

# Index

Footnotes are indicated by n. after the page number.

- abuse of rights principle of Charter, 93, 147, 207
- Ackerman, Bruce, 9
- active intermediaries, platforms as, 35, 87–8, 124–5, 131–2, 153–4
  - data controllers. *See* data controllers, platforms as
  - Digital Services Act proposals based on, 212–14
  - ECJ rulings on, 56–7, 130
  - platforms’ denial of agency, 181
- advertising by platforms, 15–16, 39, 53, *See also* digital capitalism
  - content moderation, business logic of, 167, 173, 176–81
  - Digital Services Act provisions on, 154–5
  - micro-targeting, 131, 173, 179–80, 217
  - search engines, promotional activities, 56–7
- algorithms
  - decision-making by. *See* automated decision-making
  - diversity regulation by, 208–9
  - spurious neutrality of, 3, 56–7, 119, 185, 229–30, 259–60
- Amazon, 7, 8, 294
- anonymity in digital environments, 14–15
  - anonymisation of personal data, 237–9
  - pseudonymisation of personal data, 239–40, 246
- Apple, 7, 8, 292
- Arab Spring uprisings, 13
- Arendt, Hannah, 175
- Arora, Payal, 303
- artificial intelligence, 3, 271, 274–5, 277–8
  - algorithms. *See* algorithms
  - for content moderation. *See* content moderation by platforms
  - for data processing, 16, 36, 236–7
  - for decision-making. *See* automated decision-making
  - discriminatory outcomes, 260–1, 278
  - EU regulation of, 283
    - competitive disadvantage concern, 281–2, 285
    - ethical guidelines, 32, 279, 282
    - regulatory proposals, 211, 274, 280, 283–4, 295, 310, 316
- Audiovisual Media Services (AVMS)
  - Directive amendments, 66, 69–71, 144, 149, 189–90
- Australian news ban by Facebook, 9, 158
- authoritarian regimes
  - Internet regulation in China, 12, 85, 87, 89, 289–90, 297
  - platforms’ user governance, resemblance to, 20, 35, 112–16, 185
  - regulation of platforms in, 87, 88–9, 95, 121, 171, 284, 298
  - fear of pluralism basis, 89–92, 94, 111
- automated decision-making, 18, 119, 247
  - constitutional law concerns, 119–20, 229, 230–1, 233
  - for content moderation, 19, 53–4, 72, 158, 174, 181–2, 185–6, 214
  - human intervention, 182, 184, 185, 211, 215, 252
  - discriminatory outcomes, 260–1, 278
  - GDPR rights to protection from, 31, 76–7, 246–53, 259, 261–2, 266, 268–70
  - human-in-the-loop principle, 211, 261, 268–70
  - privacy concerns, 216–17, 229, 230

- automated decision-making (cont.)  
 user benefits, 167–8  
 welfare and criminal justice contexts, 98–9
- autonomous powers of platforms, 81–2,  
 110–12, 121, 313–14  
 exercised under terms of service, 17,  
 116–18, 119  
 users rendered *status subjectionis*, 20, 35,  
 112–16, 210–11, 214, 317  
 freedom to conduct business right, 20–1,  
 58, 91, 153, 207  
 regulation to take account of, 76–7,  
 92–3, 200, 210–11  
 and horizontal effect doctrine, 200  
 quasi-judicial powers, 118–19  
 self-regulation. *See* self-regulation by  
 platforms
- AVMS (Audiovisual Media Services)  
 Directive amendments, 66, 69–71,  
 144, 149, 189–90
- balancing of rights. *See* proportionality  
 principle
- Balkin, Jack M., 1, 183, 195  
 Barker, Adam, 227  
 Barlow, John P., 42  
 Bathaee, Yavar, 252  
 Beijer, Malu, 198  
 Benkler, Yochai, 169  
 Ben-Shahar, Omri, 113  
 Berman, Paul S., 26–7  
 Biden, Joe, 189  
 Big Data analytics, 225–8, 236–7, 241, 245  
 constitutional law concerns, 229–33  
 European regulatory responses,  
 228–9, 233  
 GDPR. *See* GDPR (General Data  
 Protection Regulation)  
 personal and non-personal data confu-  
 sion, 236–40, 255
- biometric data, 258–9  
 blocking orders, 58–9, 98, 190–2  
 Boggetti, Giovanni, 165  
 Boyd, Danah, 227  
 Boyle, James, 26–7, 96, 101  
 Brandeis, Louis D., 100, 219–20  
 Brkan, Maja, 197  
 Burris, Scott, 86–7  
 Bygrave, Lee A., 245, 248–9
- Cambridge Analytica scandal, 2, 16, 40,  
 217
- Charter of Fundamental Rights of the  
 European Union (Nice Charter)  
 abuse of rights principle, 93, 147, 207  
 as bill of rights, 34, 53, 54–5, 60, 312
- ECJ application of, 55–6  
 to e-Commerce Directive frame-  
 work, 57–9  
 privacy and data protection rul-  
 ings, 60–4
- freedom to conduct business right. *See*  
 freedom to conduct business
- freedom to receive or impart informa-  
 tion right. *See* freedom of expression
- horizontal effect, 196–8  
 human dignity value, 22–3, 257  
 limitations to rights, requirements  
 for, 93  
 non-discrimination right, 260–1  
 personal data protection right, 61,  
 224, 240  
 right to effective remedy, 205
- China. *See also* authoritarian regimes  
 artificial intelligence, technological  
 leadership, 274, 282  
 government control of platforms, 91,  
 284, 298  
 Internet regulation, 12, 85, 87, 89,  
 289–90, 297
- Christou, George, 44  
 Citron, Danielle Keats, 178  
 cloud computing services for public  
 authorities, 18–19, 99
- Cohen, Julie E., 16  
 ‘collateral censorship’ risk, 207–8  
 Communication Decency Act (US), 45–6,  
 102, 162–3, 189, 212, 288
- community guidelines of platforms. *See*  
 terms of service of platforms
- complaints mechanism of Copyright (DSM)  
 Directive, 69
- consent to data processing principle, 50,  
 154, 240, 251, 252, 259, 267  
 artificial intelligence technology under-  
 mining, 242–3  
 as ‘informational self-determination’  
 right, 221, 258
- constitutional law, 3–4, 5–6, 94. *See also*  
 democratic values; fundamental  
 rights; rule of law
- delegated powers of platforms,  
 constitutional law limits on,  
 100–1
- digital constitutionalism  
 concept, 4–6, 26–7  
 European form. *See* European digital  
 constitutionalism
- globalisation’s challenge to, 10–11, 32–3,  
 83–4, 88, 311  
 platforms shaping, 8–10  
 proportionality principle. *See* propor-  
 tionality principle

- technological regulation distinguished, 18, 84–5, 117–18
- transnational constitutionalism. *See* transnational constitutionalism
- constitutionalisation of global private spheres, 9–11, 88, 89, 111, 194
- content and data relationship. *See* data and content relationship
- content moderation by platforms, 131, 313
- automated decision-making for, 19, 53–4, 72, 158, 174, 181–2, 185–6, 214
- human intervention, 182, 184, 185, 211, 215, 252
- business logic of, 167, 173, 176–81
- disinformation control. *See* disinformation
- and European digital constitutionalism, 67, 73–4, 144n., 189–90, 192, 200–1, 215
- copyright content, licensing system, 67–9, 73
- Digital Services Act. *See* Digital Services Act proposal
- ‘equivalent’ content removal, ECJ guidance, 190–2
- media pluralism reframing under, 201–3, 208–9
- platform self-regulation, Commission Recommendation on, 72–3
- positive and passive framework proposal, 207–11, 212–14, 315
- terrorist content measures, 71–2, 149–50
- video-sharing platforms, liability rules, 69–71, 81
- freedom of expression concerns, 14, 36, 47–8, 59, 102–5, 116, 157–60, 214
- horizontal effect doctrine, potential to address, 192–201
- for media pluralism. *See* media pluralism
- positive and passive framework to address, 207–11, 212–14, 315
- positive state obligations to address, 203–7
- private enforcement of right, 184–6
- profit-making goal overriding, 166–8, 184
- US and European attitudes compared, 160–6, 185, 189, 194–6, 214
- general monitoring ban, 46–7, 57–8, 68, 143, 149, 190–2
- rationale for, 207–8, 210
- hate speech control, 19, 104, 177, 179, 185
- EU measures on, 69–70, 129, 190
- micro-targeting, 131, 173, 179–80, 217
- notice and takedown mechanisms, 46, 103–4, 118–19, 142–3, 213
- rule of law concerns, 14, 59, 77, 186
- techniques, 176–7
- voluntary standards, 187–9, 210, 212
- Convention 108/1981 (Council of Europe), 49, 223
- Copyright (DSM) Directive, 66, 67–9, 73, 144, 149, 189
- Copyright (Infosoc) Directive, 129–30
- co-regulation, public and private actors, 290–6, 316
- Council of Europe, 66, 209, 286, 293
- on algorithmic systems accountability, 280, 285–6, 295–6
- Convention 108/1981, 49, 223
- ECHR. *See* European Convention on Human Rights 1950
- Court of Justice of the European Union, 55–6
- COVID-19 pandemic, 113, 157, 300
- disinformation during, 182
- platform activities during, 6–7, 81, 292
- Crawford, Kate, 184, 227
- Crawford, Susan, 293–4
- cyberspace, theories of governance in, 26, 42, 84–8
- Czerniawski, Michal, 303
- Daskal, Jennifer C., 110, 302–3
- data and content relationship, 35–6, 123–5, 231, 314
- and European digital constitutionalism, 145, 155–6
- constitutional conflict promoting convergence, 145–8
- GDPR promoting convergence, 150–5
- parallel tracks approach retained, 143–5
- procedural safeguards focus promoting convergence, 148–50
- separate EU law regimes, 123–4, 125–8
- Google Spain* (ECJ) illustrating convergence, 138–43, 154, 155
- Google v Vivi Down* (Italy) illustrating convergence, 135–8, 154, 155
- overlaps between, 128–31
- technological convergence, 124–5, 131–5
- data controllers, platforms as, 62–3, 131, 133–5
- accountability regime of GDPR, 74–5, 106–8, 116, 152–3, 242, 246, 263–7, 300
- Google Spain* (ECJ) on, 63, 138–43, 154, 155
- Google v Vivi Down* (Italy), 135–8, 154, 155

- data processing by platforms, 15–17, 36  
 artificial intelligence for, 16, 36, 236–7  
 decision-making purposes. *See* automated decision-making  
 autonomous decision-making on, 118–19  
 Big Data analytics. *See* Big Data analytics  
 data controller status. *See* data controllers, platforms as  
 ‘data power’ of platforms, 28, 39, 52, 110–11, 114, 167  
 delisting duty. *See* right to be forgotten/to erasure  
 ECJ rulings on, 60–4, 129–30, 138–43, 253–4  
 for profiling purposes, 15–16, 39, 54, 131, 167  
 privacy concerns, 14–15, 216–17, 229, 230  
 and risk-based approach of data protection regulation, 105–10, 116, 263–6  
 for security and law enforcement purposes, 43–4, 61–2, 97, 144–5, 183, 235  
 sensitive personal data, 243  
 Data Protection Directive, 41, 52, 54, 56, 74, 267  
 data and content relationship under. *See* data and content relationship, separate EU law regimes  
 EU-US data transfer safe harbour, 61–2, 301–3  
 and freedom of expression, 146–7  
 internal market logic of, 38, 41–2, 49–51, 60, 127, 223–4  
 right to be forgotten. *See* right to be forgotten/to erasure  
 risk-based approach, 105–6, 127–8, 263  
 safe harbour for online intermediaries, 129, 133–5  
 data protection regulation, 33, 271–2. *See also* privacy in digital environments  
 Big Data analytics, European responses, 228–9  
 competing regimes, 32–3, 51–2  
 consent principle. *See* consent to data processing principle  
 Convention 108/1981 (Council of Europe), 49, 223  
 Data Protection Directive. *See* Data Protection Directive  
 for democratic values protection, 232–3  
 and EU internal market goals, 38, 41–2, 49–51, 60, 127, 223–4  
 EU-US data transfer safe harbour, 61–2, 301–3  
 evolution, 126, 219–25  
 freedom of expression, relationship with, 145–8  
 GDPR. *See* GDPR (General Data Protection Regulation)  
 human dignity value underpinning, 220, 221, 222, 232, 279  
 GDPR, proposed human centric approach, 255–62  
 positive dimension, 126–7, 218, 224  
 proportionality principle, 75, 262–7  
 risk-based approach, 105–10, 116, 127–8, 263–6  
 in United States, 219–20, 221–2  
 Data Retention Directive, 61  
 De Hert, Paul, 241, 255, 265–6, 303  
 delegated powers of platforms. *See* public authority functions of platforms  
 delisting duty of search engines. *See* right to be forgotten/to erasure  
 democratic regimes, regulation of platforms, 88–90, 91–4, 111, 159  
 democratic values. *See also* constitutional law; fundamental rights; rule of law  
 and automated decision-making, 119–20, 229, 233  
 and Big Data analytics, 229–33  
 Cambridge Analytica scandal, 2, 16, 40, 217  
 data protection regulation to protect, 232–3  
 and delegated powers of platforms, 19–21, 77, 82, 99  
 freedom of expression. *See* freedom of expression  
 human dignity. *See* human dignity  
 pluralism. *See* pluralism  
 and user governance by platforms, 20, 35, 112–16  
 digital capitalism, 1–2, 23–4, 43, 287. *See also* neoliberalism  
 commodification of the human, 255, 256–7  
 content moderation by platforms, business logic, 167, 173, 176–81  
 digital humanism contesting, 276, 277–80  
 hybrid European approach, 280–6  
 freedom of expression concerns overridden by, 166–8  
 market power of platforms, 28, 170, 210, 293  
 digital constitutionalism  
 concept, 4–6, 26–7  
 European form. *See* European digital constitutionalism

- Digital Markets Act proposal, 211
- Digital Millennium Copyright Act (US), 45, 102
- Digital Services Act proposal, 66–7, 74, 105, 150, 283, 291
- e-Commerce Directive regime, interaction with, 211–14
  - GDPR regime, interaction with, 154–5
- Digital Single Market (DSM) strategy, 32, 65, 125, 282, 312
- Audiovisual Media Services (AVMS) Directive amendments, 66, 69–71, 144, 149, 189–90
- Copyright (DSM) Directive, 66, 67–9, 73, 144, 149, 189
- Digital Markets Act proposal, 211
- Digital Services Act. *See* Digital Services Act proposal
- GDPR. *See* GDPR (General Data Protection Regulation)
- Privacy and Electronic Communications Regulation (proposed), 144
- TERREG (Online Terrorist Content Regulation proposal), 66, 71–2, 149–50, 190
- discrimination from automated decision-making, 260–1, 278
- disinformation, 165
- during COVID-19 pandemic, 182
  - EU Code of Practice on, 190, 208–9
  - liability risk management by platforms, 103–4
- Drahos, Peter, 86–7
- Dreyer, Stephan, 259
- Dynamic Coalition on Platform Responsibility (Internet Governance Forum), 187
- e-Commerce Directive, 41–2, 52, 54, 56, 104–5
- Charter rights applied to regime, 57–9
  - data and content relationship under. *See* data and content relationship, separate EU law regimes
  - freedom of expression, Recitals referencing, 46, 56, 102, 127
  - general monitoring ban, 46–7, 57–8, 68, 143, 149, 190–2
    - rationale for, 207–8, 210
  - interactions with other EU regimes, 150–5, 211–14
  - internal market logic of, 128
  - procedural safeguards lacking, 148–9
  - safe harbours for online intermediaries, 44–8, 56–7, 67, 102, 128–9, 132–3, 151
- Digital Services Act proposals affecting, 212–14
- no territorial scope restrictions, 306, 308
- Enforcement Directive, 129–30
- e-Privacy Directive, 129–30
- Erdos, David, 134, 146
- establishment of platforms in EU, 63, 301, 309
- EU internal market. *See* internal market of EU
- European Convention on Human Rights 1950 (ECHR)
- EU law, relationship with, 54
- freedom of expression right, 56, 102, 103, 204–5
  - human dignity value, 21–2, 220
  - positive state obligations, 194, 203, 204–5
  - privacy right, 126, 220, 222–3
  - right to effective remedy, 205, 206
- European Court of Justice, 55–6
- European digital constitutionalism, 20–1, 25, 64–7, 275–6, 311–14
- competitive disadvantage concern, 281–2, 285
  - and content moderation by platforms. *See under* content moderation by platforms
  - and data and content relationship. *See under* data and content relationship
  - digital constitutionalism concept, 4–6, 26–7
  - DSM strategy. *See* Digital Single Market (DSM) strategy
  - evolution. *See* evolution of European digital constitutionalism
  - future directions. *See* future directions of European digital constitutionalism
  - GDPR. *See* GDPR (General Data Protection Regulation)
  - human dignity value underpinning, 21–4, 165, 195, 213, 257, 284, 294, 317
  - research questions and methodology, 25–34, 312–17
  - US approach compared, 24–5, 33, 93–4, 162–4, 189, 284, 288–9, 297–8
- European Green Deal, 274
- EU-US data transfer safe harbour, 61–2, 301–3
- Evans, David S., 114
- evolution of European digital constitutionalism, 34, 38–40, 78–9, 273, 278–9
- 1st phase: digital liberalism, 2, 38–9, 41–3, 78, 80–1, 287
  - free circulation of personal data, 48–52

- evolution of European digital (cont.)  
 resilience of, 43–4  
 safe harbours for online intermediaries. *See* safe harbours for online intermediaries  
 US influence on, 42, 44, 45–6  
 2nd phase:judicial activism, 53–6, 59, 312–13  
 Charter rights applied to e-Commerce Directive framework, 57–9  
 data protection and privacy rulings, 60–4, 129–30, 138–43, 253–4  
 search engines as active intermediaries, 56–7, 130  
 3rd phase. *See* Digital Single Market (DSM) strategy; GDPR (General Data Protection Regulation)  
 4th phase. *See* future directions of European digital constitutionalism  
 scholarly explanations for, 25–7  
 extraterritorial reach of GDPR, 299–303  
 privacy universalism critique, 303  
 territorial scope of delisting/content removal orders, 303–9
- Facebook, 8, 86, 112, 177, 294  
 advertising revenue, 167  
 Australian news ban controversy, 9, 158  
 content moderation by, 14, 182, 185  
*Glawischmig-Piesczek v Facebook Ireland Ltd* (ECJ), 190–2, 306–7, 309  
 Donald Trump's accounts blocked by, 2, 14, 105, 158  
 global reach and power, 17, 21, 112, 113, 157, 169  
 Oversight Board, 6, 17, 187, 289  
 fake news. *See* disinformation  
 Finck, Michelle, 237–8  
 First Amendment. *See* freedom of expression, US First Amendment
- Fitzgerald, Brian, 26  
 Flew, Terry, 176  
 Floridi, Luciano, 256–7  
 Fraser, Nancy, 169  
 free movement of information society services, 44–5, 46, 92, 102  
 freedom of expression, 6, 33  
 Charter right, potential horizontal effect, 197–8  
 'collateral censorship' risk, 207–8  
 and content moderation by platforms. *See under* content moderation by platforms  
 data protection and privacy, relationship with, 145–8  
 digital technology fostering, 8, 13, 14–15, 91, 157  
 e-Commerce Directive Recitals referencing, 46, 56, 102, 127  
 European balancing approach to, 164–5, 200, 206, 284, 304  
 evolution of right, 126, 160–2  
 online censorship in authoritarian regimes, 90, 171  
 positive dimension, 203–7  
 public regulation of online speech, 13–14, 44, 162–4  
 and safe harbours for online intermediaries, 46, 59  
 US First Amendment  
 content moderation influenced by, 185, 214  
 and digital regulation, 24–5, 40, 45–6, 93–4, 162–4, 178, 288–9, 293–4, 297–8  
 horizontal effect lacking, 194–5  
 liberal approach, 160–1, 162  
 freedom to conduct business, 206, 262, 284  
 digital technology fostering, 8  
 of platforms, 20–1, 58, 91, 153, 207  
 regulation to take account of, 76–7, 92–3, 200, 210–11
- Froomkin, A. Michael, 42–3, 96–7  
 fundamental rights. *See also* constitutional law; democratic values; rule of law  
 digital technology fostering, 8, 11, 13, 14–15, 91, 157, 261  
 freedom of expression. *See* freedom of expression  
 freedom to conduct business. *See* freedom to conduct business  
 as general principles of EU law, 55–6  
 horizontal effect doctrine, 3–4, 30, 64, 188  
 and content moderation by platforms, 192–201  
 human dignity. *See* human dignity  
 Internet access conceived as right, 29, 66  
 Nice Charter. *See* Charter of Fundamental Rights of the European Union (Nice Charter)
- non-delegation of state responsibility for, 100–1  
 platforms, enforcement by, 17–18, 19, 82, 118–19, 184–6  
 positive state obligations, 194, 203  
 data protection, 126–7, 218, 224  
 freedom of expression protection, 203–7  
 privacy and personal data protection. *See* data protection regulation; GDPR (General Data Protection Regulation); privacy in digital environments

- proportionality principle. *See* proportionality principle
- future directions of European digital constitutionalism, 2–4, 31–3, 36–7, 273–7, 314–17
- artificial intelligence, regulatory proposals, 211, 274, 280, 283–4, 295, 310, 316
- constitutional imperialism vs. protectionism, 276–7, 296–8
- hybrid European approach, 299, 310–11, *See also* extraterritorial reach of GDPR
- content moderation
- Digital Services Act. *See* Digital Services Act proposal
- due process safeguards, 148–50
- media pluralism, reframing of, 201–3, 208–9
- positive and passive framework, 207–11, 212–14, 315
- digital humanism vs. digital capitalism, 276, 277–80
- hybrid European approach, 280–6
- GDPR, constitutional reframing, 218–19, 253–5, 271–2, 315–16
- due process safeguards, 267–71
- human centric approach, 255–62
- proportionality approach, 262–7
- public authority vs. private ordering, 32, 276, 285–8
- hybrid European approach, 290–6, 316
- Gardbaum, Stephen, 193
- GDPR (General Data Protection Regulation), 51, 66, 78, 218, 224, 231, 283, 291–2
- algorithmic data processing clashing with principles, 240–6
- automated decision-making, rights to protection from, 31, 76–7, 246–53, 259, 261–2, 263–7, 268–70
- constitutional reframing, proposals for, 218–19, 253–5, 271–2, 315–16
- due process safeguards, 267–71
- human centric approach, 255–62
- proportionality approach, 262–7
- constitutional values underpinning, 36, 259, 263, 280
- data controller accountability under, 74–5, 106–8, 116, 152–3, 242, 246, 263–6, 300
- extraterritorial reach, 299–303
- privacy universalism critique, 303
- territorial scope of delisting/content removal orders, 303–9
- fundamental rights focus, 74, 240
- interactions with other EU regimes, 150–5
- ‘personal data’ protection under, 234–7, 255–7, 258–9
- by anonymisation, 237–9
- by pseudonymisation, 239–40, 246
- sensitive personal data, 243
- privacy by design and by default principles, 75, 107–8, 246
- right to data portability, 76
- right to erasure. *See* right to be forgotten/to erasure
- weaknesses of regime, 77–8
- general monitoring ban, 46–7, 57–8, 68, 143, 149, 190–2
- rationale for, 207–8, 210
- geo-blocking, 176, 306, 309
- German ‘informational self-determination’ right, 221, 258
- Gillespie, Tarleton, 177, 184
- Ginsburg, Tom, 23
- Glawischnig-Piesczek v Facebook Ireland Ltd* (ECJ), 190–2, 306–7, 309
- global reach of GDPR, 299–303
- privacy universalism critique, 303
- territorial scope of delisting/content removal orders, 303–9
- globalisation, 83, 120. *See also* neoliberalism
- constitutional law challenged by, 10–11, 32–3, 83–4, 88, 311
- platforms facilitating, 11, 53–4
- ‘Good Samaritan’ rule and clauses, 45, 210, 212
- Google, 7, 8, 86, 292
- as active intermediary, 56–7, 130, 132–3
- data controller. *See* data controllers, platforms as
- advertising revenue, 167
- content moderation by, 182
- delisting duty. *See* right to be forgotten/to erasure
- establishment in EU, 63, 301, 309
- global reach and power, 21, 113, 169
- Google Spain* (ECJ), 62–4, 138–43, 147, 154, 155, 301
- Google v CNIL* (ECJ), 303–6, 307–8, 309
- Google v Vivi Down* (Italy), 154–5
- Greenleaf, Graham, 86
- Grimmelmann, James, 176
- Gutwirth, Serge, 241, 255
- Gyanchandani, Manasi, 227
- Habermas, Jürgen, 166, 169, 170, 171–2
- Hartzog, Woodrow, 119

- hate speech control, 19, 104, 177, 179, 185  
 EU measures on, 69–70, 129, 190  
 Hildebrandt, Mireille, 18, 244  
 Hirschl, Ran, 83  
 horizontal effect doctrine, 3–4, 30, 64, 188  
 and content moderation by platforms,  
 192–201  
 hosting services, safe harbours for. *See* safe  
 harbours for online intermediaries  
 Huawei model, 290, 298  
 human dignity  
 and data protection and privacy protec-  
 tion, 220, 221, 222, 232, 279  
 GDPR, proposed human centric  
 approach, 255–62  
 digital humanism vs. digital capitalism,  
 276, 277–80  
 hybrid European approach, 280–6  
 European digital constitutionalism  
 founded on, 21–4, 165, 195, 213, 257,  
 284, 294, 317  
 human intervention in automated deci-  
 sion-making, 182, 184, 185, 211,  
 215, 252  
 human rights. *See* fundamental rights  
 human-in-the-loop principle, 211, 261,  
 268–70  
 Huq, Aziz Z., 23
- ICANN, 96–7, 101  
 immunities for online intermediaries. *See*  
 safe harbours for online  
 intermediaries  
 ‘informational self-determination’ right  
 (Germany), 221, 258  
 Infosoc Directive, 129–30  
 injunctions (blocking orders), 58–9, 98,  
 190–2  
 intellectual privacy notion, 146  
 internal market of EU, 41, 290–1  
 and data protection regulation, 38, 41–2,  
 49–51, 60, 127, 223–4  
 digital constitutionalism, relationship  
 with, 28, 29, 31–2  
 DSM strategy. *See* Digital Single Market  
 (DSM) strategy  
 and early approaches to digital regula-  
 tion, 43, 46, 128  
 free movement of information society  
 services, 44–5, 46, 92, 102  
 Internet access, right to, 29, 66  
 Internet of Things, 242–3, 279  
 ‘invisible handshake’ approach to platform  
 regulation, 43–4, 97, 183–4, 193, 298
- Jaffe, Louis, 117  
 Jain, Priyank, 227
- Jenkins, Henry, 115  
 Johnson, David R., 42, 84, 90
- Kaye, David (UN Special Rapporteur for  
 Freedom of Expression), 188, 203–4  
 Keller, Daphne, 143, 153  
 Kessler, Fredrick, 112  
 Kettemann, Matthias, 7  
 Khare, Nilai, 227  
 Kim, Nancy S., 114  
 King, Jonathan H., 241  
 Klonick, Kate, 181, 185  
 Knight, Alison, 238  
 Kosseff, Jeff, 45  
 Kuczerawy, Aleksandra, 206
- Laney model of Big Data analytics, 226  
 law. *See also* constitutional law  
 as social subsystem, 7–8, 88  
 interactions with other subsystems,  
 9–10, 84–8  
 technological regulation distinguished,  
 18, 84–5, 117–18  
 law enforcement and security purposes,  
 data processing for, 43–4, 61–2, 97,  
 144–5, 183, 235  
 Lessig, Lawrence, 86, 166, 260  
 Leyen, Ursula von der, 273–4  
 Lisbon Treaty, 23, 53, 54, 55, 60, 273  
 Lynskey, Orla, 12
- Macenaite, Milda, 107, 264  
 MacKinnon, Rebecca, 113  
 Manila Principles on Intermediary  
 Liability, 187  
 market power of platforms, 28, 170,  
 210, 293  
 Marsden, Christopher, 294–5  
 media pluralism  
 content moderation by platforms threat-  
 ening, 169–76, 180  
 European digital constitutionalism  
 reframing, 201–3, 208–9  
 positive state obligation to protect,  
 205–6
- Meiklejohn, Alexander, 162  
 Melber, Ari, 119  
 Mendoza, Isak, 248–9  
 metadata, 235  
 micro-targeting, 131, 173, 179–80, 217  
 Mill, John Stuart, 161–2  
 Milton, John, 161–2  
 Mittelstadt, Brent, 244  
 monitoring by platforms. *See* content mod-  
 eration by platforms  
 Montesquieu (Charles de Secondat), 120  
 Mueller, Milton, 207–8



- Murray, Andrew, 11
- Myers West, Sarah, 187
- national security and law enforcement,  
data processing for, 43–4, 61–2, 97,  
144–5, 183, 235
- Negroponce, Nicholas, 80, 169
- neoliberalism, 94. *See also* digital capital-  
ism; globalisation
- constitutional values to counter, 12–13,  
29, 31–2, 317
- and early approaches to digital regula-  
tion, 2, 38–9, 43–4, 78, 287
- self-regulation by platforms encouraged  
by, 94–5
- Network Gatekeeper Theory, 86–8
- news filtering, 14, 169–76, 180
- Nice Charter. *See* Charter of Fundamental  
Rights of the European Union (Nice  
Charter)
- Nissenbaum, Helen, 15
- non-discrimination right, 260–1
- Norton, Helen L., 178
- notice and takedown mechanisms, 46,  
103–4, 118–19, 142–3, 213
- online intermediaries  
platforms. *See* platforms  
safe harbours for. *See* safe harbours for  
online intermediaries
- Pallas, Frank, 237–8
- Pariser, Eli, 14
- Pasquale, Frank, 16–17, 110, 113–14,  
178, 294
- passive hosting services, safe harbours for.  
*See* safe harbours for online  
intermediaries
- Perritt, Henry H., 86
- ‘personal data’ protection under GDPR,  
234–7, 255–7, 258–9
- by anonymisation, 237–9
- by pseudonymisation, 239–40, 246
- sensitive personal data, 243
- personalised content delivery  
media pluralism threatened by,  
169–76, 180
- micro-targeting, 131, 173, 179–80,  
217
- types of, 174–5
- platforms  
as active intermediaries. *See* active inter-  
mediaries, platforms as  
advertising by. *See* advertising by  
platforms  
content moderation by. *See* content  
moderation by platforms  
data processing by. *See* data processing by  
platforms  
emergence of, 53–4, 80–1, 124–5  
establishment in EU, 63, 301, 309  
powers, 27–9, 82–3  
autonomous powers. *See* autonomous  
powers of platforms  
‘data power’, 1, 39, 52, 110–11,  
114, 167  
delegated powers. *See* public authority  
functions of platforms  
early consolidation of, 38–9, 52,  
80–1, 88–9  
market power, 28, 170, 210, 293  
of public policy influence, 8–10, 99  
quasi-judicial powers, 118–19  
regulation of. *See* public regulation of  
platforms; self-regulation by  
platforms  
transnational constitutional perspec-  
tive on, 10–11, 32–3, 83–4, 88,  
111, 194
- pluralism  
as democratic value, 88–9, 92, 94,  
111, 159  
media pluralism  
content moderation by platforms  
threatening, 169–76, 180  
European digital constitutionalism  
reframing, 201–3, 208–9  
positive state obligation to protect,  
205–6
- Polonetsky, Jules, 245
- positive state obligations, 194, 203  
data protection, 126–7, 218, 224  
freedom of expression protection, 203–7  
content moderation, positive and pas-  
sive framework, 207–11,  
212–14, 315
- Post, David, 42, 84, 90
- powers of platforms. *See* platforms, powers  
Privacy and Electronic Communications  
Directive, 48
- Privacy and Electronic Communications  
Regulation (proposed), 144
- privacy in digital environments, 14–15, 33,  
*See also* data protection regulation  
anonymity, 14–15  
anonymisation of personal data, 237–9  
pseudonymisation of personal data,  
239–40, 246  
automated decision-making, privacy  
concerns, 216–17, 229, 230  
ECJ rulings on, 60–4, 129–30, 138–43,  
253–4  
freedom of expression, relationship  
with, 145–8

- privacy in digital environments (cont.)  
 general monitoring ban, 46–7, 57–8, 68, 143, 149, 190–2  
 rationale for, 207–8, 210  
 privacy as negative liberty, 126, 219–20, 224  
 privacy by design and by default (GDPR principles), 75, 107–8, 246  
 right to be forgotten/to erasure. *See* right to be forgotten/to erasure
- profiling of users by platforms, 15–16, 39, 54, 131, 167  
 Big Data analytics. *See* Big Data analytics
- privacy concerns, 14–15, 216–17, 229, 230
- proportionality principle  
 and content moderation by platforms, 58, 68, 93, 129, 210–11  
 and data protection regulation, 75, 262–7  
 freedom of expression, European balancing approach, 164–5, 200, 206, 284, 304
- pseudonymisation of personal data, 239–40, 246
- public authority functions of platforms, 4, 12–13, 34–5, 39–40, 81–2, 95–101, 121, 313  
 automated decision-making. *See* automated decision-making  
 constitutional law concerns, 19–21, 77, 82, 99, 101  
 constitutional law limits on, 100–1  
 content moderation. *See* content moderation by platforms  
 in COVID-19 pandemic, 6–7, 81, 292  
 data processing. *See* data processing by platforms  
 ‘functional sovereignty’ aim, 16–17  
 fundamental rights protection, 17–18, 19, 82, 118–19, 184–6  
 non-delegation of state responsibility for, 100–1  
 and horizontal effect doctrine, 199–200  
 national security and law enforcement, 43–4, 61–2, 97, 144–5, 183, 235  
 public policy enforcement, 97–8, 121  
 public utilities regulation of platforms (proposal), 293–4  
 public-private partnerships, 18–19, 96, 98–9  
 technological regulation and law distinguished, 18, 84–5, 117–18
- public policy  
 platforms’ enforcement of, 97–8, 121  
 platforms’ influence on, 8–10, 99
- public regulation of platforms  
 arguments for, 84–5  
 in authoritarian regimes. *See under* authoritarian regimes  
 blocking orders, 58–9, 98, 190–2  
 data protection regulation. *See* data protection regulation  
 in democratic regimes, 88–90, 91–4, 111, 159  
 ‘invisible handshake’ approach, 43–4, 97, 183–4, 193, 298  
 online speech regulation, 13–14, 44, 162–4  
 platform resistance to, 8–10  
 as public utilities (proposal), 293–4  
 ‘quantity’ based approaches, failures of, 29–30  
 and self-regulation, 85–8  
 future relationship, 32, 276, 285–8, 290–6, 316  
 technological optimism influencing, 2, 8, 13, 40, 42, 78, 80–1  
 in United States. *See* United States, public regulation of platforms
- public sphere discourse. *See* media pluralism
- public utilities regulation of platforms (proposal), 293–4
- quasi-judicial powers of platforms, 118–19
- quasi-public functions of platforms. *See* public authority functions of platforms
- Radin, Margaret J., 112  
 Rahman, K. Sabeel, 293  
 redress mechanism of Copyright (DSM) Directive, 69  
 Regan, Priscilla M., 217  
 regulation of platforms. *See* public regulation of platforms; self-regulation by platforms
- Reidenberg, Joel R., 11, 85, 97–8, 183–4, 260  
 Richards, Neil M., 146, 241  
 right to be forgotten/to erasure, 75–6, 81, 108–9, 200n., 202, 257  
*Google Spain* (ECJ), 62–4, 138–43, 147, 154, 155, 301  
 territorial scope, 303–9  
 Roberts, Sarah T., 179, 181  
 Rosen, Jeffrey, 201  
 rule of law. *See also* constitutional law; democratic values; fundamental rights  
 and content moderation by platforms, 14, 59, 77, 186  
 and delegated powers of platforms, 19–21, 77, 82, 99

- and GDPR, 270
- separation of powers principle, 96–7, 99, 120, 199
- Russia, Internet regulation in, 297
- safe harbours for online intermediaries
  - Data Protection Directive regime, 129, 133–5
  - e-Commerce Directive regime, 44–8, 56–7, 67, 102, 128–9, 132–3, 151
  - Digital Services Act proposals affecting, 212–14
  - no territorial scope restrictions, 306, 308
  - EU-US data transfer safe harbour, 61–2, 301–3
  - freedom of expression rationale, 46, 59
  - platforms, application to. *See* active intermediaries, platforms as
  - in United States, 45–6, 102
- Sajó, Andras, 180
- Salinger, Evan, 119
- Santa Clara Principles on Transparency and Accountability in Content Moderation, 187
- Sassen, Saskia, 85
- Schneider, Carl E., 113
- Schudson, Michael, 174
- Schulz, Wolfgang, 259
- search engines. *See also* Google
  - as active intermediaries, 56–7, 130, 132–3
  - data controllers. *See* data controllers, platforms as
  - delisting duty. *See* right to be forgotten/to erasure
  - establishment in EU, 63, 301, 309
- Secondat, Charles de (Montesquieu), 120
- security and law enforcement purposes, data processing for, 43–4, 61–2, 97, 144–5, 183, 235
- self-regulation by platforms
  - on content moderation
    - Commission Recommendation on, 72–3
    - voluntary standards, 187–9, 210, 212
  - Facebook Oversight Board, 6, 17, 187, 289
  - neoliberalism encouraging, 94–5
  - and public regulation, 85–8
    - future relationship, 32, 276, 285–8, 290–6, 316
  - technological regulation and law distinguished, 18, 84–5, 117–18
- sensitive personal data, 243
- separation of powers principle, 96–7, 99, 120, 199
- Shachar, Ayelet, 83
- Shadmy, Tomer, 115
- Shapiro, Andrew L., 166
- Shearing, Clifford, 86–7
- Simpson, Seamus, 44
- single market of EU. *See* internal market of EU
- Slawson, David, 112–13
- Snowden, Edward, 15, 298
- social media, 131. *See also* Facebook; video-sharing platforms
  - content moderation. *See* content moderation by platforms
  - Donald Trump's accounts blocked, 2, 14, 105, 158
  - freedom of expression fostered by, 8, 13, 91, 157
  - media pluralism threatened by, 169–76, 180
  - public regulation of online speech, 13–14, 44, 162–4
  - safe harbours for providers. *See* safe harbours for online intermediaries
  - US liberal approach to accessing, 163–4
- speech moderation
  - by platforms. *See* content moderation by platforms
  - by public regulators, 13–14, 44, 162–4
- Srnicek, Nick, 170
- Stalla-Bourdillon, Sophie, 238
- state action doctrine (US), 30
- state regulation of platforms. *See* public regulation of platforms
- status subjectio*nis of users, 20, 35, 112–16, 210–11, 214, 317
- Sunstein, Cass R., 14, 172
- surveillance capitalism, 2, 43, 173, 233
- Suzor, Nicolas, 4, 27
- technological optimism, 2, 8, 13, 40, 42, 78, 80–1, 101
- technological regulation and law distinguished, 18, 84–5, 117–18
- Telman, D.A., 114
- Tene, Omer, 245
- terms of service of platforms
  - on acceptable speech or conduct, 184
  - autonomous powers exercised under, 17, 116–18, 119
  - status subjectio*nis of users under, 20, 35, 112–16, 210–11, 214, 317
- TERREG (Online Terrorist Content Regulation proposal), 66, 71–2, 149–50, 190
- Teubner, Gunther, 9–10, 88, 89, 111, 194

- third-party content
  - EU copyright licensing system, 67–9, 73
  - moderation by platforms. *See* content moderation by platforms
  - safe harbours for online intermediaries. *See* safe harbours for online intermediaries
- TikTok, 298
- transnational constitutionalism
  - constitutional imperialism vs protectionism, 276–7, 296–8
  - hybrid European approach, 299–311
  - and platforms' powers, 10–11, 32–3, 83–4, 88, 111, 194
- Treaty of Lisbon, 23, 53, 54
- Trump, Donald
  - online censorship executive order, 189, 288
  - social media accounts blocked, 2, 14, 105, 158
- Turkle, Sherry, 14–15
- Tushnet, Mark, 194, 196
- Tushnet, Rebecca, 178
- Twitter, 86, 187
  - accounts blocked by, 2, 14, 105, 158, 183
- UN Sustainable Development Goals, 274
- United States
  - data protection and privacy regulation, 219–20, 221–2
    - EU-US data transfer safe harbour, 61–2, 301–3
  - freedom of expression. *See* freedom of expression, US First Amendment
  - human dignity value, 21
  - public regulation of platforms
    - Communication Decency Act, 45–6, 102, 162–3, 189, 212, 288
    - Digital Millennium Copyright Act, 45, 102
    - First Amendment underpinning, 24–5, 40, 45–6, 93–4, 162–4, 178, 288–9, 293–4, 297–8
    - safe harbours for online intermediaries, 45–6, 102
    - state action doctrine, 30, 100, 194
  - Universal Declaration of Human Rights 1948, 257
  - user governance. *See* terms of service of platforms
  - user-generated content
    - EU copyright licensing system, 67–9, 73
    - moderation by platforms. *See* content moderation by platforms
    - safe harbours for online intermediaries. *See* safe harbours for online intermediaries
- Versteeg, Mila, 23
- Vestager, Margrethe, 287
- video-sharing platforms. *See also* social media
  - access control by, 149
  - content moderation by, 69–71, 81
  - Google v Vivi Down* (Italy), 135–8, 154, 155
- Volkszählungsurteil* case (German Constitutional Court), 221, 258
- voluntary standards on content moderation, 187–9, 210, 212
- Ward, John S., 227
- Warren, Samuel D., 219–20
- Weinberg, Jonathan, 97
- Weinrib, Lorraine, 21
- Whitman, James Q., 222
- YouTube, 14, 81, 158, 176–7
- Zalnieriute, Monika, 308
- Zarsky, Tal, 243
- Zittrain, Jonathan, 96, 170
- Zuboff, Shoshana, 113, 233
- Zuckerberg, Mark, 17, 112, 217