

# Contents

<i>Foreword</i>	
ORESTE POLLICINO	page xiii
<i>Acknowledgements</i>	xv
<b>1 Digital Constitutionalism: An Introduction</b>	<b>1</b>
1.1 Reframing Constitutionalism in the Digital Age	1
1.2 Paths of Constitutionalisation	6
1.3 Governing the Algorithmic Society	11
1.4 The Forgotten Talent of European Constitutionalism	20
1.5 Investigating European Digital Constitutionalism	25
1.6 Research Structure	34
<b>2 The Rise of European Digital Constitutionalism</b>	<b>38</b>
2.1 Moving towards European Digital Constitutionalism	38
2.2 The Charm of Digital Liberalism	41
2.2.1 Immunising Online Intermediaries	44
2.2.2 Ensuring the Free Circulation of Personal Data	48
2.3 Judicial Activism As a Bridge	53
2.3.1 The Constitutional Dimension of Online Intermediaries	56
2.3.2 The Judicial Path towards Digital Privacy	60
2.4 The Reaction of European Digital Constitutionalism	64
2.4.1 Democratising Content Moderation	67

2.4.2	Centring a Personal Data Risk-Based Approach	74
2.5	Freedoms and Powers in the Algorithmic Society	78
<b>3</b>	<b>The Law of the Platforms</b>	80
3.1	From Public to Private As from Atoms to Bits	80
3.2	The Governance Shift	83
3.2.1	The First Constitutional Asymmetry	89
3.2.2	The Second Constitutional Asymmetry	92
3.3	Delegated Exercise of Quasi-Public Powers Online	95
3.3.1	Delegating Powers on Content	102
3.3.2	Delegating Powers on Data	105
3.4	Autonomous Exercise of Quasi-Public Powers Online	110
3.4.1	A New Status <i>Subjectionis</i> or Digital Social Contract	112
3.4.2	The Exercise of Autonomous Powers	116
3.5	Converging Powers in the Algorithmic Society	120
<b>4</b>	<b>From Parallel Tracks to Overlapping Layers</b>	123
4.1	The Intimate Connection between Content and Data	123
4.2	An Evolving Relationship on Different Constitutional Grounds	125
4.3	The Blurring Lines between Content and Data	131
4.3.1	Active Providers and Data Controllers	135
4.3.2	From the Takedown of Content to the Delist of Data	138
4.4	From Legal Divergence to Convergence	143
4.4.1	Constitutional Conflict and Converging Values	145
4.4.2	From Content to Process	148
4.4.3	Content and Data Liability	150
4.5	The Challenges Ahead in the Field of Content and Data	155
<b>5</b>	<b>Digital Constitutionalism and Freedom of Expression</b>	157
5.1	Expressions in the Algorithmic Society	157
5.2	From the Free Marketplace of Ideas . . .	160

5.3	... To the Algorithmic Marketplace of Ideas	166
5.3.1	The Public Sphere in the Age of Algorithms	169
5.3.2	The Logic of Moderation	176
5.3.3	Private Enforcement of Freedom of Expression	184
5.4	The First Reaction of European Digital Constitutionalism	187
5.5	Horizontal Effect Filling Regulatory Gaps	192
5.6	Rethinking Media Pluralism in the Age of Online Platforms	201
5.6.1	The Positive Side of Freedom of Expression	203
5.6.2	The Passive Side of Freedom of Expression	207
5.6.3	The Digital Services Act	211
5.7	Expressions and Personal Data	214
<b>6</b>	<b>Digital Constitutionalism, Privacy and Data Protection</b>	<b>216</b>
6.1	Data in the Algorithmic Society	216
6.2	From the Right to Be Let Alone ...	219
6.3	...To Privacy and Data Protection in the Age of Big Data	225
6.4	The Constitutional Challenges of Big Data	229
6.4.1	The Blurring Boundaries of Personal Data	234
6.4.2	Clashing General Principles	240
6.4.3	The Freedom from Algorithmic Processing	246
6.5	The Constitutional Reframing of the GDPR	253
6.5.1	Recentring Human Dignity	255
6.5.2	Conflicting Positions and Proportionality	262
6.5.3	Enhancing Due Process	267
6.6	Constitutional Values in the Algorithmic Society	271
<b>7</b>	<b>The Road Ahead of European Digital Constitutionalism</b>	<b>273</b>
7.1	The Consolidation of European Digital Constitutionalism	273
7.2	Values: Digital Humanism versus Digital Capitalism	277
7.3	Governance: Public Authority versus Private Ordering	286
7.4	Scope: Constitutional Imperialism versus Constitutional Protectionism	296

7.5 Conclusions: The Constitutional Lesson Learnt and the Digital Road Ahead	311
<i>Bibliography</i>	318
<i>Index</i>	355