalism was conceived as a system and an ideology for organizing the modern state, it often takes center stage in theories on the emerging expressions of international private powers. In recent decades, shifts in understanding both state actions and the expansion of private power on a global scale have led to a conceptualizing effort (informed by the greater influence of transnational forces on governments' domains) that is still far from reaching uniformity.

Several contemporary formulations use the terms "constitution" and "constitutionalism" to explain changes in the working of powers and normative systems that go beyond, or are superimposed, on the nation-state and its territorial limits. The ideas of constitutional pluralism, societal constitutionalism, global constitutionalism, transnational constitutionalism, and multilevel constitutionalism are examples of this trend. It is against this background of theoretical proliferation and, as we will show, conceptual friction, that the expression "digital constitutionalism" has been lately applied – in a rather inconsistent way – to describe legal practices and the protection of rights in the realm of digital technologies, and especially of the Internet.

Ever since its expansion to civil use, the Internet has inspired new readings of political and social relationships. As new technological contexts fuel (and are fueled by) transformations in the equation that balances public and private powers, the classical categories and concepts shaped by modern political theory inspire calls for new political arrangements and law enforcement. One hears, for instance, appeals to new deliberative agreements (BARLOW, 1996), to the recognition of a digital public sphere (DE BLASIO et al., 2020; HELDT, 2020; PAPACHARISSI, 2008), and to the enforcement of the rule of law principles (RISCH, 2018; REED; MURRAY, 2018; SUZOR, 2018).

Several theories emerging at the intersection of constitutionalism and digitalization employ the term "digital constitutionalism" ever more frequently. Even though claims for a digital constitutionalism have shown up in debates about the Internet since the early 2000s, the expression gained currency in later years as a framework for different theories referring to the protection of constitutional rights in digital environments. This literature presents approaches to digital constitutionalism ranging from the description of certain normative phenomena to the concept of an "ideology that adapts the values of contemporary constitutionalism to a digitalized society" (CELESTE,

2019a, p. 77). In the face of distinct usages that entail different goals, digital constitutionalism is still a diffuse concept, with weak epistemic value. Various attempts to flesh it out have produced applications which are sometimes contradictory, sometimes redundant. As a result, the very use of the term "constitutionalism," by some of these applications indeed threaten to function as a mere rhetorical device that legitimates normative systems whose operation and effects are distant from the values that inform liberal constitutional systems.

Against this scenario, this piece aims to promote a critical analysis of different uses of the expression "digital constitutionalism." Understanding traditional constitutionalism as a political and institutional phenomenon, we propose a discussion on the risks involved in taking up and taking over the symbolical load of the constitutionalist tradition in order to name and explain transnational normative phenomena and events that take place in private digitalized environments. Starting from the criticism offered by the literature on the set of theories that we refer to as "digital constitutionalism's theoretical matrix," we shall also discuss the echoes of such criticism in order to point out the inconsistencies and the risks entailed in current applications of the concept.

In its broadest sense, digital constitutionalism relates to the protection of constitutional rights in the context of diverse digital technologies. It is thus not confined to debates about the Internet and digital platforms, as it has also been related to artificial intelligence technologies, data protection, and, more recently, quantum technologies. Despite the emphasis given to digital constitutionalism as a mechanism for regulating relationships and countering the accumulation of power of digital platforms, the present work is informed by a broader perspective. We also account for associations of the term with technological infrastructures that are distinct from digital platforms, especially with regard to their interface with them.

The work is organized as follows: in Section 1, we lay the conceptual foundations for analyzing digital constitutionalism, discussing the theoretical dispute over the concepts of constitution and constitutionalism. In particular, we interrogate the use of these terms in a sense which is detached from the context of its original formulation in modern political theory, i.e., rule-based order of a newly established democratic society. This analysis focuses on the instrumentalization of "constitutionalism" for illiberal purposes and their transposal onto supra-state or even private dynamics. In Section 2, we review the claims for applying the postulates of modern democracy – such as

constitutionalism, the rule of law, and representative democracy – to the Internet. Thereupon, we endeavor to situate the theoretical context in which the means for ensuring rights online – understood as a general category for digital constitutionalism – are discussed and disputed. Specifically, we identify a group of theories that reframe the concepts of constitution and constitutionalism. As mentioned, we refer to these theories as digital constitutionalism's "theoretical matrix", a group that includes global and societal constitutionalism, both aligned with constitutional pluralism. After that, Section 3 will map out the current uses of digital constitutionalism, highlighting the conceptual disarray that jeopardize its current applications. Lastly, in Section 4, we build on some of the criticism directed to digital constitutionalism's theoretical matrix to explore the contradictions and risks of using the term as a vector for platform power mitigation. The article concludes with a brief reflection on the importance Constitutions have in mitigating power asymmetries even – and mainly – in transformative contexts generated by globalization and by shifts in the dynamics of private power.

1. Constitutionalism as a Modern Development and its Features

The debate over the concept of constitutionalism has a direct connection with what a constitution is perceived to be. In general, the idea of constitution can be intuitively related to the forms of things, to the way a set of parts *constitutes* a whole. Under this meaning, the constitution is conceived on the basis of the word's common import, as employed in everyday parlance, or as defined in dictionaries. When transposed to the perspective of political organization, "constitution" alludes to a community's social arrangement and mode of government, i.e., the prevailing values and the way in which power structures are organized. It is in this sense, for instance, that Ferdinand Lassale (2007) discusses the notion of constitution as an expression of power. In a similar vein, Charles McIlwain (1991, p. 42 ff.) lists dictionary definitions and reflects on the structure and makeup of power and government, arguing for the existence of an ancient conception of constitution and constitutionalism which differs from its modern counterpart.

In the tradition of modern political theory, however, constitutionalism is an expression of a political and legal movement that erupts in the midst of 18th century liberal revolutions. It emerges, therefore, as a particular doctrine of political organization that

has in its heart a legal constitution, understood as a normative instrument that institutes and regulates government and is oriented to limiting the exercise of state power and protecting individuals. Historically, the constitution is invented as a legal tool intended to restrict arbitrariness and rationalize the exercise of authority – an institutional creation that seeks to implement a liberal ideology. In such a context, neither the constitution, nor constitutionalism, appear as neutral concepts or as merely descriptive of the way a society exists. On the contrary, they emerge with a well-defined purpose and meaning: to provide the state with a certain constitution, that is to say, with a normative structure that differs from that of the absolute state and advances citizens' liberties by controlling political power (OTTO, 1987; PASQUINO, 1998; TROPER; JAMME, 1994).

Different legacies inform the construction of constitutionalism. The European tradition prioritizes the *content* of the constitution, conceived as a normative order that incorporates human rights and the separation of powers.[1] In the United States, by contrast, the constitution is articulated in the form of a document endowed with normative primacy, a tool for limiting power that not only incorporates liberal structures and principles but also takes up a paramount position in the legal order. In this context, the judiciary is invested with the function of ensuring its application through judicial review (FIORAVANTI, 2000, p. 97-125). When the two traditions are combined, constitutionalism begins to assume not only the articulation of liberal values, but also the understanding of the constitution as a *supreme legal rule invested with imperative force.* In the course of the 20th century, and especially after the Second World War, constitutional systems became increasingly more uniform and more alike. As such, two aspects began to inhere in the concept of a constitution: the material dimension, related to the regulation of the state and of rights, and the formal aspect, related to constitutional supremacy, i.e. to the fact that the constitution sits at the very top of the system of norms (the hierarchical standard).[2] From this perspective, the constitution is also defined as a meta-norm that grounds, limits, and conditions the creation of further norms by the state (OTTO, 1987, p. 15). In this context, constitutionalist aims of limiting political power are

[1] This sense of the word was crystallized post-French Revolution in Article 16 of the Declaration of the Rights of Man and of the Citizen: "Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution" (1789).

[2] While in the United States the concept of constitutional supremacy was already affirmed in 1803 as the foundation for judicial review in the celebrated *Marbury v. Madison* case, ruled on by the Supreme Court, Europe had to wait until the 20th century – mostly in the post-war period – for systems of constitutional review to be established and for the idea that constitutional norms are legal rules to be accepted.

achieved not only by the content of constitutional norms, but also by their unique position in the legal system, by means of which they operate as a check on legislation.

The underlying meaning of constitutionalism has changed, however, as its conceptual apparatus has been applied for different purposes, leading to theoretical disputes on the idea of “Constitution’. On one hand, the notion of constitutionalism has been updated as a natural consequence of the fact that constitutional documents are delved into history, and thus subject to the incorporation of different meanings. An emblematic example of such an expansion is the social constitutionalism of the 20th century. On the other hand, the term also gained a purely descriptive meaning, referring to the existence of a legal order systematized by a written document. Thus, it has moved beyond the original purpose of checking political power, which was the basis of its emergence in the early days of liberal movements.

The reason for this diversity of meaning is that various normative systems, designed and constructed in multiple ways throughout the 20th century, have all emerged as self-proclaimed constitutional orders. In this process, constitutional forms became detached from liberal content. Against this background, the adoption of written documents called "constitutions" began to function as labels that validate autocratic power structures. Illiberal systems adopted written constitutions, appropriating the historical credentials and aura of legitimacy that emanated from constitutionalist movements. When a regime is styled as constitutional, it implies a certain degree of rationality and self-restraint. For example, when we speak of a monarchy, we imagine a certain power structure. However, when we mention a constitutional monarchy, we intuitively assume a certain check on power and a modicum of legal rationality. In this context, the constitutional form may be instrumentalized as a label that bestows an appearance of legitimacy (Loewenstein 1970, p. 214).

This phenomenon has been detected and described by constitutional theory. In the 1960s, Karl Loewenstein talked about subversive uses of the constitutional form, saying that new authoritarian regimes had found it “convenient to disguise the crude use of force by means of pseudo-constitutional forms and even by written constitutions, skillfully designed to serve the political ends of those who truly wield power” (LOEWENSTEIN, 1969, p. 206-207). Starting from this diagnosis, Loewenstein then presents his familiar ontological classification, based on the degree to which constitutions conform to reality: normative, nominal, and semantic constitutions. Giovanni Sartori

(1962) formulates a similar theory, referring to *garantiste* constitutions that effectively limit power vis-a-vis facade constitutions (or fake constitutions), as in forms that hide realities at odds with the purposes of constitutionalism.

On the wake of contemporary constitutional experiences that curtail liberties and encourage the concentration of power, new terminologies have been recommended to indicate the use of constitutionalist machinery to promote authoritarian purposes or to mask realities that diverge from those set out in the written rules. The categories of abusive constitutionalism (LANDAU, 2013) and authoritarian constitutionalism (TUSHNET, 2015) would be examples of this kind of framework.

At the same time, constitutionalist terminology has been transposed to certain dynamics of power and normativity that operate outside the state. This is where theories appear that seek to explain different legal structures and changes in the system of sources of law by appealing to constitutionalism. The doctrines of constitutional pluralism, global constitutionalism, and societal constitutionalism, for instance, arise in a post-national context as influent approaches in debates about rights protection in digital environments. We will address these theories in the next section.

Thereby, there are at least two antinomies at play in the discussions about the meaning of constitutionalism and the constitution. First, there is a contrast between binding written constitutions that effectively fulfil the purpose of limiting political power and those that, despite giving form to government institutions (and possibly even laying down rights), do not constrain the exercise of authority. The latter can be understood as semantic or facade constitutions (LOEWENSTEIN, 1970; SARTORI, 1962), i.e., constitutions bereft of constitutionalism. Moreover, there is a controversy about whether the concept of constitutionalism applies only to political systems with written constitutions that concentrate supremacy inside the legal system, or if the constitutional framework can be applied to understand and define the limits of power in post-national contexts. The latter approach refers to the possibility of a constitution that regulates private or supranational powers that lie outside or beyond the state.

The problem is whether constitutional theory should employ a neutral, purely descriptive concept – or even a metaphorical concept – of the constitution (and, correlatively, of constitutionalism) and then adorn it with new attributes. In other words, the question is whether notions of constitutionalism that differ from those that shaped the very construction of the concept are useful as descriptive or normative devices. A

critical analysis of current uses of digital constitutionalism shows that the term's elasticity in the field of digital politics may weaken the very concept of constitutional order. The discussion on the development of different forms of digital constitutionalism has to do precisely with a pursuit for symbolic legitimation by appealing to the structuring features of modern democracies. This approach has, in fact, long been present in the literature and even in public policies dedicated to supporting and materializing the protection of rights online, as we analyze in the next section.

2. Pacts, Deliberation, and the Rule of Law on the Internet

Even though the set of theories that underpin digital constitutionalism interpret legal and political phenomena beyond digital technologies, they have often referred to the Internet as an experimentational paradigm of norm enforcement that exceeds the capacities of the state. In this section, we explore how this reference takes place, by first looking at a greater debate about the limitations of traditional legal institutions in pervading digital technologies operations. As we understand them, these limitations have long given ground to claims for special approaches to democratic institutions.

Recent calls for digital constitutionalism have emerged in a political, social, and economic context largely defined by the idea of a "platform society". The term captures the pervasive technological mediation by private digital platforms that have "penetrated the heart of societies" (DIJCK; POELL; WAAL, 2018, p. 2), affecting institutions, economic transactions, and social and cultural practices. In this scenario, digital constitutionalism generally presents itself as an interpretative framework to theorize the emergence of public, private, and hybrid measures aimed at mitigating the concentration of economic and political power of such platforms. In the face of private companies that run their own infrastructure and make decisions that affect billions of people, regulatory and academic debates seek solutions for safeguarding rights and ensuring individual and collective self-determination in those environments. They often appeal to ideas like the rule of law (SUZOR, 2018), representative democracy, and constitutionalism (CELESTE, 2019a, p. 76–99) as means of (re)introducing into the digital realm the values that inspired democratic and liberal political arrangements in the first place.

Regarding constitutionalism, these precede the context of the platform society. For instance, Brian Fitzgerald (1999) has proposed "constitutionalism for the information society". Information society being a global, intangible, and decentralized phenomenon, Fitzgerald acknowledged the role of private organizations as agents of governance endowed with coercive power. His "informational constitutionalism" thus emphasized the role of state law (mainly in the fields of copyright law, contractual law, competition law, and the protection of privacy) in limiting self-regulation by private agents.

In the same context, Paul Berman (2000) has appealed to the notion of "constitutive constitutionalism," highlighting the cultural benefits that come from the use of a constitutional framework to address key values in both the public and private spheres. He looks for an alternative solution to bypass the American doctrine of state action[3] and subject private agents to national constitutional law. According to his model, courts would play an educational role by articulating narratives that affirm the nation's constitutional identity. In distinguishing these theories, Celeste (2019a, p. 82–83) explains that Berman, unlike Fitzgerald, sees statute law as inadequate to limit private power in digital environments, and argues for bringing such power under constitutional limitations and giving courts a part to play in that task.

This summoning of the concepts that flaunt the promises of modernity has been a feature of the Internet and of its interpretation and political signification since the network expanded into civil use. In the early 1990s, the Internet was presented as an environment that offered unique opportunities for interpersonal and collective communication, apparently lying outside traditional infrastructures. The technical choices and narratives that gave the Internet its current shape are inextricably linked to other factors that contributed to the political context of "late modernity."[4] According to

[3] The state action doctrine was spelled out by the US Supreme Court from the 1940s in the framework of a discussion about the possibility of applying civil rights in legal relationships between private agents. The Court has used the theory as a benchmark in order to affirm that constitutional rights can only have a bearing in the private sphere in those cases in which the state in some way participates in violating the right, or when private agents play roles analogous to those played by the state. This doctrine reflects the framework of American constitutionalism, which tends to see the constitution as a mere instrument for ensuring to individuals a space which is free from state interferences. On this subject, see PEREIRA, 2006, p. 475–483; GLENNON; NOWAK, 1976; MINOW, 2017.

[4] Relying on Giddens (1991), Hofmann (2019) categorizes the Internet, and even of computers themselves, as a space of new possibilities in a period she refers to as "late modernity." Among other approaches, Giddens' narrative about the closing years of the 20th century reflects the end of a period of social stability that marked the Global North after the Second World War. That model featured, among other aspects, a strong state (that took responsibility for economic prosperity and stability and for the well-being of its citizens, including the quality and universal availability of public infrastructure) and a high level of collective organization in the form

Jeanette Hofmann (2019, p. 8), these influences include a diversification of social norms as well as collective identities, new forms of political participation, and the emergence of a neoliberal paradigm advancing the privatization of public communication infrastructures. These circumstances also shaped the early social and computer science literature dedicated to the Internet. These works feature claims of a new socio-political order in line with the emerging technological and cultural paradigm, including calls for new agreements, norms, community deliberative processes, and alternative means of enforcing agreed-upon norms. The "Declaration of Independence of the Cyberspace" is often referred to as an example of the libertarian thought that motivated computer scientists taking part in the early stage of the Internet's development, as it reflects such claims in an almost naïve fashion.[5]

In an economic scenario marked by decreasing state protagonism, such claims leaned towards building arrangements outside the bounds of state regulation. Referring to Turner's work (2006), Hofmann (2019, p. 8) also draws attention to the Internet as a prototype of "'networked forms of economic organization' that would flatten bureaucratic hierarchies, both public and private, and provide for self-determined ways of working," liberating the "individual entrepreneur." According to Hofmann's synthesis, cyberspace was presented in the literature "as a forerunner of a post-national social order governed by code and bottom-up consensus rather than by national laws" (Hofmann, 2019, p. 8).

The idea that the virtual environment was immune from the "longer and deeper forces that shape human history" (WU, 2010, p. 180) was at the heart of the theoretical approaches known as *exceptionalism*. Irrespective of their variations, exceptionalist authors thought that the Internet's "unique" features would make it an exception to previous communication networks, preventing traditional forms of law from being

of political parties, trade unions, commercial associations, and a social stratification stabilized through widely shared social norms. This "organized modernity" was succeeded by "late modernity" when "cultural norms began diversifying, collective identities in the form of classes and political parties lost cohesion, markets increasingly expanded beyond the nation-state and challenged the paternalistic welfare state model. Economic innovation, individual freedom and cultural diversity became benchmarks in their own right and formed a competing force against dominating rules and customs" (Hofmann, 2019, p. 7).

[5] Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions. (BARLOW, 1996)

applied to virtual social relations.[6] David Post and David Johnson (1996, p. 1371), for instance, thought that such an impossibility derived from the need for a regulatory framework beyond territorial jurisdiction, since the Internet subverted the production of norms tied to given physical spaces. Barlow (1996), on the other hand, referred to the emergence of a space purportedly beyond the reach of traditional political institutions, denying governmental legitimacy and championing the organization of the Internet on the basis of the virtual community's self-determination. To a certain degree, this perspective influenced the emergence of the first multisector bodies charged with deliberating and implementing the Internet's technical operational protocols – bodies that were set up by the very scholars responsible for the Internet's early development and therefore for the early literature on the subject. One of the mottos of the Internet Engineering Task Force (IETF), for instance, first coined in a talk by David Clark, advocated: "We reject: kings, presidents, and voting. We believe in: rough consensus and running code" (BORSOOK, 1995).

Exceptionalism may be understood as a relatively long-lasting phenomenon, not regarding the impossibility of state regulation over the internet, but as a theoretical (and ideological) basis for regulatory solutions that differ from those traditionally employed in the field of (tele)communications.[7] The de facto way the Internet infrastructure and its related governance evolved was not determined by this claim for a self-organizing space based on community deliberation. From an empirical point of view, nation-states have always claimed competence to make the virtual space abide by the rule of law, even though efforts of enforcement are essentially mediated by private actors. A complete lack of content regulation, for instance, is not the case due to legal frameworks' long

[6] The prevention under consideration may refer either to an absolute impossibility of applying the law or to the need for a specific regulatory approach. For these and other variations of exceptionalist theories (see IGLESIAS KELLER, 2019, chapter 3).

[7] In this sense, one may highlight the work of Eric Goldman (2008), who identifies three waves in which those ideas have influenced the development of public policies for the Internet. The first one, which Goldman calls "Internet Utopianism," is associated with regulatory proposals that treated the Internet differently than other media, based on the premise that the Internet's unique technology would supposedly overcome the structural problems of preceding networks. The second wave, "Internet Paranoia," was a period in which the Internet's singularity was still acknowledged, but instead of inspiring a more favorable treatment it was invoked to justify proposals that treated Internet services more harshly (such as content filter technologies, well-known for implementing private censorship mechanisms that impose disproportionate restrictions on freedom of speech). Lastly, the third wave is that of "Exceptionalism Proliferation," in which the emergence of each new Internet-based technology has inspired specific regulations targeted at that technology. In this last wave, Goldman identifies a movement of proliferation of regulatory frameworks addressed to specific services. He mentions, for instance, regulations targeted at streaming services and social networking sites, which are treated in a specific way.

established tort and criminal rules (MARSDEN, 2011, p. 51) – although the implementation of the law by means of traditional legal mechanisms has been challenging and problematic from the start. In Brazil, for instance, legislative debates to regulate the Internet started in the early 1990s at its initial stages of development in the country[8]. One of the first relevant proposals presented to the House of Representatives yet in that decade, which eventually resulted in Law 12,735/2012 (known as the "Azeredo Law"), focused on strengthening users' criminal liability. Finally passed in 2012, the Azeredo Law, together with other proposals, has influenced legislative debates that culminated in the approval of the Civil Rights Framework for the Internet in 2014 (Law 12,965/2014). Similar legislative developments have taken place in the United States, where the intermediary liability regime[9] was established in 1996 through section 230 of the Communications Decency Act (in force to date). In 2011, the country debated legislative proposals similar to the Azeredo Law, which became known as SOPA/PIPA. The possibility of criminalizing the conduct of Internet users triggered an intense dispute led mainly by civil society, and the SOPA/PIPA bills gave way to less transparent tactics to coerce digital companies in the name of copyright protection.[10] In Europe, the e-Commerce Directive was adopted in 2000, establishing the European Community's intermediary liability regime and other pillars of Internet regulation, which then focused on digital commercial practices. These examples, among so many others, show that many countries have been directing their legislative attention to the Internet for at least two decades, even though such attention has not proved adequate to put a stop to the current concentration of power amongst digital platforms. More recent legislative bills show a tendency to expand regulatory mechanisms already in use. That is the case regarding the European Digital Services Act (EUROPEAN COMMISSION, 2022) and some proposals under analysis by the Brazilian parliament.[11] In addition to defining liabilities for damages, these initiatives put forward the idea that platforms should be bound to duties of care when pursuing their business models. Legal obligations in this realm would include a range of transparency requirements (including from the number of content removal rulings to public records of

[8] This reference to Brazil was included in the original piece, published in Portuguese, as it is part of the dossier by Revista Direito & Praxis on "Constitutionalisms", targeted at the Brazilian research community.
[9] For intermediary liability regimes, see IGLESIAS KELLER, 2019, chapter 4, and IGLESIAS KELLER, 2020.
[10] For a detailed analysis of those practices and of this whole scenario (TUSIKOV, 2017).
[11] At the time of this text's completion, those proposals were still being debated under PL 2,630/2020.

advertisements and commercial partnerships), due process rules in content moderation decisions and other visibility mechanisms.

Theoretically, the influential literature of Joel Reidenberg (1998) and Lawrence Lessig (2006) set the idea of code as regulation. It contributed to an epistemology according to which the Internet, besides being subject to traditional justifications for state intervention, is also self-regulated. Reidenberg introduced the idea of regulation by architecture, from which it is inferred that technical capabilities and the way systems are designed dictate rules to their users. In this sense, the creation and implementation of information policies would be inherent to network design and setup. Lessig, in turn, builds his theory on the acknowledgement of modes of regulation: the law, social norms, the market, and architecture. Applying this classification to the Internet, he concludes that regulation by "architecture" (LESSIG, 2006, p. 568), which he identifies with code, is more effective, as the dynamics of the digital environment also limit other forms of influencing or determining behaviour (including state law). Lessig points out the need to confront the same evils in the virtual world that threaten political and social coexistence in the physical world, while also emphasizing the impossibility of governing the Internet through user consensus independently of/in parallel with other forms of regulation. While the intricacies of such theories are beyond the scope of this paper, we understand that they set important grounds for a debate about conformation of digital technologies to the rule of law that is shifted towards the *appropriate means*.

Specialized scholarship has conducted the debate on conforming the Internet to the rule of law as one about means – i.e., most suitable way to apply legal norms on an environment defined by network architecture. Since those discussions were guided by a political and economic context derived from the limitations of government bureaucracy, one may say that Internet regulation was added to a set of pre-existing theories that strived to legitimate alternatives to statutory law in view of its limitations. This is where the "digital constitutionalisms theoretical matrix" comes into play. These approaches address a larger debate on the relevant functions, ways, and strategies for regulating globalized complex environments that are also marked by uncertainty. The difficulties of applying the law within the state's capacity, in addition to the emergence of hybrid governance subsystems, are presented as a shared underlying phenomenon that triggers segmented theoretical and empirical consequences expressed from several theoretical

points of view and not necessarily anchored in the concepts of constitutionalism or of the constitution.

Theories about a "global administrative law," for instance, frame the creation of regulatory rules beyond the state, often with global reach, by a network of public and private agents (DIMITROPOULOS, 2012). ICANN, the corporation in charge of managing IP addresses and domain names, is one of the often-quoted examples of a private body endowed with regulatory competence on a global scale (BINENBOJM, 2016, p. 311). Building on the observation of theoretical and empirical shifts that "challenge thinking about regulation which is oriented to the capacities of the state," Colin Scott (2004, p. 146) coined the term "Post-Regulatory State" to describe a stage that succeeds the Regulatory State. Instead of regulatory activity being acknowledged to be concentrated in the state machinery, Scott believes that in the Post-Regulatory State previously clear boundaries between the state and the markets, between the public and private realms, are now blurred. It is therefore shaped by a variety of norms, control mechanisms, controllers, and even controlled parties that go beyond the state (SCOTT, 2004, p. 166). Scott's theory was adapted to the Internet by Andrew Murray (2008, p. 301), who refers to the "post-regulatory cyberstate" as a paradigm of Internet regulation characterized by the relevance of hybrid and indirect forms of regulation. According to Murray, theorization of a post-regulatory cyberstate would succeed the doctrines that champion the application of traditional regulatory forms to the virtual world. He thus defends the development of a unique regulatory charter instead of transplanting traditional law without assessing the regulatory matrix of such a complex, global, and interconnected environment.

At the same time, there is another group of theories that seek to explain changes in legal relations by reframing the constitutional concept. They have inspired some applications of "digital constitutionalism" theories (as we show in the next section), as they rely on the existence of new normative spaces that go beyond nation-states. The most representative examples are theories that maintain the existence of a *global constitutionalism* (PETERS, 2009; FASSBENDER, 2009; KUMM, 2018) or of a *societal constitutionalism* (SCIULLI, 1992; TEUBNER, 2014) as explanatory categories for transnationalization and privatization in the political sphere. As distinct from a narrative of expanding regulatory powers on a transnational scale (such as in the approaches referred to above), these theories try to interpret the new equation of normative powers

through the lens of the concepts of constitution and constitutionalism. However, they challenge the cornerstones of constitutionalism as understood in modern political theory. They do not characterize constitutions as normative systems endowed with primacy and designed to institutionalize sociopolitical powers and rights through a set of metanorms that underpin the validity of the entire system.

In general terms, these theoretical strains depart from the perspective of legal pluralism and encompass variations that fit into the school of thought called "constitutional pluralism." The term constitutional pluralism made its appearance in legal literature in the wake of the German Constitutional Court's decision on the Treaty of Maastricht (MACCORMICK, 1995; LOUGHLIN, 2014; WALKER, 2002) and served as a starting point for many discussions on the arrangement of the international legal order. The underlying idea is that constitutional pluralism is present wherever several legal systems are simultaneously at work, each one of them functioning according to its own "constitution" and invoking autonomous legitimacy (LOUGHLIN, 2014). In this framework, the question whether a supreme norm exists is put into perspective by the notion of several partial institutional or private constitutional systems that either are not subject to each other at all (TEUBNER, 2014, *passim*) or, according to a different pluralist perspective, are integrated by transnational constitutional principles (KUMM, 2018).

"Global constitutionalism" is a concept employed by the theories that call for adapting traditional constitutional principles to apply them to relationships between states (international relations) or beyond states (transnational relations) in order to improve justice and legitimacy on the global legal sphere. Some advocates of constitutionalizing the international order understand this as an instance of the political arrangement that arose in the post-war period, especially with the United Nations Charter (FASSBENDER, 2009). Others relate it to the increasing fragmentation of international law that began in the late 20th century (PETERS, 2012, p. 118-135). In broad terms, global constitutionalism presents itself as "an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order" (PETERS, 2009, p. 397). It is, therefore, oriented towards the promotion of constitutional principles to coordinate solutions for essentially global problems such as the climate crisis, international terrorism, the regulation of the international financial system, and Internet governance. Ingolf Pernice understands that the global

constitutional framework should be understood as a form of multilevel constitutionalism in which the primacy of the individual requires that public and private constitutional systems be considered in several levels – sub-state, state, regional (like the EU), and global (PERNICE, 2015). As highlighted by Celeste, this interpretation involves a dual approach to the Internet (CELESTE, 2023) that operates both as a catalyst for multilevel global constitutionalism (PERNICE, 2015, p. 6) – its legitimacy being boosted by the fact that it connects individuals and allows equal participation on a broader sphere – and as an object of the global governance model. Hence, the Internet's global reach would itself inspire a constitutionalism conducted by non-state agents, which would ultimately stand as one of many constitutional systems that make up the multilevel mosaic of global constitutionalism (CELESTE, 2023).

While global constitutionalism emphasizes the international order's institutional machinery, "societal constitutionalism" focuses on the private dimension of globalization. According to this view, constitutional processes do not take place solely in the legal systems of states, but also in private and hybrid systems (GOLIA; TEUBNER, 2021). This concept has been used as a tool to explain normative orders that operate outside the state, particularly in transnational economic relations and in the digital domain. This is a radical form of legal pluralism, as it posits the existence of partial constitutions in many different regulatory fields. Arguing for the theory of societal constitutionalism, Gunther Teubner (2014) talks about the need to set aside the false premise that constitutionalization means that a group of individuals changes into a collective agent and to acknowledge the constitutional function of private agents' initiatives at self-regulation. As manifestations of this phenomenon, he points to the emergence of high-level constitutional rules in international organizations such as the World Trade Organization. Beyond that, the author indicates the existence of several 'partial constitutions' in civil society and in the transnational sphere in different domains, such as economy, science, culture, sports, and technology; he even alludes to a 'corporate constitutionalism' as an expression of the self-regulatory capacity of transnational corporations. As mentioned above, societal constitutionalism has been influencing the quest for theoretical and normative solutions to online rights protection, and ICANN is once again presented as a paradigmatic example. In Teubner's work, it appears as an instance of societal constitutionalism due to its nature as a private organization that has undergone a constitutionalizing process. The gradual development of functional and territorial

representations has suggested forms of separation of powers based on an actual jurisdiction over the allocation of domain names (TEUBNER, 2014, p. 55).

Furthermore, societal constitutionalism appears – either on its own or together with other theories – as the main framework for several efforts at framing, developing, or problematizing the concept of digital constitutionalism (REDEKER; GILL; GASSER, 2018; PADOVAN; SANTANIELLO, 2018; CELESTE, 2019a; DE GREGORIO, 2022; GOLIA, 2022). The underlying idea of legitimizing private systems by means of normative and functional arrangements set up by non-state actors informs a wide array of digital constitutionalist theories, with diverse views that range from those that see it as an 'online' derivation of societal constitutionalism – which finds its ultimate expression in a certain kind of document, as we will soon see – to those that use it as a mere label to describe private and state actions intended to mitigate the concentration of power in digital platforms.

A key controversy addressed in this paper is whether it is useful or appropriate to extend the original concept of constitutionalism to explain such different approaches. In the following section, we provide an overview of recent theories on digital constitutionalism, precisely to pinpoint the elasticity of the term and the conceptual inconsistencies.

3. Digital Constitutionalism(s) – Varieties and Inaccuracies

"Digital constitutionalism" is used as a label for several approaches to rights protection on digital platforms, from which many different theoretical and empirical consequences derive. Usages of the term range from a description of private normative documents or regulatory solutions drawn up specifically for digital platforms to traditional law-enforcement processes by the state. A conceptual disorder has therefore been introduced which jeopardizes the epistemic integrity of digital constitutionalism and its usefulness as an explanatory and legitimizing theory. In the following paragraphs, we propose to approach current theories in three groups: digital constitutionalism as a normative phenomenon; as the rearrangement of constitutional protections in the face of societal transformation; and as a theoretical framework for potential state and non-state means of applying the law to digital technologies.

As a normative phenomenon, digital constitutionalism refers to "a constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet" (REDEKER; GILL; GASSER, 2018, p. 2).[12] The first works that identified this category of digital constitutionalism tried to make sense of a variety of normative instruments of public, private, or hybrid origin (which, therefore, were binding to different degrees). In Claudia Padovani and Mauro Santaniello's view (2018, p. 296), these initiatives differ substantially from those previously championed by the Internet scientific community in that they prioritize individuals and their fundamental rights (as opposed to establishing and protecting a certain network architecture). This type of documents adopts a constitutional language and aim at consolidating[13] principles of public interest that could guide relations in the virtual world – such as, for instance, preserving and promoting freedom of speech, non-discrimination, equal access, and promoting innovation. Among such documents there are charters that express agreements between non-profit associations or other sectors, official statements by private companies or hybrid institutions, guidelines and even terms of service (and other contractual instruments) The Brazilian Civil Rights Framework for the Internet (Law 12,965/2014), for instance, may be seen as the epitome of legislated digital constitutionalism. Due to its constitutional grammar (MONCAU; ARGUELHES, 2020) that "establishes principles, safeguards, rights, and duties related to Internet use in Brazil" (Law 12,965/2014, section 1) it is often referred to as "Internet Constitution" (CELESTE, 2019a, p. 86).

This approach to digital constitutionalism attends mainly to the content of regulatory norms and tries to identify to what extent they employ a typically constitutional language, regardless of who enacted them. The legal constellation in question does not include only documents that formally classify as a constitution, not even only those enacted by the state. As such, it is independent of any constitutional process tied to popular representation; instead, it presumes that constitutionalizing processes may be identified by the "emergence, creation, and identification of constitutional elements" (PETERS, 2006, p. 582).

[12] In the same vein, see SANTANIELLO et al., 2018.
[13] Sometimes on the wake of a multisector deliberative process, as in the case of the principles agreed to at the NetMundial Initiative.

Although they do encompass the defense of rights against spheres of public and private power, the documents of digital constitutionalism may be placed beyond the state's official actions and within the domain of private enterprise. As such, from a substantive point of view, they amount to a bolder attempt than what traditional constitutionalism would bear (MONCAU; ARGUELHES, 2020). Even though some authors have confined their studies of the documents of digital constitutionalism to governance by private or multisector agents, the concept is also relevant to governmental attempts to regulate the Internet. That is the case, for instance, of the Brazilian Civil Rights Framework – a legal diploma published 2014 whose goal is set a principles framework that will curtail both digital private agents on the Internet and future state regulation. The instruments of digital constitutionalism have also been recognized as references for judicial interpretation by the Brazilian Supreme Federal Court. For instance, in in his opinion on ADI 6529 MC (BRASIL, 2020, p. 78), Justice Gilmar Mendes has acknowledged that

> there is a concern that the interpretation of statutes such as our Civil Rights Framework for the Internet should be guided by normative principles and values that take into account, in a harmonic sense, the impact of rights declarations, positions taken by international organizations, and legislative bills on the protection of fundamental rights in cyberspace.
>
> An immediate corollary of this understanding is the awareness that legal charters that state the rights of Internet users often involve a choice of constitutional matrix as regards the way online relations should be treated.[14]

The strongest objections to this form of digital constitutionalism, however, revolve around its rhetorical use, labelled by its most scathing critics as likely a marketing strategy (CELESTE, 2019b, p. 124). Yilma's criticism (2017) hinges on the fact that "Internet Bills of Rights" are not binding for digital enterprises. Recognizing that digital constitutionalism is important as a process in which "new rights" (in a sense we will soon unpack) are constitutionalized in the normative sphere, Yilma suggests the adoption of a bill of rights by the United Nations as a more effective protection mechanism (Yilma, 2017, p. 128). Criticisms such as these highlight the merely descriptive character of this strain of digital constitutionalism, which chiefly enumerates instruments of varying degrees of

[14] The Justice's opinion indeed acknowledges the relevance of documents belonging to the universe of digital constitutionalism to guiding constitutional interpretation, even in court settings. The implications of the Supreme Federal Court's ruling on ADI 6529, however, will be treated below when we talk about a second view of digital constitutionalism.

obligation. In this sense, it defines an ecosystem of legal sources that are labelled as a constitution, but whose symbolic value exceeds its tangible effectiveness by far.

In a second sense, digital constitutionalism refers to a rearrangement of constitutional protections in the wake of techno-social shifts related to digitalization processes. Here, the term encompasses processes of and calls for adjustment or improvement in the protection of rights that are threatened by the structures and practices and that define the possibilities of interaction in digital environments. The right to freedom of speech constitutes a notorious example. In the face of changes within the public sphere induced by the expansion of digital communications,[15] an overhaul both of the scope of freedom of speech and of its protective mechanisms may be called for. In the American regulatory experience, marked by a liberal approach to freedom of speech in which non-intervention prevails as a protective mechanism, this shift is addressed by Jack Balkin (2014). Analyzing what he calls an "infrastructure of free expression" (Ibidem, p. 6–7), Balkin identifies associates the new technological paradigm with a turn in the regulatory approach. According to Balkin, along with the continuous use of "old-school" regulation of freedom of speech (as embodied in criminal and tort penalties targeted at individuals and publications), a "new school" of speech regulation arises to

> regulate speech through control over digital networks and auxiliary services like search engines, payment systems, and advertisers; instead of focusing directly on publishers and speakers, they are aimed at the owners of digital infrastructure. (Ibid., p. 4)

In a different realm, Oreste Pollicino (2021, p. 10) identifies "a new phase in digital constitutionalism," referring to a set of new rights that have become necessary in the face of challenges posed by artificial intelligence technologies. Many techniques subsumed under the AI label affect the structural mechanisms of digital platforms, such as automated content moderation in social networks (GORWA; BINNS; KATZENBACH, 2020). Examples quoted by Pollicino include demands for a right to an explanation (ensuring individuals access to information on how their data are processed in automated processes that affect their rights) and a right to accessibility (in the sense of having easy and straightforward access to such information).

In dealing with the role of digital constitutionalism as a source of constitutional jurisdiction, Gilmar Mendes and Victor Ferreira (2020, p. 3) rely on the premise that "the

[15] Including new ways of intermediating and, therefore, of influencing the flow of information and attention – through algorithmic management, for instance. On these shifts, cf. JUNGHERR; SCHROEDER, 2021.

principles and values of digital constitutionalism may serve as normative criteria for judicial review of statutes having to do with the Internet." As such, given the current technological paradigm, digital constitutionalism would be taken up by the judiciary and inspire a reframing of "the essence of basic constitutional rights associated to freedom of speech and the protection of honour and privacy" (MENDES; OLIVEIRA, 2020, p. 3).

This extension of constitutional protections underlies the reasoning for the above-mentioned ruling in ADI 6529 MC (BRASIL 2020),[16] especially concerning the constitutional safeguard of data protection.[17] In ADI 6529 MC, the Court reviewed the constitutionality of the sole paragraph in section 4 of Law 9,883/99 to provide that the data stored at the Brazilian Intelligence Service must be supplied to the Brazilian Intelligence Agency (ABIN). In the ruling drafted by Justice Carmen Lúcia, the Court interpreted the challenged section by saying that the handover of data to ABIN must solely aim at combining data and effectively protecting national institutions and interests. Justice Gilmar Mendes also highlighted that the fundamental right to the protection of personal data is autonomous in the Brazilian constitutional order, "especially in the form of an expanded projection of the right to the protection of one's privacy, honour, and image, which has been enshrined in section 5, item 10 of the Federal Constitution" (BRASIL, 2020, p. 78 of the decision). This "expanded projection" explains why the data protection stands on its own as an autonomous right, accruing from three combined aspects of the Brazilian Constitution: the dignity of the human person; the acknowledgement of the centrality of *Habeas Data* for the substantive protection of the right to self-determination regarding information about oneself; and the commitment to normatively invigorate the right to privacy in the face of new scenarios brought in by the development of digital technology (Ibid., p. 79). Justice Mendes' opinion makes a point for constitutionalizing data protection in a technological environment in which risks for privacy and human dignity are enhanced by new means of data collection and treatment for different purposes.

In a similar vein, Wimmer and Moraes (2022) use the framework of digital constitutionalism to enhance the constitutional protection of privacy, particularly against potential uses of quantum technology to decipher protected data. Assuming a need to

[16] The provisional measure was partially granted and confirmed during the trial, which took place in the following year. Cf. BRASIL, 2021.
[17] Which only was granted constitutional status afterwards, with Constitutional Amendment 115/2022.

define subsets of rights capable of adapting constitutional privacy protections to the online environment, the authors argue the existence of a "right to encryption" as a tool "that is instrumental to the effective enjoyment of human rights, in particular the rights to privacy and freedom of speech and the right of assembly" (Ibid., p. 5).

These versions of digital constitutionalism are not inconsistent with the classical view of constitutionalism. In a way, they acknowledge the addition of a new topic to the traditional constitutionalist agenda. They entail a recognition that constitutionalism is a dynamic reality that historically had to face new challenges and include new agendas in its scope. In this sense, digital constitutionalism reflects the addition of a new normative domain to existing constitutions – similar to how other historical phenomena have resulted in the emergence of social, economic, and environmental constitutionalism.[18]

In the third group of recent approaches to digital constitutionalism, the term is used as a theoretical framework for potential state and non-state means of enforcing constitutional rights in digital environments. In this sense, digital constitutionalism is particularly popular as one of several theoretical approaches that aim at mitigating the concentration of power in digital platforms. The idea is that the prevalence of self-regulation, as well as the shortcomings of state-sponsored attempts at regulation, have allowed those business models to develop with little regard for the public interest. Between the ineffectiveness of existing regulatory frameworks and the absence of legal provisions aimed at innovative practices, digital platforms are assumed to have developed with no concern for legal and social responsibilities about the constitution of those spaces and how the exercise of power may be limited inside them (SUZOR, 2018, p. 2).

The label of digital constitutionalism taken in this sense came to encompass a variety of mechanisms whose implementation is rationalized by transposing the values of liberal constitutionalism to relationships that take place in the digital world. As Golia (2022, p. 2) points out, those values are understood as an optimal matrix whose principles should be introduced into the digital environment. Approaches that take a critical look at the constitutionalist premises laid down by liberal jurisprudence and political theory are more seldom (GOLIA, 2022, p. 3).

In Suzor's work (2018, p. 2), digital constitutionalism is presented as a project "that seeks to articulate and realize appropriate standards of legitimacy for governance

[18] For the evolution of social, economic, and environmental constitutionalism, see respectively AYALA, 1997; CAIRO ROLDAN, 1998; O'GORMAN, 2017.

in the digital age." It thus implies an assessment of the governance mechanisms of private platforms according to "the principles of the rule of law." In his approach, consent, predictability, and procedural fairness are considered procedural principles of the rule of law that constitute the idea of good governance (Ibid., p. 2).[19] Without committing to a specific kind of regulatory mechanism, Suzor calls for adopting a process of "monitoring, justification, and improvement for the systems that platforms implement to regulate the behaviour of their users."

Referring to recent regulatory initiatives, Giovanni de Gregorio (2022) identifies a mode of digital constitutionalism in what is actually a regulatory model recently adopted within the European Union. Gregorio refers to the European Digital Services Act as a "reaction to new digital powers" after a period in which EU regulation would have neglected and forgot "the role of constitutionalism, and then constitutional law, in protecting fundamental rights and limiting the rise and consolidation of unaccountable powers abusing constitutional values" (DE GREGORIO, 2022, p. 3). Digital constitutionalism is presented here as an European constitutionalism aimed at regulating digital platforms. It manifests through judicial review and various other regulatory strategies recently implemented in the EU across multiple domains, including data protection, content moderation conformation, and algorithmic architecture. In a similar sense, Floridi (2021, p. 220) relates digital constitutionalism to the European development of "an infosphere where its citizens may live and work better and more sustainably." Floridi conceptualizes a legislative "hexagram" of digital constitutionalism (FLORIDI, 2021, p. 220) that includes distinct initiatives addressing different dimensions of the digital expansion, i.e., the General Data Protection Regulation (GDPR), the Digital Services Act (DSA), the Digital Markets Act, the Data Governance Act, the Artificial Intelligence Act, and the bill for regulating a European Health Data Space.[20]

[19] As he explains "[t]he rule of law framework provides a lens through which to evaluate the legitimacy of online governance and therefore to begin to articulate what limits societies should impose on the autonomy of platforms. For the governance of platforms to be legitimate according to rule of law values, we should expect certain basic procedural safeguards. First, decisions must be made according to a set of rules, and not in a way that is arbitrary or capricious. Second, these rules must be clear, well understood, and relatively stable, and they must be applied equally and consistently. Third, there must be adequate due process safeguards, including an explanation of why a particular decision was made and some form of an appeals process that allows for the independent review and fair resolution of disputes. These are the fundamental minimum procedural standards for a system of governance to be legitimate, and platforms currently perform very poorly on these measures" (SUZOR, 2018, p. 2).

[20] All these acts and regulations, including the legislative bills for digital services and health data, may be accessed at the EU site (EUROPEAN UNION, [n.d.]).

Another example of the elasticity of digital constitutionalism in the context of means-oriented applications is its association with institutional initiatives in the self-regulatory sphere. A well-known example of such arrangements is the Facebook Oversight Board. The Board was created by Meta in 2019 as a second judgement tier for moderation decisions made by the site about user-posted content (OVERSIGHT BOARD, 2019). The Board is financed through a trust fund set by Meta itself and was designed as an independent entity as regards management. Facebook's decisions on content moderation can be appealed to the board and are reviewed by board members, who are considered experts in the field. The normative reference for the board's decisions is the company's "Community Standards" (KLONICK, 2020, p. 2476). The structure of the Facebook Oversight Board has been the object of wide academic analysis, especially regarding its actual potential for enhancing the protection of online freedom of speech (HAGGART; IGLESIAS KELLER, 2021, p. 7). For now, however, we are interested in how its alleged intention of improving procedural legitimacy has made room for the diffusion of constitutional metaphors.

Although private and very limited in its enforceability and scope, the Oversight Board is often associated to constitutional phenomena. It has been referred to as the "Facebook´s Supreme Court" (OVIDE, 2021; GRADONI, 2021; GOLIA, 2021). In this scenario where platforms seek validation using state-related metaphors, critical approaches can be already found in the literature (COWLS et al., 2022). Miloš and Pelic (2022) link the Oversight Board to the theoretical framework furnished by digital constitutionalism, as part of an "expansive quest for reversing the complicity of the law in the development of an informational capitalism" (Ibid., p. 198).

However, the several applications of digital constitutionalism do not necessarily reverse this complicity. Quite on the contrary, the misappropriation of the symbolic value of constitutionalism by solutions managed and operated by the digital private platforms themselves may work towards legitimizing such structures.[21] For now, it should be noted that the balance of power embedded in regulatory initiatives aimed at digital platforms and founded on procedural legitimacy is conditioned by the agents who run such initiatives. If this nuance is not considered in technical assessments, digital

[21] We will delve deeper into this point in the next section.

constitutionalism becomes a mere label that tends to disguise and reinforce the power of digital platforms instead of their purported function to reign it in.

Inconsistencies in digital constitutionalism have already been pointed out by other authors, albeit in different terms. Celeste (2019a, p. 77), for example, argues for the reconciliation of conceptual differences through the idea of an "ideology that adapts the values of contemporary constitutionalism to the digital society". Also approaching digital constitutionalism from an ideological point of view, Golia (2021, p. 11) defines it as "the constitutional discourse which at the same time investigates and contributes to shaping the socially constructed relationships of individuals to their actual conditions of existence, directly or indirectly mediated by digital technologies." This definition expands Celeste's proposal by creating a focal point for different lines of research dealing with constitutional limitations that bear on digital technologies. In this regard, digital constitutionalism should go well beyond constitutional language and values and begin to focus on the ways in which technology shapes and affects the lives of individuals, collective agents, and whole social systems.

It may be argued that the above-mentioned theoretical approaches all share the same concern about digital platforms' compliance with the values and purposes of constitutional protections. But their implications are quite distinct. Each one of them is relevant to a specific type of (public or private) agent, and thus inspires different sets of democratic legitimacy criteria. Clearly distinguishing between them also helps to correctly assess these theories' limitations, as well as the risks and contradictions inherent in their respective applications of the term "constitutionalism." – which is the analysis we undertake in the next section.

4. Digital Constitutionalism: Contradictions and Risks

A discussion about the limitations and possibilities of the notion of digital constitutionalism involves two different problems. The first refers to the explanatory and normative value of expanding the concept of constitution to include legal forms that differ in many respects from those shaped by modern political theory. The second revolves around the risks and impacts entailed by such a conceptual expansion and by recent uses of digital constitutionalism as a heading. For the most part, those two analytical lines

appear to intertwine and overlap, and in this section, we will look at both angles in an inter-related way.

In the first line of critical assessment, the question to be tackled involves mainly the theoretical viability of appropriating the symbolic credentials of modern constitutionalism to describe and analyze political and social phenomena that take place outside the context of nation-states. This debate is not unprecedented in constitutional theory. Objections to applying the conceptual framework and terminology of the constitutionalist tradition to describe the regulation of supranational public and private powers stand as one of several conceptual challenges to the doctrines of constitutional pluralism, global constitutionalism, and societal constitutionalism. As said by Marcelo Neves (2009, p. 4–5), "the constitution in a modern sense is tied to broad structural assumptions and demands conceptual clarity on a semantic level." This is the reason why it cannot be "characterized as a mere metaphor having nothing to do with certain structural implications" (2009, p. 4–5). In Neves' view, "the inflated use of the term has made it quite vague, leading to the loss of its historical, normative, and functional senses" (2014, p. 202). The multiple applications of digital constitutionalism have concurred to hollow out and trivialize the idea of constitutionalism itself, especially insofar as they may be conflated with the ideas of industry regulation and even of self-regulation.

From a perspective grounded in the modern tradition, non-state agents are structurally unfit for constitutionalization, because they are devoid of the essential elements that would enable them to operate constitutionally, both from a functional and a symbolic point of view. Among current authors, a paradigmatic defense of the traditional concept of constitutionalism has been made by Dieter Grimm (2010), who rejects the idea that a constitution may be conceived outside the territorial limits of states. Grimm (2010, p. 9) lists five defining characteristics of constitutions that are not simultaneously present in transnational and private systems: i) they are legal norms expressing a political decision; ii) they are aimed at establishing and regulating public power; iii) they do not recognize extraconstitutional bases and means for exercising that power; iv) they spring from the will of the people as the only legitimate source of power, supported by the distinction between *pouvoir constituant* and *pouvoir constitué*; and v) they enjoy primacy over all other sources of law.

Similar ideas can be found in the various criticisms made against the constitutional pluralism theory, notably in analyses of its application to the functioning of the European

Union. In general terms, constitutional pluralism sees Union law as a normative order in which no institution has final authority, so that hierarchy is substituted by "heterarchy" (WALKER, 2002; KRISCH, 2010). Criticisms of such a doctrine range from claims that it is theoretically inconsistent – epitomized in Martin Loughlin's statement that "constitutional pluralism is an oxymoron" (LOUGHLIN, 2014, p. 23) – to doubts about its operational expediency, on the grounds that pluralism is not only logically unfeasible but also presents significant risks to the effectiveness of law and the functioning of democracy. From the perspective of theoretical correctness, one may list by way of example the objections according to which pluralism i) impairs the order of the legal system by leaving open the question of who has the final authority (CRUZ, 2016); ii) promotes a selective and unequal enforcement of legal rules (KELEMAN, 2018; KELEMEN; PECH, 2019); and iii) allows for a high degree of legal uncertainty, impairing implementation of the premises of the rule of law (CRUZ, 2016, p. 370). According to this line of thought, illiberal governments such as those of Hungary and Poland have found in the concepts of constitutional pluralism and constitutional identity a way of giving an appearance of respectability to their autocratic reforms. Assessing the practical effects of the theory, Cruz (2016) says that the "heterarchy" advocated by constitutional pluralism provides a lot of room for interpretation and manipulation and may be used as an instrument to reopen political debates through law, further weakening the Union's precarious political processes.

Also worth mentioning are some critical readings of societal constitutionalism that identify similar inconsistencies and difficulties. Regarding the conformity of that theory with the concepts of constitution and constitutionalism, Marcelo Neves (2009) rejects the idea of "global civil constitutions" as an expression of fragmentation and of "legal global villages." Beyond a general objection to "arbitrary metaphorical usages" of the concept of a constitution (NEVES, 2009 p. 3), Neves points out that the meaning of "constitution" adopted in societal constitutionalism is expanded in an inordinate way so as to encompass also the "rationality of global systems that are quite independent of democracy for their reproduction." Regarding the *lex mercatoria*, Neves highlights that it "puts law at the service of money or makes it a means for the latter", jeopardizing its ability to "develop a legally consistent equal/unequal treatment" (Ibid., p. 112). In a similar vein, Christodoulidis argues that societal constitutionalism generates risks on two dimensions. One of them operates on the constitutional level, as "the conscious and

incessant distancing of societal constitutionalism from any debt to – or leverage from – the political or state systems threatens to undercut its constitutional grounding and send it into free fall" (CHRISTODOULIDIS, 2013, p. 632). The second danger, more insidiously, is that of capture by the market, since "civil constitutions" are subject to the market's functional imperatives in such a way that any response to crises may be silenced or co-opted.

One of the most significant weaknesses of those theories that posit a constitutionalism outside the state, however, is their largely debated deficit of democratic legitimacy, which has already been acknowledged as the "Achilles' heel" of transnational regimes (TEUBNER, 2018, p. 57). The question here refers not only to the empirical capability of private and transnational bodies to function as deliberative and participative spaces. They are also devoid of the foundational elements that are inseparable from the constitutionalist ideal, in both its symbolic and real dimension. This problem must be addressed as a central point of the conflicts and legal voids that digital constitutionalism proposes to solve and fill. In an empirical field in which private agents operating pervasive infrastructures unilaterally draw up rules that apply to billions of users, democratic legitimacy also appears as the most vulnerable spot in the debates about private, hybrid, or multisector regulation. As Haggart and Keller (2021) have pointed out, in addition to the difficulty involved in referring democratic legitimacy to a common understanding, these debates tend to neglect the fact that solutions born from state regulation embody significant gains in terms of democracy.

Digital constitutionalism as featured in most recent discussions is largely a specific expression of the different modern constitutional theories addressed above. Thus, we propose an assessment of how the criticisms directed at the theories that precede it are also relevant in different degrees to the epistemic field of digital constitutionalism.

First, the very concept of "digital constitutionalism" is excessively dilated. As shown in the previous section, it is used to describe very different phenomena, and the ensuing conceptual confusion is enough to challenge its value as an explanatory and legitimizing theory. Moreover, its current definitions include opposing ideas, such as those of state regulation directed at diluting digital platforms' power and of self-regulating instruments implemented by the platforms themselves, whose effectiveness at limiting their power is questionable to say the least. Even if the founding principles of those initiatives were substantively the same – even if both state regulation and self-

regulation did implement due process mechanisms in content moderation, for instance – the balance of powers embedded in those arrangements would remain asymmetric. The rules drawn up and implemented by a private agent to regulate its own activities are imbued with a different regulatory rationality and lead to potentially different impacts from those produced by regulatory obligations founded on state coercion.

It is not a matter, then, of calling for a semantic purism or ignoring the existence of new phenomena which cannot accurately be described by traditional concepts. The problem resides in knowing what the terminology hides and what it reveals. It should be asked whether conceptual flexibilization brings with it certain philosophical and ideological changes which risk not being properly diagnosed and tackled due to murky terminological fluidity.

This becomes clear when we look at the swelling of the concept of "constitution" in the field of digital constitutionalism. In attempting to minimize the concentration of private power in digital spaces, most uses of the term "digital constitutionalism" ultimately function as theories that place a cloak of legitimacy over asymmetrical power dynamics. For example, the power of digital platforms can be understood in different ways. Specialized literature associates it, for instance, with economic concentration, with influence on the flow of and access to data, and with the fact that the same actor performs the role of drafting, applying, and assessing the enforcement of self-regulatory rules. (DIJCK; NIEBORG; POELL, 2019, p. 3; BELLI, 2022; COHEN, 2019, p. 2). Except for those usages that merely refer to the fact that constitutional law must now deal with the topic, both the subsystems of principles that operate outside the state and the regulatory mechanisms currently associated with digital constitutionalism may potentially generate effects that run counter to their own intentions, i.e., preventing the concentration of power. Although subsystems may evade state action to some degree, regulatory mechanisms that hold platforms responsible for enforcing proceedings to ensure due process or transparency, for instance – even in the context of regulatory obligations imposed by the state – run the risk of validating their concentration of power. For instance, regulatory attempts to introduce public values into the structure of powerful private agents end up by formalizing and reinforcing their role as “rulers” of online discourse, and may, as such, reinforce their political power (HELBERGER, 2020, p. 848).

It would serve us well to recall here that the discourse legitimating established powers – often of a private nature – subverts the original purposes of constitutionalism,

because it conceives the "constitution" as a mere institutionalization of a given order of things, validating the activity of agents that already hold effective power with no democratic participation. This approach corresponds to a practice used since the 20th century by autocratic systems that appropriated the symbolic charge of constitutional forms to legitimize, stabilize, and crystallize previously established powers. Constitutions, however, in their normative and *garantiste* sense, are not intended to formalize and validate previously existing imbalances, but rather to operate as mechanisms of democratic freedom, reshaping power correlations and founding new social and political orders.

Final remarks

In increasingly fragmented societies, constitutions are tools that may function as repositories of shared meanings, of minimal consensus, of safeguarded freedoms, and mitigation power asymmetries. Crises triggered by the advance of globalization, such as changes in the dynamics of private power, the climate crisis, or cultural tensions, are not indications that constitutions have become obsolete. On the contrary, they reaffirm the importance of their democratic function and as a medium for establishing agreements between divergent groups, as well as formulas for implementing essential protections for the autonomy, equality, and dignity of the people.

Possible frictions that technological changes inflict on constitutions are not a sign that the concept and the meaning of constitutionalism as a system of ideas, and as a project, needs to be dilated, or emptied. Conversely, they reinforce the need to preserve an essential framework for democratic discussion and agreement, one that functions as a buffer against divergences and a support for citizenship.

Apart from those usages in which digital constitutionalism is treated as a process by means of which constitutionalism absorbs the digital agenda, or even when treated as an ideology, the recent varied applications of the term increase these frictions. In some cases, they come to reinforce the very concentration of power that they originally intended to mitigate. The definitions of constitutionalism as mere self-regulation of private powers or even as any governmental regulatory strategy aimed at digital platforms cannot be separated from a context of democratic and regulatory crisis.

Specially regarding the latter, digital constitutionalism appears as a rhetorical appeal to constitutional law in a field where administrative and regulatory law have failed us. As for the democratic crisis, digital constitutionalism does not help to overcome it, as rhetorically intended; instead, it disguises the crisis in a usage of the term divorced from its original principles. The reinstatement of those principles is a key agenda for research in digital law.

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