

RESEARCH ARTICLE

# A constitutional reflector? Assessing societal and digital constitutionalism in Meta's Oversight Board

Lucas Henrique Muniz Da Conceição 

Angelo Sraffa Department of Legal Studies, Bocconi University, Via Roentgen, 1, Milano, 20136  
Email: [lucas.munizda@unibocconi.it](mailto:lucas.munizda@unibocconi.it)

## Abstract

This article explores the use of constitutional narratives in social media platform governance, addressing the concept of digital constitutionalism. It aims to elucidate how digital constitutionalism manifests in platforms and the implications for democratizing these governance environments. It argues that digital constitutionalism exposes three goals toward platform governance: (1) an analogous application of constitutional values in private landscapes; (2) an ideological framework permeating multiple normativity levels; and (3) a policy consideration framing the symmetry of regulatory efforts with fundamental values. These three objectives hinge on a liberal and normative approach to constitutionalism, detaching from the political and social considerations at the centre of constitutional democracy. The article argues that this leads to extensive legitimacy issues when considering the transnational character of social media platforms and the localized issues of its users, as explored through an analysis of Meta's Oversight Board. It is argued that a societal perspective of (digital) constitutionalism must guide the institution's goals and procedures to promote legitimacy and accountability. This societal approach exposes the reliability issues of the established self-referencing system. It also allows an analysis of the hybridization of traditional constitutional principles in the emerging societal constitution developed by the corporation.

**Keywords:** digital constitutionalism; legitimacy; Meta Oversight Board; platform governance; societal constitutionalism

## 1. Introduction

In February 2017, Mark Zuckerberg addressed the increasing role of Facebook in building a global community. In his words, 'The most important thing ... Facebook can do is develop the social infrastructure to give people the power to build a global community that works for all of us.'<sup>1</sup> Drawing a parallel to the initial formation of nation-states,

<sup>1</sup>Mark Zuckerberg, 'Building Global Community'. Facebook, 16 February 2017. <<https://www.facebook.com/notes/3707971095882612>>.

Zuckerberg made clear his discomfort in making policy decisions for a large number of users, vowing to employ more ‘democratic’ mechanisms to involve users in the decision-making process in content moderation.

Zuckerberg’s discomfort in 2017 follows the first set of scandals concerning the US general election in 2016 and the platform’s role in promoting an intense national divide.<sup>2</sup> Political and social developments made clear how social media platforms increasingly apply fundamental rights when developing their governance structures and community standards that guide the use of their services. Framing Facebook as a reflection of society, the outcome of these preoccupations took into consideration other failed attempts to have a democratic debate on the platform’s governance.<sup>3</sup> It led to the beginning of the project to create the Oversight Board, an external institution capable of serving as a supreme court with policy privileges, revising content moderation decisions and acting as policy advisor for Meta, then Facebook Inc.

This article assesses the Oversight Board’s institutional design and how it replicates a liberal narrative of constitutionalism, which also underlies the developing framework of what has been described in the literature as digital constitutionalism.<sup>4</sup> As such, although a step forward in legitimacy and accountability in content moderation decisions, the Oversight Board fails to promote a significant engagement with its users and their political realities outside the platform, curtailing legitimacy through a technocratic approach towards governance. In contrast, the article advances a reconsideration of constitutionalism as an instrument to guide transparent, accountable and legitimate governance, countering technocratic approaches. The argument is put forward by following a societal approach that reconsiders democratic legitimacy in tandem with the expansion of platform governance transnationally. The liberal and societal theoretical approaches to digital constitutionalism are analysed diametrically to the Oversight Board’s performance in the case concerning the de-platforming of former US president Donald Trump and the 2021 ‘Facebook Files’ scandal.

This article’s main argument is that to better understand the constitutionalisation processes of social media platforms, digital constitutionalism as a concept must engage with a critical approach to constitutional theory that perceives the internal politics in virtual communities and understand the reflexive processes that circumvent the

<sup>2</sup>Evelyn Douek, ‘The Supreme Court of Facebook: Mark Zuckerberg Floats a Governance Structure for Online Speech’. *Lawfare*, 5 April 2018. <<https://www.lawfareblog.com/supreme-court-facebook-mark-zuckerberg-floats-governance-structure-online-speech>>.

<sup>3</sup>Adi Robertson, ‘Facebook Used to Be a Democracy – but Nobody Voted’. *The Verge*, 5 April 2018. <<https://www.theverge.com/2018/4/5/17176834/mark-zuckerberg-facebook-democracy-governance-vote-failure>>.

<sup>4</sup>Nicolas P Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) 4 *Social Media + Society* 1. <<https://doi.org/10.1177/2056305118787812>>; Dennis Redeker, Lex Gill and Urs Gasser, ‘Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights’ (2018) 80 *International Communication Gazette* 302. <<https://doi.org/10.1177/1748048518757121>>; Edoardo Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76. <<https://doi.org/10.1080/13600869.2019.1562604>>; Nicolas P Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge: Cambridge University Press, 2019); Giovanni De Gregorio, ‘The Rise of Digital Constitutionalism in the European Union’ (2021) 19 *International Journal of Constitutional Law* 41. <<https://doi.org/10.1093/icon/moab001>>; Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Oxford: Hart, 2021); Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (London: Routledge, 2022).

exercise of power in this environment. This societal approach, it argues, may lead to broader legitimacy for the governance structure of private platforms, specifically in the case of Meta's Oversight Board. As such, the present study addresses legitimacy in sociological rather than normative terms, investigating how far the Oversight Board is able to promote the social conditions necessary for Facebook and Instagram users distributed in different regions to perceive Meta's platform governance as legitimate. This analytical framework considers the dichotomy between procedure and performance, perceiving the Oversight Board from a democratic, technocratic and fair-mindedness approach.<sup>5</sup>

As such, a constitutionalist agenda towards platform governance must recognize that between the regulation provided by the nation-state and the normative prescription imbued in community standards at private platforms lie individuals (users and citizens). As citizens, they may need a clearer perception of the extent of the fundamental rights they can exert within national and digital social environments; as users, they need a clearer perception of how they can define the legitimacy of those exercises of powers in transnational legal orders.

Although related to the concept of digital constitutionalism, this approach distinguishes itself by investigating a societal approach to constitutionalism in digital environments. It explores a preoccupation that the normative approach to digital constitutionalism does not have because it reflects constitutionalism, and its description of liberal and representative democracy, to the extent that it perceives the capacity for the rule of law to limit the exercise of power in a social and political environment – a specific characteristic of liberal constitutionalism.<sup>6</sup> This distinction is relevant because it considers how content moderation can impact civil society, public culture and users' social and political lives despite the transnational character of the governance performed by social media platforms.<sup>7</sup>

Using societal constitutionalism as a frame for the concept of digital constitutionalism, this article analyses the establishment of the Oversight Board as a self-contestation institution within Meta's governance system, analysing the generalization and respecification of democracy within this specific virtual community.<sup>8</sup> The aim is to investigate the constitutionalisation of private governance in social media platforms and the legitimacy

<sup>5</sup>Jan Aart Scholte and Jonas Tallberg, 'Theorizing the Institutional Sources of Global Governance Legitimacy', in Jonas Tallberg, Karin Bäckstrand and Jan Aart Scholte (eds), *Legitimacy in Global Governance: Sources, Processes, and Consequences* (Oxford: Oxford University Press, 2018); Jiří Příbáň, 'Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism' (2018) 45 *Journal of Law and Society* S30. <<https://doi.org/10.1111/jols.12118>>.

<sup>6</sup>Martin Loughlin, *Against Constitutionalism* (Cambridge, MA: Harvard University Press, 2022) 27–76; Denis J Galligan and Mila Versteeg, 'Theoretical Perspectives on the *Social and Political Foundations of Constitutions*', in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge: Cambridge University Press, 2013); Gunther Teubner and Angelo Golia, 'Societal Constitutionalism in the Digital World: An Introduction' (1 May 2023) 14. <<https://papers.ssrn.com/abstract=4433988>>.

<sup>7</sup>Tarleton Gillespie, 'Platforms Intervene' (2015) 1 *Social Media + Society*. <<https://doi.org/10.1177/2056305115580479>>; Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (New Haven, CT: Yale University Press 2018); L DeNardis and AM Hackl, 'Internet Governance by Social Media Platforms' (2015) 39 *Telecommunications Policy* 761. <<https://www.sciencedirect.com/science/article/pii/S0308596115000592>>.

<sup>8</sup>Gunther Teubner, 'Quod Omnes Tangit: Transnational Constitutions Without Democracy?' (2018) 45 *Journal of Law and Society* S5. <<https://doi.org/10.1111/jols.12102>>.

deficit within the exercise of private power. Underlying this analysis is a societal perspective of constitutionalism that refrains from perceiving the critique of digital constitutionalism solely from a negative and liberal perspective.

The article is divided as follows. **Section II** briefly introduces content moderation and its regulatory framework before the constitutionalisation narrative. **Sections III and IV** focus on the liberal foundation of constitutionalism, its relationship with three approaches to digital constitutionalism, and the institutional design of the Oversight Board, considering the Oversight Board's decision reviewing the de-platforming of former US president Donald Trump. **Section V** develops a societal approach towards constitutionalism in digital environments that continues to address the internal political legitimacy of private governance structures. **Section VI** critically assesses the Oversight Board's institutional framework in relation to Meta's legitimacy crises following the disclosure of the Facebook Files, indicating the procedural and substantial restraints that impede this institution's capability of extending constitutional democracy in Meta's environment. **Section VII** concludes the article.

## II. Prelude: Content Moderation Before Constitutionalisation

Concerning content moderation within platform governance, the regulatory framework that has moulded digital platforms' exercise of powers has followed the liberal trend embedded in the development of the internet itself. This liberalist perspective in internet governance considers the communicative technology as an emerging transnational space that should be governed mostly by self-regulation, with voluntary participation and technical expertise. It contrasts a sovereigntist approach that perceives the technology more as a threat than an opportunity advocating for the role of governmental and intergovernmental institutions to protect domestic sovereignty and 'avoid external encroachments'.<sup>9</sup>

In the United States, the Communications Decency Act of 1996 (CDA) provided a safe harbour provision for internet service providers (ISPs) and search engines, not holding them liable for the content and speech of their users. Section 230 of the CDA provides a double-edged sword that recognises intermediaries as mere conduits of information. It also defines that even when they decide to moderate content, they can still maintain their safe harbour protections.<sup>10</sup> In this sense, platforms can 'claim the right but not the responsibility' to moderate content according to their internal necessities and business strategies.<sup>11</sup>

In contrast to this broad immunity regime, the European Union and most South American nations initially offered intermediaries, what has been described in the literature as a system of 'conditional liability'.<sup>12</sup> As such, ISPs enjoyed safe harbour provisions

<sup>9</sup>Daniëlle Flonk, Markus Jachtenfuchs and Anke S Obendiek, 'Authority Conflicts in Internet Governance: Liberals vs. Sovereigntists?' (2020) 9 *Global Constitutionalism* 364, 365–373 <[https://www.cambridge.org/core/product/identifier/S2045381720000167/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S2045381720000167/type/journal_article)>.

<sup>10</sup>Gillespie, *Custodians of the Internet* (n 7) 30.

<sup>11</sup>Rebecca Tushnet, 'Power Without Responsibility: Intermediaries and the First Amendment' (2008) 76 *Georgetown Law Faculty Working Papers*. <[https://scholarship.law.georgetown.edu/fwps\\_papers/76](https://scholarship.law.georgetown.edu/fwps_papers/76)>.

<sup>12</sup>Rebecca MacKinnon et al., 'Fostering Freedom Online: The Role of Internet Intermediaries' (UNESCO; Internet Society, 2015). <[https://repository.upenn.edu/cgcs\\_publications/21](https://repository.upenn.edu/cgcs_publications/21)>; Eduardo Magrani (ed), *Digital Rights: Latin America and the Caribbean* (Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas 2017); Juan Carlos Lara Gálvez and Alan M Sears, 'The Impact of Free Trade Agreements on Internet

but became liable to the third-party content hosted on their platforms if, after a specific court order or a request from a state authority, they did not take any steps to remove the content identified as unlawful within the framework of their service and the time stated in the order.<sup>13</sup> However, even adopting a system of conditional liability, the legal framework framing the liability of ISPs in Europe has been defined as liberal by the literature and has since been reformed by the implementation of the Digital Service Act (DSA), as will be addressed below.<sup>14</sup>

Although these immunity regimes were drawn to promote the exponential development of the digital environment and freedom of expression, they also fostered the expansion of power within ISPs to administer their business models and set standards for their users. As such, in the case of social media platforms, broad and conditional liability regimes allowed for enlarged discretion from these companies in determining how their users interact and which standards of freedom of expression apply in their virtual communities.

The pervasiveness of this enlarging private power has become exponentially more significant as social media platforms amass vast numbers of users and enormous economic relevance. The significant increase in the scope and prominence of social media platforms and digital intermediaries in the 2010s led to a broadening critique of the possibilities for constitutionalizing internet governance.<sup>15</sup> The increase of voluntary content moderation practices despite a relatively permissive regulatory framework led to the development of approaches concerned with translating and applying traditional public law principles into private governance structures, considering an attempt to limit and legitimize the exercise of power in these environments.<sup>16</sup>

### III. Digital constitutionalism: From State to Platforms

Following the extension of public law principles towards private governance, multiple visions for digital constitutionalism started to permeate the scholarly debate, not

---

Intermediary Liability in Latin America', in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (New York: Oxford University Press, 2020).

<sup>13</sup>In this sense, see articles 12 to 15 of Directive 2000/31/EC of the European Parliament and of the Council of the European Union, 8 June 2000, on certain legal aspects of information society services – in particular, electronic commerce, in the Internal Market ('Directive on electronic commerce') 2000 (OJ L). See also article 19 of Marco Civil da Internet [Brazilian Internet Bill of Rights]. Lei no. 12.965/2014 2014.

<sup>14</sup>See Sec. III. De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (n 4); Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge: Cambridge University Press, 2022); Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) 2022 (OJ L).

<sup>15</sup>Andreas Fischer-Lescano, 'Struggles for a Global Internet Constitution: Protecting Global Communication Structures against Surveillance Measures' (2016) 5 *Global Constitutionalism* 145. <[https://www.cambridge.org/core/product/identifier/S204538171600006X/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S204538171600006X/type/journal_article)>; Monika Zalnieriute, 'Human Rights Rhetoric in Global Internet Governance: New ICANN Bylaw on Human Rights' (2019) 10 *Harvard Business Law Review Online* 1. <<https://heinonline.org/HOL/Page?handle=hein.journals/hblro10&id=62&div=&collection=>>>.

<sup>16</sup>Nicolas P Suzor, 'A Constitutional Moment: How We Might Reimagine Platform Governance' (2020) 36 *Computer Law & Security Review* 105381. <<https://www.sciencedirect.com/science/article/pii/S0267364919303929>>.

necessarily concerned with the intersection between legitimacy and governance.<sup>17</sup> Although still perceived as an inconsistent concept, the multiple approaches have so far engaged with a liberal framework of constitutionalism, extending a classic normative-based constitutional narrative in at least three distinct ways: as the analogical extension of the rule of law in private landscapes; as an ideological framework permeating multiple normativity levels; and as policy consideration framing the symmetry of regulatory attempts with fundamental values.

### Analogy

Nicholas Suzor engages with the concept from a rule of law perspective, arguing that principles deriving from the concept of the rule of law (due process, equality, legality and predictability) need to be incorporated into the private governance of virtual communities, primarily through their internal norms and terms of service (ToS).<sup>18</sup> In Suzor's analysis, the legitimacy of the governance exercised in the private sector hinges on the possibility of enlarging the predictability of the rules that internet users must follow. In his writing, constitutionalism is distinguished from a lawless environment by the definition of a system of rules that are 'fairly, equally and predictably applied'.<sup>19</sup> This approach uses the narrative of liberal constitutionalism as an analogy for the application of rules in virtual communities through clear and predictable contractual instruments.

Considering the legitimacy of the governance performed in digital platforms, Suzor observes the interconnection between the autonomy-based notion of consent, the contractual framework of virtual communities and the public law definition of legitimacy, considered from the standpoint of self-determination and political autonomy.<sup>20</sup> Equating legitimacy with consent, Suzor acknowledges that the platforms' contractual frameworks are limited instruments to perform the functions of constitutional documents following the requirements of the rule of law. These private documents poorly articulate the rights of users *vis-à-vis* platforms' responsibilities and fail to promote a set of clear and well-understood rules able to legitimate a system of governance.<sup>21</sup>

This analogical approach to digital constitutionalism can also be perceived in Celeste's approach to the concept and its intersection with the democratic principle. Addressing the use of ToS and bills of rights as new mechanisms of constitutionalisation of the social media environment, Celeste describes the phenomena as the use of a constitutional tone – that is, 'the use of the traditional jargon of constitutional texts and ... the adoption of the peculiar configuration that articulates contents in terms of rights, principles, and duties' – in contractual documents of social media platforms, perceived specifically in Meta's

<sup>17</sup>Redeker, Gill and Gasser (n 4); Celeste, 'Digital Constitutionalism' (n 4); De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (n 4); Pollicino (n 4); Suzor, *Lawless* (n 4); Suzor, 'A Constitutional Moment' (n 16).

<sup>18</sup>Suzor, 'Digital Constitutionalism' (n 4); Suzor, *Lawless* (n 4); Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

<sup>19</sup>Suzor, 'A Constitutional Moment' (n 16) 2.

<sup>20</sup>Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996) 449.

<sup>21</sup>Suzor, 'Digital Constitutionalism' (n 4) 8–9.

ToS.<sup>22</sup> Although envisioning the theoretical possibility of these contractual documents serving the constitutional function of limiting the possibilities of action of social media companies, Celeste agrees with Suzor's assessment of the shortcomings inherent to these private frameworks as mechanisms of constitutionalisation.<sup>23</sup>

Moreover, highlighting that constitutionalisation is not symmetrical to democratization, Celeste argues that Facebook has failed in its attempt to increase democratic participation in its governance structure when offered its users procedures to vote on new provisions in its ToS.<sup>24</sup> This assessment, however, does not engage with what democracy within platform governance should be, extending an analogy of representative politics within the social environment of the private platform. More specifically, Celeste maintains in his scholarship that democracy is a value contained within the precept of constitutionalism, without formally defining what democracy means within this framework.<sup>25</sup> In modern constitutionalism, democracy has been interpreted as representative and deliberative politics, and its containment in law is a particular characteristic of both liberal and republican thought.<sup>26</sup>

### Ideology

Conversely, Celeste expands on digital constitutionalism by framing it as the ideology that permeates the national, regional and transnational development of regulatory practices towards protecting fundamental rights and balancing powers in the digital environment.<sup>27</sup> This framework engages with a perspective that attempts to consider digital constitutionalism beyond the translation of public law principles into private legal regimes, considering the expansion of digital technologies as a new constitutional moment characterized by the disruption of the equilibrium of the constitutional ecosystem.<sup>28</sup> The author's systematic definition allows for the conciliation of different perspectives of digital constitutionalism, focusing on the normative counter-reactions to the influence of digital technology in contemporary societies.<sup>29</sup>

<sup>22</sup>Edoardo Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2019) 33 *International Review of Law, Computers & Technology* 122, 124. <<https://doi.org/10.1080/13600869.2018.1475898>>.

<sup>23</sup>Ibid 131–34.

<sup>24</sup>Ibid 127.

<sup>25</sup>Celeste, 'Terms of Service and Bills of Rights' (n 22); Celeste, 'Digital Constitutionalism' (n 4); Celeste, *Digital Constitutionalism* (n 4) 78–88.

<sup>26</sup>In contrast, as will be developed later, societal constitutionalism perceives democracy and politics with the distinction between *le politique* and *la politique*. It considers political processes beyond the representational politics founded on constituted structures. Beyond the literature on societal constitutionalism, this differentiation is also present in democratic critiques of constitutionalism. Emiliós A Christodoulidis, *Law and Reflexive Politics* (Dordrecht: Kluwer Academic, 1998) 61–72; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Gareth Norbury trans (Oxford: Oxford University Press, 2012) 114–19; Martin Loughlin, 'Constitutional Law: The Third Order of the Political', in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003); Martin Loughlin, *Political Jurisprudence* (Oxford: Oxford University Press, 2017) 75–108; Loughlin, *Against Constitutionalism* (n 6) 77–110.

<sup>27</sup>Celeste, 'Digital Constitutionalism' (n 4).

<sup>28</sup>Ibid 78.

<sup>29</sup>Ibid 90.

Celeste's conceptualization of digital constitutionalism reverberates in other studies focusing on the rise of constitutional approaches to protecting fundamental rights in the digital environment. It considers a liberal approach to constitutionalism, focusing on internet bills of rights as vehicles for the broader constitutionalisation of the internet.<sup>30</sup> Celeste's approach focuses on the internet as a global regulation issue that demands constitutional counterreactions in various levels of governance. As such, while focused on the analyses of internet bills of rights, his approach is tightly connected with the theoretical framework of global constitutionalism, which (1) calls for the development of global constitutional law as a strategy to compensate for the de-constitutionalisation of domestic governance, and (2) considering all layers of governance as a whole, argues that constitutionalism should focus on how traditional constitutional functions can be secured in the interface between domestic and international law, elaborating a cognitive framework of cosmopolitan constitutionalism.<sup>31</sup>

Peters defines global constitutionalism as the use of traditional constitutional principles (the rule of law, separation of powers, fundamental rights, solidarity and democracy) and the institutional mechanisms and apparatus to enforce them as parameters to inspire strategies for the improvement of the legitimacy of the international legal order and institutions.<sup>32</sup> In terms of implementation, Peters argues that global constitutionalism should not necessarily lead to the formation of a global state, focusing instead on the development of multiple forms of legitimation in what the author describes as the process of constitutionalisation.<sup>33</sup>

Thus, envisioning digital constitutionalism within this approach to global constitutionalism, Celeste conceptualizes it as the 'ideology which aims to establish and to ensure the existence of a normative framework for the protection of fundamental rights and the balancing of powers in the digital environment'.<sup>34</sup> In Celeste's view, the limitation of the power of dominant actors in the digital environment is achievable through the definition of legal frameworks (at the state, international and transnational levels) that articulate principles and values such as democracy (perceived through the prism of representation, transparency, and accountability) and the protection of fundamental rights.<sup>35</sup>

## Policy

From a European perspective, a policy-based approach to digital constitutionalism considers the jurisprudence of the European Court of Justice (ECJ), the role performed

<sup>30</sup>Celeste, *Digital Constitutionalism* (n 4).

<sup>31</sup>Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579. <<https://doi.org/10.1017/S0922156506003487>>; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

<sup>32</sup>Anne Peters, 'Global Constitutionalism', in Michael T. Gibbons, Lisa Ellis, Kennan Ferguson and Diana Coole (eds), *The Encyclopedia of Political Thought* (Chichester: John Wiley & Sons, 2014); Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge: Cambridge University Press, 2014).

<sup>33</sup>Peters, 'Compensatory Constitutionalism' (n 31) 582; Anne Peters, 'Global Constitutionalism: The Social Dimension' in Anne Peters et al. (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge: Cambridge University Press, 2018).

<sup>34</sup>Celeste, 'Digital Constitutionalism' (n 4) 88.

<sup>35</sup>Celeste, *Digital Constitutionalism* (n 4) 82–88.

by judicial institutions in protecting fundamental rights in the digital environment, the horizontal application of fundamental values and the definition of procedural safeguards.<sup>36</sup>

De Gregorio explicitly signals the rise of digital constitutionalism in Europe by addressing the transition of the regulatory framework on content moderation and data protection from a digital liberalist approach to a digital constitutionalist one.<sup>37</sup> De Gregorio highlights how this transition derives from the increasing role (post Treaty of Lisbon) of the EU Charter as a bill of rights of the European Union, with the ECJ promoting the application of fundamental rights standards in a judicial activist agenda that inherently modified the liberal regulatory framework etched in the former EU Data Protection Directive<sup>38</sup> and e-Commerce Directive.<sup>39</sup> Following judicial activism, De Gregorio perceives the enlargement of this digital constitutionalist agenda in the regulatory debate in the European Union, specifically by the enactment of the General Data Protection Regulation and the DSM strategy set forth by the Commission.<sup>40</sup>

Translated as a policy, digital constitutionalism is preoccupied with the ‘contamination of private determinations’ in constitutional law, and thus replicates what is described in internet governance debates as a sovereigntist approach.<sup>41</sup> Although acknowledging both an internal and external aspect of digital constitutionalism related to the nation-state and private ordering respectively, De Gregorio maintains that the challenge of perceiving threats to constitutional democracy by the algorithmic society does not imply the need to revolutionize the tenets of modern constitutionalism.<sup>42</sup> Instead, De Gregorio maintains that constitutionalism in the digital environment should extend the eighteenth-century Lockean idea of legal limitation of government powers, with legitimacy emerging from power structures and actors’ legal compliance.<sup>43</sup> Thus, digital constitutionalism in De Gregorio’s approach focuses on interpreting and understanding the role of constitutional law in the algorithmic society, considering that even

<sup>36</sup>De Gregorio, *Digital Constitutionalism in Europe* (n 14); Pollicino (n 4).

<sup>37</sup>De Gregorio, ‘The Rise of Digital Constitutionalism in the European Union’ (n 4); Giovanni De Gregorio, ‘Digital Constitutionalism Across the Atlantic’ [2022] *Global Constitutionalism* 1 <<https://doi.org/10.1017/S2045381722000016>>.

<sup>38</sup>Directive 95/46/EC of the European Parliament and of the Council of the European Union, 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data 1995 (OJ L).

<sup>39</sup>Directive 2000/31/EC of the European Parliament and of the Council of the European Union, 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’).

<sup>40</sup>Regulation (EU) 2016/679 of the European Parliament and of the Council of the European Union of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) 2016 (OJ L); European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe 2015.

<sup>41</sup>De Gregorio, *Digital Constitutionalism in Europe* (n 14) 9; Flonk, Jachtenfuchs and Obendiek (n 9) 365.

<sup>42</sup>De Gregorio, *Digital Constitutionalism in Europe* (n 14) 4. Similar claims have been made by Celeste’s conceptual analysis of digital constitutionalism, even though the author maintains an affinity with the societal concepts of generalization and respecification. Celeste, ‘Terms of Service and Bills of Rights’ (n 22) 126; Celeste, ‘Digital Constitutionalism’ (n 4); Celeste, *Digital Constitutionalism* (n 4) 79; Edoardo Celeste and others, *The Content Governance Dilemma: Digital Constitutionalism, Social Media and the Search for a Global Standard* (Dordrecht: Springer, 2023) 19.

<sup>43</sup>De Gregorio, *Digital Constitutionalism in Europe* (n 14) 4.

with the increasing internationalization of constitutional law, nation-state constitutions represent the identity and values of a certain community which is connected to territorial boundaries.<sup>44</sup>

Concerning the external point of view, De Gregorio acknowledges that normative reactions can stem from multiple entities, which, in turn, influence internet governance by imposing their internal values to the detriment of the principles and safeguards of constitutional democracies.<sup>45</sup> This leads to an alteration of constitutional stability, argues De Gregorio, in which the digital environment becomes subject to the governance and authority of private actors competing with public authorities.<sup>46</sup> Such framing of digital constitutionalism implies a policy approach that aims to re-establish constitutional balance by avoiding the continuous marginalization of constitutional democracies.

In this brief analysis of De Gregorio's approach, it is argued that in assessing digital constitutionalism in Europe, he focuses on a policy approach that aims to strengthen constitutional democracies' power and legal processes. In general, this perspective perceives private powers as a challenge to state-constituted powers and assigns constitutional value to judicial activism attempts in limiting them and to the legislative and regulatory attempts that have since been developed to curb big tech.<sup>47</sup> An outcome of focusing solely on this approach relates to the difficulties of strengthening regional regulation of transnational exercises of power without enforcing local perspectives globally. De Gregorio's answer to this difficulty is to rely on the material universality of fundamental rights.<sup>48</sup> He argues that the European Union's approach does not extend European constitutional imperialism but rather protects individual fundamental rights, conflating their application and interpretation as values universally recognized.<sup>49</sup> This conflation circumvents the possibility for other regions to define their interpretation and application of human rights according to social, political and cultural expressions.

These three approaches to digital constitutionalism engage with an explicit normative view of constitutionalism, focusing on its liberal features.<sup>50</sup> Therefore, as it attempts to replicate certain features of the political theory in the digital environment, it remains insensitive towards the internal politics within virtual communities that underlie the justification and legitimation of governance. As an analogy, it perceives constitutionalisation solely as the fortification of the rule of law principles, focusing on predictability,

<sup>44</sup>ibid 5.

<sup>45</sup>ibid 4–6.

<sup>46</sup>ibid 8–9.

<sup>47</sup>Oreste Pollicino and Giovanni De Gregorio, 'Constitutional Law in the Algorithmic Society' in Hans-W Micklitz and others (eds), *Constitutional Challenges in the Algorithmic Society* (Cambridge: Cambridge University Press, 2021).

<sup>48</sup>De Gregorio, *Digital Constitutionalism in Europe* (n 14) 309–10.

<sup>49</sup>Ibid. Some consider the regional prominence of the EU in global regulation of big tech as normatively desirable. Also arguing from the standpoint of a material universality of the European perspective of human rights, Bradford highlights how an EU global regulatory framework might be the 'next best thing' in the global regulation of technology issues such as data protection and online speech. Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press, 2020) 253; Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford: Oxford University Press, 2023).

<sup>50</sup>Martin Loughlin, 'The Constitutional Imagination' (2015) 78 *The Modern Law Review* 1 <<https://doi.org/10.1111/1468-2230.12104>>; Michael W Dowdle and Michael A Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, 2017).

transparency and fundamental rights, or the implementation of representative structures not enhancing the democratic legitimacy of governance within virtual communities. As an ideology, it perceives the societal impact of platform governance, but focuses solely on the normative counter-reaction at multiple normative levels, following a normative approach to global constitutionalism. As a policy, it justifies a constitutional narrative concerned with rebalancing the authority conflicts between nation-state constitutional orders and transnational private powers, tied to protecting fundamental European values in the EU Court of Justice decisions and the regulatory framework that superseded it.

As will be argued below, during its development and at the beginning of deliberations, the Oversight Board incorporated these three normative accounts of constitutionalism into its structure and procedures. By doing so, it reflected the traits of US constitutionalism, particularly concerning the role and extension of powers of the Supreme Court, which partly explains the institution's limitations as a legitimacy-enhancing body within the broader framework of platform governance. This is not to say that this is caused by an inherent flaw within the US constitutional system, which is not the case, but rather to comprehend that the country's constitutional design is inserted within a specific social environment that allows and justifies the constitutional court's procedural elements and power processes. The following sections argue that these conditions are lacking within the subsystem developed by the Oversight Board.

#### IV. The Oversight Board as an Expression of Liberal Constitutionalism

The Oversight Board represents an attempt of Meta Inc. to increase the legitimacy of the content moderation decisions it takes by submitting them to the accountability and oversight of an independent institution.<sup>51</sup> As Douek highlights, multiple benefits explain the establishment of such an institution and self-restraining efforts by the company. Beyond addressing internal pressures from its users requesting more legitimacy, the self-curtailed through the establishment of the Oversight Board can be understood concurrently as an attempt to (1) either avoid broader regulation from governments or (2) guide those developments by setting the standards. Additionally, the Oversight Board's institutionalization allows the company to (3) distance itself from highly political and controversial decisions and (4) streamline the enforcement of existing community standards.<sup>52</sup>

Regarding the coherent enforcement of the company's norms, the Oversight Board Charter establishes a jurisdiction similar to that of the US Supreme Court, following the common law tradition.<sup>53</sup> The Oversight Board Charter states that 'the board will seek to

<sup>51</sup>Evelyn Douek, 'Facebook's "Oversight Board": Move Fast with Stable Infrastructure and Humility' (2019) 21 *North Carolina Journal of Law & Technology* 1. <<https://scholarship.law.unc.edu/ncjolt/vol21/iss1/2>>; Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129 *The Yale Law Journal* 2418. <<https://www.yalelawjournal.org/feature/the-facebook-oversight-board>>.

<sup>52</sup>Douek, 'Facebook's "Oversight Board"' (n 51) 15–25, 53–66.

<sup>53</sup>As Klonick argues, 'The analogy to a constitution that guarantees substantive and procedural rights through review by an independent judiciary is crucial for understanding' the Oversight Board. Klonick, 'The Facebook Oversight Board' (n 51) 2477; Josh Cows et al., 'Constitutional Metaphors: Facebook's "Supreme Court" and the Legitimation of Platform Governance' [2022] *New Media & Society* 14614448221085559. <<https://doi.org/10.1177/14614448221085559>>.

consider cases that have the greatest potential to guide future decisions and policies.<sup>54</sup> Additionally, the Oversight Board is automatically bound by its prior decisions as they ‘will have precedential value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are substantially similar.’<sup>55</sup>

At the time of writing, the Oversight Board is composed of 22 members, with the institution’s by-laws providing a flexible structure and an ideal composition of 40.<sup>56</sup> The members are representatives of different regions of the globe and have distinguished expertise in different fields, not necessarily law. When issuing its decisions, the Oversight Board’s analysis takes into consideration a legal framework that combines Facebook’s and Instagram’s Community Standards, the company’s values and standards established in international human rights law, specifically those recognized by the UN Guiding Principles on Business and Human Rights (UNGPs). The institution’s foundational documents do not make an express reference to international human rights law as a guideline for interpretation, but the Oversight Board set this criterion based on the understanding of the company’s commitment to the UNGP.<sup>57</sup> In this respect, Gradoni argues that the inclusion of international human rights law as a source for the interpretation and application of internal norms represents a *Marbury v. Madison* moment in which the Oversight Board solidified its authority within the context of Meta’s governance structure concerning content moderation.<sup>58</sup>

Although the community standards on Instagram and Facebook have a few differences specific to each platform, the Oversight Board started to unify those documents. It does so by issuing recommendations towards Meta and through the interpretation of these internal norms through the lens of international human rights standards such as the International Covenant on Civil and Political Rights (ICCPR).<sup>59</sup> This unification can be seen in the Oversight Board’s decisions number 2020-004-IG-UA (‘Breast Cancer Symptoms and Nudity’ case) and 2021-010-FB-UA (‘Colombia Protests’ case), which recommended that Meta should apply the newsworthiness exception for content that violates community standards more coherently.<sup>60</sup> The first case concerned the prohibition of nudity within an awareness campaign for breast cancer. Among other recommendations, the Oversight Board signalled that Meta should make it clear that in case of disparities among specific norms, the community standards of Facebook prevail over those of Instagram.<sup>61</sup> In the second case, which concerned an alleged violation of the community standard on hate speech, the Oversight Board recommended that the company should

<sup>54</sup>Facebook, ‘Oversight Board Charter’ Article 2, Sections 1–2 <[https://about.fb.com/wp-content/uploads/2019/09/oversight\\_board\\_charter.pdf](https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf)>.

<sup>55</sup>Ibid.

<sup>56</sup>Oversight Board, ‘Oversight Board Bylaws’ Article 1, Section 1.4. <<https://www.oversightboard.com/sr/governance/bylaws>>.

<sup>57</sup>Facebook, ‘Oversight Board Charter’ (n 54); Oversight Board, ‘Oversight Board Bylaws’ (n 56).

<sup>58</sup>Referring to the US Supreme Court landmark case in which, without express constitutional warrant, the court affirmed its prerogative to void unconstitutional laws in accordance with its interpretation of the constitutional text. Lorenzo Gradoni, ‘Constitutional Review via Facebook’s Oversight Board: How Platform Governance Had Its *Marbury v Madison*’ (*Verfassungsblog: On Matters Constitutional*, 10 February 2021). <<https://verfassungsblog.de/fob-marbury-v-madison>>.

<sup>59</sup>International Covenant on Civil and Political Rights 1966.

<sup>60</sup>Oversight Board, ‘Case Decision 2020-004-IG-UA “Breast Cancer Symptoms and Nudity”’. <<https://oversightboard.com/decision/IG-7THR3S11>>; Oversight Board, ‘Case Decision 2021-010-FB-UA “Colombia Protests”’. <<https://oversightboard.com/decision/FB-E5M6QZGA>>.

<sup>61</sup>Oversight Board, ‘Case Decision 2020-004-IG-UA “Breast Cancer Symptoms and Nudity”’ (n 60).

establish more precise and detailed norms for the definition of the newsworthiness exception, especially considering the right to freedom of speech.<sup>62</sup>

The Oversight Board's Charter is an example of the reflection of the structural-liberal perspective of constitutionalism in this system of governance.<sup>63</sup> It focuses on the role of the institution as a mechanism to limit content moderation governance through the juridified interpretation of foundational values established in hierarchically superior laws, be it either the company's community standards or the international standards of human rights.<sup>64</sup> As such, it relates to the analogy and ideology claims within the established concept of digital constitutionalism, focusing on the judicial performance and role of the Oversight Board in interpreting and applying the company's community standards.<sup>65</sup>

Replicating this liberal and normative constitutional framework within the Oversight Board institution can reduce the complexity inherent in governance mechanisms intertwined with different political realities, corporate objectives and users' interests. Liberal constitutionalism interprets constitutions as legal constructions defined as higher-order legal norms securing some rights against the exercise of public powers. In doing so, it limits the scope of constitutions to state–individual relations and encloses them to domestic orders.<sup>66</sup> Parametrically, those limitations inhibit the consideration of the institutional politics involved in the exercise of power within online platforms, restraining the full capability of digital constitutionalism as a theoretical frame that envisions the effective enhancement of the legitimacy of these governance structures.

The closeness of this institutional design to classic constitutionalism lies not only in the powers conferred to the Oversight Board in judicial reasoning but also in the technocratic framework that considers the platforms' community standards *vis-à-vis* international human rights standards. In classical constitutionalism reasoning, the limitation of the state and government powers is maintained through a legal order that perceives freedoms from a negative standpoint. This approach relates to an interconnection between constitutional principles deriving from a specific concept of the state, perceiving it under a virtual legitimacy claim that supports the exercise of dominion within a given territory.<sup>67</sup>

This negative approach is criticized for its link with a liberal ideological framework that preconditions the democratic debate within the polity. Jeremy Waldron questions the democratic value of defining constitutionalism solely from a negative and liberal standpoint, stressing that a liberal perspective is based on the assumption that citizens want to consistently be left to their own devices, preventing and hindering the capacity of the state to promote human dignity through policies and direct assistance.<sup>68</sup> Considering the apparatus of the state, even when coupled with a structural component, the negative perspective of constitutionalism perceives the definition of institutional devices (such as

<sup>62</sup>Oversight Board, 'Case Decision 2021-010-FB-UA "Colombia Protests"' (n 60).

<sup>63</sup>Facebook, 'Oversight Board Charter' (n 54); Dowdle and Wilkinson (n 50).

<sup>64</sup>Dowdle and Wilkinson (n 50).

<sup>65</sup>Celeste, 'Digital Constitutionalism' (n 4) 88.

<sup>66</sup>Gunther Teubner, 'Societal Constitutionalism: Nine Variations on a Theme by David Sciulli' in Chris Thornhill and Paul Blokker (eds), *Sociological Constitutionalism* (Cambridge: Cambridge University Press 2017); Teubner, *Constitutional Fragments* (n 26).

<sup>67</sup>NW Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) 2–19; Max Weber, 'Politics as a Vocation' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (London: Routledge, 2014).

<sup>68</sup>Jeremy Waldron, 'Constitutionalism: A Skeptical View' in Jeremy Waldron, *Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016).

the separation of powers, democratic elections and judicial review) only to the extent of their abilities to promote the liberal purpose of limiting state power. Thus, this approach does not consider constitutionalism's capacity to influence and guide state-building in the adaptation of normative commitments to broader social changes.<sup>69</sup>

In reframing this discussion in terms of the Oversight Board, the declared community values of voice, dignity, safety, privacy and authenticity are also considered solely in terms of their capacity to limit Meta's interference with predefined notions of freedom and human dignity, assuming users' disinterest in participating on the setting of standards and application of rights in content moderation procedures.<sup>70</sup> Although users maintain their freedom of speech within the platform, they do not retain instruments and rights to participate in the definition of those rights as applied by the platform, considering the different political environments in which they are inserted.

As such, while under a negative approach, digital constitutionalism may frame Meta's attempt to legitimize its governance further, it fails to provide venues for the corporation's responsiveness to different legal and political environments and their expectations, allowing it to define standards discretionally. This paradox has been made clear in Facebook's highly political content moderation decision in de-platforming former US president Donald Trump for stoking the insurgent rebellion in the US Capitol on 6 January 2021, relating to the Oversight Board's appropriation of digital constitutionalism's policy goal. The Oversight Board aligned its interpretation of community standards with international human rights law and, in doing so, detached itself from the US absolutist approach towards free speech etched in the US Constitution, reaffirming its transnational character, as will be addressed further.

### *Reflections: The Oversight Board Decision Concerning Donald Trump*

On 7 January 2021, Facebook restricted then-President Donald Trump's access to posting content on his Facebook page and Instagram account. The suspension followed the politician's activities on both platforms during the counting of the 2020 electoral votes the day prior, which was threatened by the storming of the Capitol Building in Washington, DC. Following the suspension of the account, Facebook submitted its content moderation decision to the Oversight Board, questioning whether, according to the company's values and commitment to voice and safety, the prohibition of Trump's account for an indefinite period was correct. The submission also requested the Oversight Board's observations and recommendations regarding suspensions of accounts from political leaders.

In its decision, the Oversight Board addresses essential aspects of Facebook's handling of Donald Trump's account, framing the limits and accountability of the exercise of power by the platform. Facebook's Community Standard on Dangerous Individuals and Organizations prohibits

content that praises, substantively supports or represents events that Facebook designates as violating violent events – including terrorist attacks, hate events,

<sup>69</sup>Dowdle and Wilkinson (n 50) 17–27.

<sup>70</sup>Facebook, 'Updating the Values That Inform Our Community Standards' (12 September 2019) <<https://about.fb.com/news/2019/09/updated-the-values-that-inform-our-community-standards>>.

multiple-victim violence or attempted multiple-victim violence, multiple murders or hate crimes.<sup>71</sup>

It also prohibits ‘content that praises’ hate and criminal organizations.<sup>72</sup> On the other hand, Instagram’s Community Guidelines state that ‘Instagram is not a place to support or praise terrorism, organized crime, or hate groups.’<sup>73</sup>

The Oversight Board corroborated Facebook’s decision to suspend the former president’s account, understanding that the posts made on 6 January with words such as ‘We love you’, ‘You’re very special’, ‘great patriots’ and ‘remember this day forever’ amounted to praise or support of the individuals involved in the violent events at the Capitol.<sup>74</sup>

Although supporting the decision, the Oversight Board argued that an indefinite suspension of the account is inconsistent with the company’s Community Standards and commitments to international human rights standards, specifically freedom of expression and security. It is observed that Facebook’s imposition of an indefinite restriction is vague and uncertain, as this sanction is not described in the Community Standards on both platforms.<sup>75</sup>

Considering the recommendation request from Facebook on dealing with political figures’ accounts, the Oversight Board establishes that the company should refrain from drawing a firm distinction between political leaders and other influential users. At the time, Facebook provided limited information concerning the system of ‘cross-check’, a differentiated procedure established by the company to avoid erroneous content removal from accounts of highly influential users. With limited information regarding those different procedures, the Oversight Board issued, among others, two recommendations for Meta. First, it advised the company to clearly explain the rationale, standards and review processes, including the criteria to determine which pages and accounts are selected for inclusion in the cross-check system. Second, it recommended that the company engage more with extensive transparency, disclosing error rates and the thematic consistency of the standards determinations among ordinary enforcement procedures and those of the cross-check system. These two recommendations were made concerning the attempt of the company not to be perceived as unduly influenced by political or commercial considerations, with the Oversight Board stating that ‘different processes may lead to different substantive outcomes.’<sup>76</sup>

In response to the Oversight Board in the Trump case, Meta argued that it had fully implemented the first recommendation, providing more information about the cross-check system and how it applies its community standards consistently between ordinary users’ and public figures’ accounts. Concerning the Oversight Board’s second recommendation, the company argued that because the measurement of accuracy systems is not

<sup>71</sup>Facebook, ‘Facebook Community Standard on Dangerous Individuals and Organisations’. <<https://transparency.fb.com/en-gb/policies/community-standards>>.

<sup>72</sup>Ibid.

<sup>73</sup>Facebook, ‘Instagram’s Community Guidelines’. <[https://help.instagram.com/477434105621119/?helpref=uf\\_share](https://help.instagram.com/477434105621119/?helpref=uf_share)>.

<sup>74</sup>Oversight Board, ‘Case Decision 2021-001-FB-FBR “Former President Trump’s Suspension”’ <<https://www.oversightboard.com/decision/FB-691QAMHJ>>.

<sup>75</sup>Ibid 26–28.

<sup>76</sup>ibid 24.

designed to review the ‘small number of decisions made through the cross-check process’, it would take no further action to implement the recommended transparency.<sup>77</sup>

The Oversight Board decision in the Trump case, with many nuances concerning the definition of freedom of speech within Meta’s platform governance, is important in multiple ways.<sup>78</sup> It has allowed the company to distance itself from the political cost of maintaining its position against the former political leader, despite the sensitive landscape concerning the electoral results and the dissatisfaction of part of the American electorate. Additionally, it showcased the value of the institution’s openness in its deliberation process, with the Oversight Board taking into account upwards of 9,000 public comments related to the case from multiple regions around the globe.

The use of public comments in its adjudication procedure promotes output legitimacy as it aligns the Oversight Board’s approach to governance issues with values common to democracy, such as pluralism and tolerance.<sup>79</sup> The acceptance and acknowledgement of public comments can introduce additional perspectives, mobilize the general public to join the debate and assist in the acceptance of judgements by the interested parties, attributes already perceived in other transnational adjudication bodies.<sup>80</sup> Thus, at first glance, the Oversight Board served its purpose by not only defining a clear interpretation of Meta’s community standards *vis-à-vis* the American constitutional landscape and its commitment to international standards of human rights but also by providing a venue in which users could directly contribute to the final decision and interpretation of the issues at hand.

Additionally, the decision demonstrates how the institution replicates a specific narrative of digital constitutionalism in its structure and jurisdiction. As an analogy, it frames the platform’s community standards within the broader landscape of international human rights law, interpreting the former liberally regarding the definitions of the latter. As such, it sustains the notion of the rule of law by predefining the internal rules themselves and attaching them to a globally recognized normative standard. As an ideology, it promotes the characteristics of constitutional government, specifically by

<sup>77</sup>Facebook, ‘Facebook Responses to Oversight Board Recommendations in Trump Case’ <<https://about.fb.com/wp-content/uploads/2021/06/Facebook-Responses-to-Oversight-Board-Recommendations-in-Trump-Case.pdf>>.

<sup>78</sup>Oreste Pollicino and Giovanni De Gregorio, ‘Shedding Light on the Darkness of Content Moderation: The First Decisions of the Facebook Oversight Board’ (*Verfassungsblog: On Matters Constitutional*, 5 February 2021) <<https://verfassungsblog.de/fob-constitutionalism>>.

<sup>79</sup>Output legitimacy refers to the willingness of people to accept the government’s authority and coercive powers when its actions are believed to serve the community’s common good and are consistent with societal norms. As an experiment, the Oversight Board aims to legitimise Meta’s platform governance by interpreting the platform’s community standards in conjunction with international human rights standards. Fritz Scharpf, *Demokratiethorie zwischen Utopie und Anpassung* (Univ Verl 1970) <<https://kops.uni-konstanz.de/handle/123456789/34455>>; Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); Vivien A Schmidt, ‘Conceptualizing Legitimacy: Input, Output, and Throughput’, in Vivien A Schmidt (ed), *Europe’s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford: Oxford University Press, 2020); Evelyn Douek, ‘The Siren Call of Content Moderation Formalism’ in Lee C Bollinger and Geoffrey R Stone (eds), *Social Media, Freedom of Speech, and the Future of our Democracy* (Oxford: Oxford University Press, 2022); Evelyn Douek, ‘Content Moderation as Systems Thinking’ (2022) 136 *Harvard Law Review* 526, 577–83 <<https://harvardlawreview.org/print/vol-136/content-moderation-as-systems-thinking>>.

<sup>80</sup>Nienke Grossman, ‘Legitimacy and International Adjudicative Bodies’ [2009] *All Faculty Scholarship* <[https://scholarworks.law.ubalt.edu/all\\_fac/266](https://scholarworks.law.ubalt.edu/all_fac/266)>.

addressing governance and rights issues through a technocratic and juridified approach that reduces the political claim of its users to a matter of legal interpretation.<sup>81</sup> Finally, from the policy perspective of digital constitutionalism, the Oversight Board decision strongly rejects the applicability of the US Constitution and its particular interpretation of freedom of expression, although maintaining the symmetry of US constitutional law with international human rights law.<sup>82</sup> This alleged symmetry is particularly relevant when considering the Oversight Board's decision to corroborate Facebook's suspension of the former president under the 'Dangerous Individuals and Organizations' community standard instead of applying the 'Violence and Incitement' standard. An example of the Oversight Board's exercise of 'judicial' restraint, the decision acknowledges a dissent by a relative minority of the counsellors recognizing the infringement of the 'Violence and Incitement' policy for its relevance in denouncing Trump's utterances in support of the false narrative based on disinformation campaigns that the US election had been stolen.<sup>83</sup>

This approach showcases only one side of the coin of a much broader discussion in constitutional theory regarding the intersection of politics and law, precisely the societal, political and legal parameters that frame the limitation of power in a collective of individuals within a territory (at the state level) and a virtual community (at the platform level). Considering the renewed legitimacy crises of Meta after the Facebook Files scandal, this article's next section will focus on broader discussions within the constitutional theory that may identify the shortcomings perceived in the legitimacy claim supported by an institution such as the Oversight Board.

### V. A Sociological Constitutional Approach: Strengthening the Oversight Board

As the Oversight Board charter and jurisprudence have showcased, national and international legal initiatives can guide the development of principles and standards to be applied by platforms in their exercise of governance. When preoccupied with the definition of a negative space in which users' fundamental rights are protected, digital constitutionalism allows for the development of a normative framework of co-regulation, combining the normative counterreactions from national constituted powers on one side and the continuous development of internal norms and procedures by the platforms themselves on the other.

Still, as transnational corporations, social media platforms avoid addressing their users with a consideration to their specific nationality, preferring to adopt a transnational legal framework that applies indistinctively to all its customers. Comprehending digital constitutionalism from the standpoint of the platforms themselves implies a consideration of the complexities within the relationship between platform users and their governance structures, beyond that between the platform and governments.

<sup>81</sup>Constitutional government following Loughlin's interpretation of Charles McIlwain – that is, the notion that the legal limitations of government powers, supported by the differentiation between various functions of government, serve as the antithesis of arbitrary rule. Loughlin, *Against Constitutionalism* (n 6) 7, 208–12; Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell University Press, 1940).

<sup>82</sup>Oversight Board, 'Case Decision 2021-001-FB-FBR "Former President Trump's Suspension"' (n 74) 25–26.

<sup>83</sup>*Ibid* 23.

Digital constitutionalism can be developed in a theoretical framework that allows the critical analysis of the internal production and application of norms by social media platforms, considering the societal interests of the users and the intersection of those with the political environment in which they belong. As such, beyond pursuing the limitation and legitimation of power through human rights, perceiving these as effective protections against arbitrary rule, a sociological approach aims at understanding the social conditions that should be in place for power within social media platforms such as Facebook and Instagram to be legitimized.<sup>84</sup> Thus, beyond the negative approach embedded in liberal constitutionalism, a sociological critique pursues a different aim, approaching the project of limitation of power with consideration for the capacity of each social environment to institutionalize power in reflection of its material conditions.

This perception is corroborated by the increasing definition of platforms as institutions akin to quasi-public institutions, in which fundamental freedoms are regulated in a similar hierarchical framework between the platform as governor and its users, as citizens.<sup>85</sup> In this instance, Klonick highlights one of the central issues of this framework by summarizing that ‘platforms are both the architecture for publishing new speech and the architects of the institutional design that governs it’.<sup>86</sup> More critically, Lehdonvirta frames the issue from a social and economic approach by drawing a parallel between platforms and empires, defending a regulation of platform power that goes further than governmental competition law. Such parallels, Lehdonvirta argues, should also be able to legitimize a democratic foundation for platform governance.<sup>87</sup>

Exploring this claim in a constitutional context hinges on exploring two theoretical frameworks for the reasoning supporting digital constitutionalism. First, as a theory or technique for government, constitutionalism must also be understood in the context of private governance. This approach follows the critique of the state-centred constitutional narrative embedded in societal constitutionalism’s overall framework.<sup>88</sup> This framework, however, risks replicating some of the pitfalls of traditional liberal constitutionalism, as it can also be engaged solely in a normative approach towards the increase of a system’s capacity for self-limitation.<sup>89</sup> For example, the ideology frame of digital constitutionalism proposed by Celeste engages with societal constitutionalism to identify the limitation of power in internet governance through internet bills of rights, focusing on multiple normativities without consideration of internal system politics that can be formed within

<sup>84</sup>Galligan and Versteeg (n 6).

<sup>85</sup>Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harvard Law Review* 1598 <<https://harvardlawreview.org/2018/04/the-new-governors-the-people-rules-and-processes-governing-online-speech>>.

<sup>86</sup>Ibid 1603–04.

<sup>87</sup>Vili Lehdonvirta, *Cloud Empires: How Digital Platforms Are Overtaking the State and How We Can Regain Control* (Cambridge, MA: MIT Press, 2022).

<sup>88</sup>David Sciuili, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge: Cambridge University Press, 1991); Teubner, *Constitutional Fragments* (n 26); Teubner, ‘Societal Constitutionalism’ (n 66); Příbáň, ‘Constitutional Imaginaries and Legitimation’ (n 5); Teubner and Golia (n 6) 3.

<sup>89</sup>Jiří Příbáň, ‘Normativity at Large: On Moral Absolutism, Legal Relativism and Social Systems Anti-Normativism’ in Christoph Bezemek, Michael Potacs and Alexander Somek (eds), *Vienna Lectures on Legal Philosophy, Volume 2: Normativism and Anti-Normativism in Law* (Oxford: Hart, 2020) <<http://www.bloomsburycollections.com/book/vienna-lectures-on-legal-philosophy-volume-2-normativism-and-anti-normativism-in-law>>.

those environments.<sup>90</sup> As highlighted, although an essential part of the puzzle, promoting constitutional reflections in platform governance should also focus on mechanisms beyond normative counterreactions, not blocking what Unger defines as ‘institutional imagination’.<sup>91</sup>

From a social system theory perspective, Klonick’s preoccupation can be understood as an argument for reflexive politics.<sup>92</sup> As architects of the institutional design that governs speech governance, social media platforms silence the reflexive debate concerning the design, substance and institutionalization of content-moderation practices.<sup>93</sup> This reflexive discussion relates to the internal politics of the social subsystem, its capacity for self-reference and the understanding of new political actors and forms of political action in the definition of systems-specific constitutional functions, arenas, processes and structures.<sup>94</sup> As such, particularly in the context of social media platforms, a reflexive politics approach allows the identification of community within the understanding of what constitutes it, thus politicizing it beyond normative determinations.<sup>95</sup>

Thus, societal constitutionalism can also perceive the internal politics that lead to collective binding decisions, reasserting democratic legitimacy within the private governance of virtual communities and considering the multiple procedural, architectural and substantive decisions that frame Meta’s platform governance.

### Societal Constitutionalism

Engaging with the possibility of perceiving the rise of civil constitutions within social media platforms hinges on adopting a societal approach to constitutionalism. In 1992, David Sciulli argued that norm-producing institutions should be considered civil constitutional formations to counteract the authoritarian tendency of the rationalization of modern society, as prescribed by Weber’s sociological writings.<sup>96</sup> A societal constitution perceives the multiple complexities of the social environment to which they belong,

<sup>90</sup>Celeste’s proposal in terms of internet bill of rights seems to approach the argument from a perspective of legal pluralism. Here, legal pluralism, although one of the aspects of the broader sociological approach to constitutionalism, does not equate to democratization, neither within a representative democracy framework nor in the societal approach to democratic legitimation. Celeste, *Digital Constitutionalism* (n 4); Jiří Příbáň, ‘Asking the Sovereignty Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations’ (2015) 28 *Ratio Juris* 31. <<https://onlinelibrary.wiley.com/doi/abs/10.1111/raju.12065>>; Paul Blokker and Chris Thornhill, ‘Sociological Constitutionalism: An Introduction’ in Chris Thornhill and Paul Blokker (eds), *Sociological Constitutionalism* (Cambridge: Cambridge University Press, 2017).

<sup>91</sup>Roberto Mangabeira Unger, ‘Legal Analysis as Institutional Imagination’ (1996) 59 *The Modern Law Review* 1.

<sup>92</sup>Christodoulidis (n 26).

<sup>93</sup>ibid 176–85, 256–85.

<sup>94</sup>Christodoulidis (n 26); Teubner, *Constitutional Fragments* (n 26) 73–123; Angelo Jr Golia, ‘Critique of Digital Constitutionalism: Deconstruction and Reconstruction from a Societal Perspective’ [2023] *Global Constitutionalism* 1 <<https://www.cambridge.org/core/journals/global-constitutionalism/article/critique-of-digital-constitutionalism-deconstruction-and-reconstruction-from-a-societal-perspective/9EAAF71EC6E8184C923A2D9B3FA7965A>>.

<sup>95</sup>As argued by Christodoulidis, contingency in terms of politics means to acknowledge that ‘something acquires meaning politically in that it could be otherwise.’ Christodoulidis (n 26) 284; Roberto Mangabeira Unger, *Social Theory: Its Situation and Its Task* (2nd ed, New York: Verso, 2004) 65.

<sup>96</sup>Sciulli (n 88).

developing autonomously through the structural coupling of social ideals and legal form.<sup>97</sup> In this instance, Meta's Oversight Board represents an important aspect of the constitutionalisation of the company's platform governance. It creates a specific legal framework that subjects its content-moderation practices to more transparency, legal integrity considerations and due process, enlightening the specific rationality of the communication system developed in this environment.<sup>98</sup>

The societal perspective considers the broader scope of social disturbances produced by the governance exercised in private platforms. Therefore, through a societal lens, one can investigate the development of self-regulating systems of value and legal identity by internet platforms and how these intersect with the social expectations already recognized beyond the digital and private spheres. The constitutionalisation of platform governance in this parameter is defined by the reflexivity between the production of norms that guide the relationship between users and the platform itself, with a stable hierarchy between the community standards and the established practices, decisions and codes implemented by its content-moderation team.<sup>99</sup> Therefore, institutional experimentation such as the Oversight Board can highlight a further dimension of digital constitutionalism that is more explicitly critical towards assumptions of liberal and state-centred constitutional theory.<sup>100</sup>

Thus, from a societal standpoint, the constitutionalisation of platform governance considers the necessity to improve the legitimacy standard by which social media platforms abide themselves, circumventing a policy paradigm that envisions digital constitutionalism solely as: (1) a defence of state constitutional orders against private powers in support of fundamental values; and (2) the normative counter-reactions within multiple governance levels that limit the exercise of power in these environments. Engaging with the legitimacy claim within the platform governance structure considers a socio-political approach that refrains from conflating the notion of constitutionalisation to that of the rule of law.

### *Political Legitimacy in Transnational Environments*

The overall critique of the democratic deficit of transnational legal regimes can be summarized in Loughlin's understanding of 'constitutionalisation'.<sup>101</sup> While Peters defines the concept as the 'process of the emergence, creation and identification of constitution-like elements' in any given legal order, Loughlin describes this phenomenon

<sup>97</sup> Gunther Teubner, 'Constitutional Drift: Spontaneous Co-Evolution of Social "Ideas" and Legal "Form"', in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, 2017).

<sup>98</sup> Gradoni (n 58); Angelo Jr Golia, 'Beyond Oversight. Advancing Societal Constitutionalism in the Age of Surveillance Capitalism' (*I-CONnect: Blog of the International Journal of Constitutional Law*, 5 March 2021). <<http://www.iconnectblog.com/2021/03/beyond-oversight-advancing-societal-constitutionalism-in-the-age-of-surveillance-capitalism>>.

<sup>99</sup> Teubner, *Constitutional Fragments* (n 26) 107–10; Angelo Jr Golia and Gunther Teubner, 'Societal Constitutionalism: Background, Theory, Debates' (2021) 15 *ICL Journal* 357 <<https://www.degruyter.com/document/doi/10.1515/icl-2021-0023/html?lang=en>>.

<sup>100</sup> Golia (n 94).

<sup>101</sup> Martin Loughlin, 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford: Oxford University Press, 2010); Loughlin, *Against Constitutionalism* (n 6) 111–90.

as the consideration of the constitution solely in its normative perspective, with the notion of constituent power serving only as a historical foundation of the constitutional order or, in a strict normative understanding, not relevant for the authority of the law.<sup>102</sup> The constitutional discourse thus focuses on constitutional rights, interpreted as normative prescriptions instead of institutional powers. It aims to ‘de-politicize and de-democratize state-society relations, replacing political and democratic deliberation with juridical and technocratic forms of decision-making and norm-setting’.<sup>103</sup>

This trend, argues Loughlin, is perceivable at the local, regional, international and transnational levels. Domestically, it can be observed by the extension of constitutional principles in all areas of the law on the normative justification of the constitutional text’s supremacy and the judiciary’s requalification as the political power capable of enforcing all constitutional provisions.<sup>104</sup> On the international level, Loughlin describes that two different movements expose constitutionalisation. The first is the reinterpretation of international law and treaties in a constitutional frame, constitutionalizing the international legal order between states. The second is the claim that a multi-level constitutionalism representative of the era of globalization will supersede the nation-state constitution.<sup>105</sup> Loughlin’s critique of constitutionalisation as the establishment of legal orders without democracy reverberates with Habermas’s understanding of the democratic principle as conveying the necessity for citizens in a democratic state to perceive themselves as the author of the laws they are obliged to obey.<sup>106</sup>

This reading is partly reverberated by De Gregorio’s concerns regarding the protection of constitutional democracies against private powers.<sup>107</sup> De Gregorio argues that in the process of constitutionalisation of global private spheres, ‘constitutional values ... are under a process of extraconstitutional amendment ..., a reframing which is not expressed

<sup>102</sup>Peters, ‘Compensatory Constitutionalism’ (n 31) 582; Loughlin, ‘What is Constitutionalisation?’ (n 101); Martin Loughlin, ‘On Constituent Power’ in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge: Cambridge University Press, 2017).

<sup>103</sup>Michael A Wilkinson, ‘The Reconstitution of Post-War Europe: Liberal Excesses, Democratic Deficiencies’ in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (Cambridge University Press 2017); Loughlin, *Against Constitutionalism* (n 6) 179–90, 194; Graziella Romeo, ‘What’s Wrong with Depoliticisation?’ (2022) 1 *European Law Open* 168 <<https://www.cambridge.org/core/journals/european-law-open/article/whats-wrong-with-depoliticisation/3F6C504F4F47C37485D87DC5BF7706DD>>.

<sup>104</sup>More recently, Loughlin has described constitutionalisation as a reflexive form of constitutionalism that synthesises perspectives of aspirational and ordo-constitutionalism. The aspirational aspect of contemporary constitutions, argues Loughlin, refers to the incorporation of values and ambitious schedules of civil, political and social rights in the constitutional text, shifting the execution of these policies from the executive and legislative into courts. On the other hand, ordo-constitutionalism reframes classic constitutionalism for contemporary global conditions and directs the constitution towards the specific end of preserving individual freedom by protecting a market-based order. For Loughlin, in either of its understandings, reflexive constitutionalism circumvents the materiality of real-world global politics dismissing the changes to the ideal expression of rights by the dynamic forces of power. Loughlin, *Against Constitutionalism* (n 6) 176, 177, 183–87, 183–95; Loughlin, ‘What is Constitutionalisation?’ (n 101) 62.

<sup>105</sup>Loughlin, ‘What is Constitutionalisation?’ (n 101) 67.

<sup>106</sup>Habermas (n 20); Jürgen Habermas, ‘On the Internal Relation between the Rule of Law and Democracy’ (1995) 3 *European Journal of Philosophy* 12 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0378.1995.tb00036.x>>.

<sup>107</sup>In part because while Loughlin defends a conception of constitutional democracy that is inherent republican, revitalising the *droit politique* nature of constitutional law, De Gregorio envisions the protection of public powers through a liberal and normative approach to constitutionalism. De Gregorio, *Digital Constitutionalism in Europe* (n 14); Loughlin, *Against Constitutionalism* (n 6).

by codification but by the constitutional contamination of private determinations'.<sup>108</sup> Referring to Teubner and Golia, he defines 'law, technology and society, as examples of social systems' that continuously shape each other in a process of mutual influence.<sup>109</sup> While this reading of societal constitutionalism supports his concern about private contaminations of constitutional law, it also negates fundamental aspects developed by Teubner within the larger framework of social systems theory. A primary critique of this reading is that both in Luhmann's social systems theory and Teubner's societal constitutionalism framework, social subsystems are autopoietic and self-referential.<sup>110</sup> Each social subsystem perceives and interprets the social environment with its own rationality and cannot be influenced by the reading and processes of other social subsystems. Equally, one system cannot operate outside its own boundaries, and even those borders cannot be taken as given by a pre-constituted world.<sup>111</sup> As such, interrelations between systems occur through social irritations and structural couplings, which do not modify a system's internal rationality and processes of self-determination.<sup>112</sup>

In contrast, Teubner's approach to societal constitutionalism perceives constitutionalisation as the juridification of reflexive processes through a co-evolutionary drift between the autonomous system of law and other social subsystems.<sup>113</sup> The co-evolution of autopoietic systems is reciprocally stimulated and yet not causally related through a hybrid binary meta-coding that steers the systems involved while respecting their boundaries and internal logic.<sup>114</sup> The coding is binary because it recognizes only two possible encoded states (constitutional/unconstitutional); it is meta since it applies to decisions that have already been processed by other social systems (legal/illegal in the example of the self-constituted legal system); and it is hybrid because it takes precedence not only over the legal system but also over other binary codes of specialized function-systems such as the economy, the system of mass media and the political system. Thus, the constitutional/unconstitutional divide applied to societal subsystems concerns the emergence of norms that perform both a foundational and limitative function towards a specific system's communicative media and its processes.<sup>115</sup>

Concerning democratic legitimation, societal constitutionalism rejects the view that democratic legitimation can only operate through state politics and procedures such as elections, representation and organized opposition.<sup>116</sup> As such, it considers democratic

<sup>108</sup>De Gregorio, *Digital Constitutionalism in Europe* (n 14) 9.

<sup>109</sup>Ibid 7, 10–11.

<sup>110</sup>Niklas Luhmann, 'The Autopoiesis of Social Systems', in RF Geyer and J Van der Zowen (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Thousand Oaks, CA: Sage, 1986); Niklas Luhmann, *Ecological Communication*, trans John Bednarz (Chicago: University of Chicago Press, 1989); Gunther Teubner, 'Juridification Concepts, Aspects, Limits, Solutions', in *Juridification Concepts, Aspects, Limits, Solutions* (Berlin: De Gruyter, 1987); Teubner, *Constitutional Fragments* (n 26) 73–123.

<sup>111</sup>Luhmann, 'The Autopoiesis of Social Systems' (n 110) 178–79.

<sup>112</sup>Luhmann, *Ecological Communication* (n 110) 147; Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System Closed Systems and Open Justice. The Legal Sociology of Niklas Luhmann' (1991) 13 *Cardozo Law Review* 1419; Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann' (1991) 13 *Cardozo Law Review* 1443; Marcelo Neves, *Transconstitutionalism* (Oxford: Hart, 2013) 25–36.

<sup>113</sup>Teubner, *Constitutional Fragments* (n 26) 102–10.

<sup>114</sup>Teubner, 'Juridification Concepts, Aspects, Limits, Solutions' (n 110); Teubner, *Constitutional Fragments* (n 26) 110–13.

<sup>115</sup>Golia (n 94) 6.

<sup>116</sup>Ibid 9.

legitimacy within transnational settings without solely referring to the regulatory capacity of nation-states.<sup>117</sup> Thus, in addressing this perceived lack of democratic legitimacy in transnational regimes, Teubner investigates the development of the democratic principle from a historical-contextual perspective and filters the principle's two distinguishing features throughout its respecification and generalization from Roman law to modernity. Teubner finds that the democratic principle is tied to building an identitarian consensus, which is reinforced paradoxically by the organization of internal dissent through the institutionalization of politics.<sup>118</sup> Thornhill concurs, indicating that these two tendencies are interlocked in a chain of communication that allows democracy to become institutionally entrenched, stabilizing contestation and consent within the democratic nation-state.<sup>119</sup>

Therefore, in re-specifying the democratic principle from modernity to the current transnational legal order, Teubner argues that it is necessary to promote a division of labour between the two central attributes of democracy.<sup>120</sup> Within this division, the dogma of political representation needs to be reinterpreted as self-contestation. In transnational institutions, building identitarian consensus between its members might be unfeasible as transnational regimes are composed of fluctuating constituencies and not well-defined collective *demos*. This fluctuance is especially visible in social media platforms, as the number of users and their commitment to the platform oscillate in time and region for various social, political and economic reasons.

Consequently, instead of building an identitarian consensus, Teubner argues that democracy in transnational regimes should focus on enlarging the possibilities of internal dissent, which can expose those institutions to broader social irritations, making them more responsive to the social environments they intersect.<sup>121</sup> Furthermore, this internal dissent must become institutionalized according to each issue-specific regime's rationality and necessity, with the definition of procedures that allow for 'a high learning capacity in collective decisions' and a 'high potential for collective decisions'.<sup>122</sup>

Reframing digital constitutionalism from a societal perspective allows the critical assessment of the Oversight Board within the framework of platform governance in Meta's Facebook and Instagram platforms. The establishment of the Oversight Board has served many purposes, but the structure and operational procedures follow a specific normative constitutional vision within the framework of power curtailment and accountability. The ability of the institution to promote self-contestation, institutionalizing dissent and enlarging the learning capacity for content moderation decisions, is curtailed

<sup>117</sup> A trend perceived also in studies that aim to promote democratic values in platform governance. Giovanni De Gregorio, 'Democratising Online Content Moderation: A Constitutional Framework' (2020) 36 *Computer Law & Security Review* 105374. <<https://www.sciencedirect.com/science/article/pii/S0267364919303851>>; Blayne Haggart and Clara Iglesias Keller, 'Democratic Legitimacy in Global Platform Governance' (2021) 45 *Telecommunications Policy* 102152 <<http://doi.org/10.1016/j.telpol.2021.102152>>; Jane Reis Gonçalves Pereira and Clara Iglesias Keller, 'Constitucionalismo Digital: contradições de um conceito impreciso' (2022) 13 *Revista Direito e Práxis* 2648 <<https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/70887>>.

<sup>118</sup> Teubner, 'Quod Omnes Tangit' (n 8).

<sup>119</sup> Chris Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge: Cambridge University Press, 2018) 5.

<sup>120</sup> Teubner, 'Quod Omnes Tangit' (n 8) 11–13.

<sup>121</sup> Ibid 11–15.

<sup>122</sup> Ibid 13.

by these design choices that strengthen output, rather than input, legitimacy.<sup>123</sup> This deficit has become clear with the institutional crises at the end of 2021 caused by the whistleblower Frances Haugen. The ‘Facebook Files’ highlights the societal dimension of the governance exercised by Meta, emphasizing the broader social impact of the decisions made within its platform environment and the limits of the Oversight Board in holding it accountable. As such, a societal perspective partly adjusts the concept of digital constitutionalism to address not only formal legitimacy but substantial legitimacy, considering the multiple social environments in which the Oversight Board and Meta perform as moderators.

## VI. Refraction: The Oversight Board, the Facebook Files and Societal (digital) Constitutionalism

The disclosure of internal documents by Frances Haugen showcased, among other aspects of Facebook’s definitions of content moderation, an extensive trove of data relating to the system of ‘cross-check’. The authority of the Oversight Board was directly challenged by the company when it failed to provide consistent information concerning the operation of this content-moderation system and its impact on the application of content moderation in public figures’ accounts.

According to the *Wall Street Journal* report, the system of ‘cross-check’ involves a content-moderation procedure in which content posted by accounts from public and highly influential users is sent for additional review by human moderators. The issue with the system lies in the fact that a high percentage of the content sent for additional review is not assessed expeditiously, and without the completion of this multiple-step verification, possibly violating content from highly influential users remains on the platform. The underlying debate concerns not only the possibility of harm by highly visible accounts posting harmful content but also Meta’s inconsistent application of norms and values. Users inserted into the cross-check procedure are indirectly given the privilege of not having their content removed after an automated decision.<sup>124</sup>

Another cause of concern was the subterfuge regarding the system’s prominence within Meta’s content-moderation processes. Although, during the proceedings of the Trump case, Meta Inc. underscored ‘cross-check’ by arguing it involved a ‘small number of decisions’, the *Wall Street Journal* reported that by 2020 the system included at least 5.8 million users.<sup>125</sup> Upon the release of the Facebook Files, the Oversight Board publicly called on Meta to commit to the maximum level of transparency regarding its use of the cross-check system.<sup>126</sup> The call led to the company formalizing a request for an advisory policy opinion on 28 September 2021.

<sup>123</sup>Scharpf, *Demokratiethorie zwischen Utopie und Anpassung* (n 79); Scharpf, *Governing in Europe* (n 79); Schmidt (n 79); Douek, ‘The Siren Call of Content Moderation Formalism’ (n 79); Douek, ‘Content Moderation as Systems Thinking’ (n 79) 577–83; Haggart and Keller (n 117).

<sup>124</sup>Jeff Horwitz, ‘Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That’s Exempt’, *Wall Street Journal*, 13 September 2021. <<https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353>>.

<sup>125</sup>Facebook, ‘Facebook Responses to Oversight Board Recommendations in Trump Case’ (n 77); Horwitz (n 124).

<sup>126</sup>Oversight Board, ‘To Treat Users Fairly, Facebook Must Commit to Transparency’. <<https://www.oversightboard.com/news/3056753157930994-to-treat-users-fairly-facebook-must-commit-to-transparency>>.

This request specifically addressed the cross-check system, with Meta probing the Oversight Board for recommendations regarding (1) the need to balance the coherent application of its community standards across different accounts with the consideration of context-specific decisions and corporate interests, (2) possible improvements the company should implement in the governance of the system, considering the enforcement of its community standards and the requirement to minimize what it describes as ‘false positives, – that is, the over-enforcement of standards and removal of content that does not violate community standards’; and (3) the definition of criteria to determine which accounts are included into the cross-check system, now re-labelled as the ‘Early Response Secondary Review System’.<sup>127</sup>

The Oversight Board decision included 32 recommendations and addressed Meta’s commitments to international human rights standards. In its assessment, the system enables visibility for violating content and represents the company’s misguided focus on corporate interests at the expense of its human rights commitments.<sup>128</sup> The failure to track core metrics of the system impedes an assessment of its efficacy, specifically concerning the broad definitions that allow users and pages to be inserted into the system on an equal footing, despite the need to prioritize content that is relevant for human rights, such as that from users in minority groups and journalists who report from conflict zones. Overall, the Oversight Board assessment also portrays the system’s role as maintaining unequal access to discretionary policies and enforcement, resulting in a policy approach that correlates with the company’s focus on more lucrative markets.<sup>129</sup>

Illustrating this dynamic, the Oversight Board summarizes Meta’s briefing on the system, which reports that 42 per cent of content reviewed through ‘cross-check’ originated from the United States or Canada, while just 9 per cent of ‘monthly active people’ on Facebook were from this region. This discrepancy is correlated with the fact that ‘average revenue per person’ in the United States and Canada is the highest in the world, three times larger than in Europe and about twelve times larger than in the Asia-Pacific regions.<sup>130</sup>

The case highlights issues with Facebook’s content-moderation policies and its expected output legitimacy. The company utilizes two systems – the Early Secondary Response System – ESRS (ESRS) and General Review System (GSR) – to avoid erroneous content removal. ESRS includes the moderation of accounts through multiple tiers of review, including human moderators, regional market teams, and policy experts. GSR extends additional review to all users by tagging content to pre-established markers of risk level. Both systems allow the escalation of the final decision of content removal to the company leadership, which may arbitrarily overrule previous assessments.<sup>131</sup> In highly sensitive and political cases, the escalation and final decision are still based on a discretionary assessment by the team reviewing prior assessments, which is recognized

<sup>127</sup>Oversight Board, ‘Oversight Board Opens Public Comments for Policy Advisory Opinion on Cross-Check | Oversight Board’. <<https://oversightboard.com/news/485696136104748-oversight-board-opens-public-comments-for-policy-advisory-opinion-on-cross-check>>.

<sup>128</sup>Oversight Board, ‘Policy Advisory Opinion 2021-002 “Meta’s Cross-Check Program”’ §78. <<https://www.oversightboard.com/decision/PAO-NR730OFI>>.

<sup>129</sup>Ibid §98–99.

<sup>130</sup>Ibid.

<sup>131</sup>Ibid §24–34; Facebook, ‘Reviewing High-Impact Content Accurately via Our Cross-Check System’. <<https://transparency.fb.com/en-gb/enforcement/detecting-violations/reviewing-high-visibility-content-accurately>>.

by the Oversight Board in its recommendation.<sup>132</sup> Besides this, Meta's leadership can decide on enforcement without considering the expertise and localized context that has guided previous assessments within the company structure, prioritizing corporate interests that may replicate biases.

Moving beyond the system, even if the user successfully appeals the decision and is able to have the Oversight Board analyse the enforcement of the community standards (as happened in the Trump case), the 'adjudication' would address this discretionary exercise of power only *ex-post*, either contesting or legitimizing it.<sup>133</sup> Thus, 'cross-check', or its new variances as ERSR and GSR, undermine even the formal legitimacy claim surrounding the enlargement of the scope of Meta's community standards, exchanging the rule of law for the company's leadership assessment.

As such, the Oversight Board's effectiveness in promoting democratic legitimacy is limited by its procedural and substantial aspects. Furthermore, the juridified structure of the Oversight Board limits its accountability function and fails to address other mechanisms of content moderation that can be as pervasive as content removal. In its report, the *Washington Post* highlights internal research from Meta regarding the engagement metric that fed the algorithm for the distribution of content.<sup>134</sup> Between 2017 and 2019, the metric was skewed towards shared public content that caused more angry reactions on the platform, with those being promoted on more individual feeds. The internal research found that this fostered rage and misinformation on the platform and, upon this discovery, changed the algorithm.<sup>135</sup> This example showcases how the curation and moderation of content impact public life, from algorithmic determinations to content removal in the enforcement of rules and the prevention of harm.<sup>136</sup>

Extensive transparency and accountability can also be employed in architectural decisions framing content-moderation procedures. Therefore, although an unprecedented step towards transparency and legitimacy within platform governance, the Oversight Board might be eclipsed by its limitations, be it on the institutional design or in its substantive authority, which does not encompass the possibility for a broader debate on collectively binding decisions within this medium. A societal approach to constitutionalism, engaged with the internal and external politics within platform governance, highlights these limitations by reframing the standard of legitimacy within platform governance. From this approach, the three dimensions of digital constitutionalism might be reimagined beyond their liberal premises.

### Analogy

As an analogy, digital societal constitutionalism would justify the establishment of more representative institutions capable of discussing the definition of content moderation policies by Meta or even establishing a federated system that reviews content moderation

<sup>132</sup>Oversight Board, 'Policy Advisory Opinion 2021-002 "Meta's Cross-Check Program"' (n 128) §35.

<sup>133</sup>James Grimmelman, 'The Virtues of Moderation' [2015] *Yale Journal of Law and Technology* 63–70. <<https://openyls.law.yale.edu/handle/20.500.13051/7798>>.

<sup>134</sup>Jeremy B Merrill and Will Oremus, 'Five Points for Anger, One for a "Like": How Facebook's Formula Fostered Rage and Misinformation'. *Washington Post*, 26 October 2021. <<https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/>>.

<sup>135</sup>Ibid.

<sup>136</sup>Gillespie, *Custodians of the Internet* (n 7) 1–24; Klonick, 'The New Governors' (n 85); Douek, 'Content Moderation as Systems Thinking' (n 79).

decisions in tandem with regional particularities and normative expectations. Thus, besides having only an Oversight Board acting as a Supreme Court with a set of ‘justices’ appointed in an obscure manner, legitimacy would be enhanced by defining procedures and institutions with equal and proportional representation of users capable of informing content moderation policies, algorithms, and mechanisms developed by Meta.

Although the Oversight Board criticizes the disproportionate attention Meta gives to content and accounts in more lucrative regions in its advisory opinion, the institution itself also replicates a similar trend in its performance. According to the company’s investor earnings report for the second quarter of 2023, the Asia-Pacific region registered 1,349 billion monthly active users on Facebook, while the United States and Canada registered 270 million and Europe 409 million. At the same time, the Oversight Board’s transparency report of the same period demonstrates that 83 user-submitted cases were long-listed for review, of which only four originated in the Asia-Pacific and Oceania region in contrast to 50 from Europe.<sup>137</sup>

This trend in case selection follows the output of decisions released until the time of writing. From its inception to December 2023, the Oversight Board has issued 89 rulings on individual posts with an almost perfect balance between cases originating from the Global North and South.<sup>138</sup> In addition, it has issued three policy advisory opinions, which the Oversight Board defines as inherently global. The Oversight Board uses a more specific description for the regional distribution of the cases decided, not following Meta’s SEC classification.<sup>139</sup> As such, the distribution of users in the defined regions recognized by the Oversight Board was taken from external data analysis, which considers Facebook’s advertising audience instead of monthly active users.<sup>140</sup> The analysis (see [Table 1](#) and [Figure 1](#)) showcases how, beyond the North/South dichotomy, lies a further divide. Cases originating from Central and South Asia, the region with the highest concentration of users, for example, represent approximately only 12 per cent of the decisions, against approximately 47 per cent of combined decisions for the European and North American regions (27 per cent and 20 per cent, respectively).<sup>141</sup>

This brief analysis demonstrates how being a Facebook or Instagram user in North America differs from being one in India or Sri Lanka when it comes to content moderation and accountability. Although many justifications can be tied to this variance (language barrier, predisposition to present claims, technical literacy and accessibility, for

<sup>137</sup>Meta Inc., ‘Meta Reports Second Quarter 2023 Results (10-Q)’ (2023). <<https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=17005963>>; Oversight Board, ‘Q2 2023 Transparency Report’ (Oversight Board, 2023) <<https://oversightboard.com/attachment/2033294933715404>>.

<sup>138</sup>Oversight Board, ‘Case Decisions and Policy Advisory Opinions’ (Oversight Board). <<https://www.oversightboard.com/decision>>.

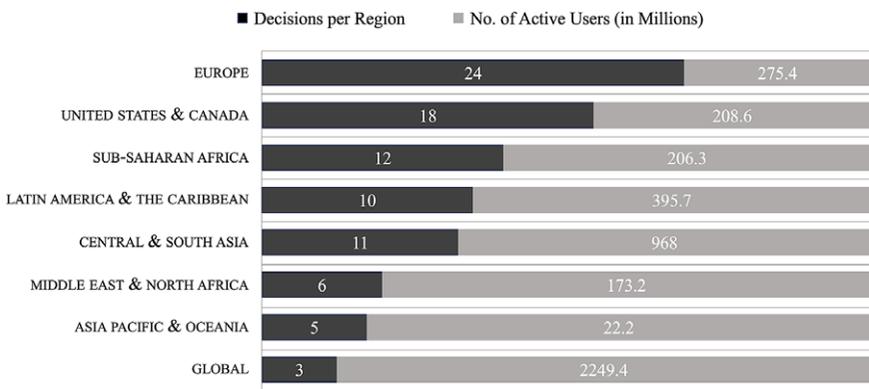
<sup>139</sup>While Meta’s SEC filings distinguish between four regions (United States and Canada; Asia-Pacific; Europe, which includes Russia and Turkey; and Rest of the World, encompassing Africa, Latin America and the Middle East), the Oversight Board distinguishes Meta’s users between seven regions (United States and Canada; Europe; Middle East & North Africa; Sub-Saharan Africa; Latin America and the Caribbean; Central and South Asia; and Asia Pacific and Oceania). Oversight Board, ‘Oversight Board Annual Transparency Report: 2022’ (Oversight Board, 2023) <<https://www.oversightboard.com/news/560960906211177-2022-annual-report-oversight-board-reviews-meta-s-changes-to-bring-fairness-and-transparency-to-its-platforms>>; Meta Inc., ‘Meta Reports Fourth Quarter and Full Year 2022 Annual Results (10-K)’ (Meta Inc, 2023) 99 <<https://investor.fb.com/investor-news/press-release-details/2023/Meta-Reports-Fourth-Quarter-and-Full-Year-2022-Results/default.aspx>>.

<sup>140</sup>Simon Kemp, ‘Essential Facebook Stats’ (Datareportal, 2023). <<https://datareportal.com/essential-facebook-stats>>.

<sup>141</sup>Oversight Board, ‘Oversight Board Annual Transparency Report: 2022’ (n 139); Meta Inc. (n 137).

**Table 1.** Facebook's monthly active users according to Meta's earnings report data for July 2023 and the distribution of decisions from the Oversight Board up to December 2023

Region	No. of Active users (in millions)	Decisions per region	% Decisions
Europe	409	24	27
United States and Canada	270	18	20
Asia-Pacific	1,349	16	18
Rest of the world	1,002	28	32
Global	3,030	3	3

**Figure 1** Oversight Board decisions, following the Oversight Board regional classification up to December 2023 and Facebook's active users according to Meta's advertising audience data for April 2023.

example), the Oversight Board's selection of cases considering issues the institution perceives to be of political significance can be biased towards appeals from users from more profitable regions.<sup>142</sup>

If the Oversight Board's preoccupation is not related to more profitable markets, which could be the case considering the institution is external and autonomous from Meta's immediate corporate interests, the regional disparity might be related to more sensitive responsiveness to the regulatory demands of specific regions, which silences the reflexivity of other policy concerns from a plurality of demands from the different nations in the

<sup>142</sup>In fact, both annual transparency reports released from the Oversight Board showcase an estimation of case submissions by user-selected region. In 2021, users from the Global South were responsible for 30.9 per cent of appeals to the Oversight Board, while in 2022 the estimation raised to 32 per cent. In contrast, user appeals from the Global North averaged 69 per cent in both reported years. The disparity may be indicative of more extensive issues concerning accessibility to the Oversight Board (transparency and availability of translated community standards). Oversight Board, 'Oversight Board Annual Transparency Report: 2021' (Oversight Board. 2022) 19. <<https://www.oversightboard.com/news/322324590080612-oversight-board-publishes-first-annual-report>>; Oversight Board, 'Oversight Board Annual Transparency Report: 2022' (n 139) 32.

Global South. Thus, to be effective as a constitutionalisation instrument within the virtual community of Meta's Instagram and Facebook platforms, the Oversight Board should be able to engage with more extensive policies regarding content moderation on these platforms, considering the input of users and civil organizations.

### *Ideology*

As an ideology, digital societal constitutionalism can also engage with a constitutional narrative that considers users' power over platforms, not only structuring mechanisms for users to dissent from platform regulation and content moderation policies legitimately but also reconfiguring the substance of the jurisdiction of the system already established.

As such, engaging with a democratic constitutional narrative from this societal approach, the Oversight Board's role in enlarging legitimacy would expand in tandem with its capacity to inform the decision-making process of Meta beyond content removal, focusing on larger debates such as the use, design, and implementation of algorithms in the regulation of users' engagement with and within the platforms.

This focus entails a more extensive consideration of content moderation beyond content removal. Gillespie defines content moderation as 'functioning technical and institutional systems' that regulate the visibility, amplification and availability of user-generated content on digital platforms and the forms of user interaction within virtual communities.<sup>143</sup> Content moderation encompasses any instance in which the platform intervenes in the communication between platform users, defining rules of participation, forms of engagement and the organization of content.<sup>144</sup> These practices are stimulated by the development of algorithms, which combine machine learning, artificial intelligence and human content moderators to enforce the platform rules that define acceptable content and behaviour.<sup>145</sup>

Approaching regulatory issues of content moderation from an administrative law perspective, Douek highlights the need to expand the debate of regulating content moderation from an individualistic perspective towards a systematic approach that considers the plurality of mechanisms, actors and processes involved in content moderation.<sup>146</sup> As such, Douek criticizes the Oversight Board as the epitome of an 'individual rights paradigm' that focuses 'on providing notice, reasons, and an individual appeal to a human in every case' and falters in the protection of aggregate harms, algorithmic determination and operational mistakes.<sup>147</sup> Although partly agreeing with Douek's argument, this article perceives the possibility of systemically addressing platform governance through a constitutional lens, albeit not one entrenched only in the US constitutional framework. As Klonick points out, beyond circumventing a constitutional framework to address content moderation, a systems-thinking approach must acknowledge that moderation in social media platforms should take both platform governance

<sup>143</sup>Gillespie, 'Platforms Intervene' (n 7); Gillespie, *Custodians of the Internet* (n 7) 6.

<sup>144</sup>Organization of content entails highlighting and suppressing specific communications to different users. Gillespie, 'Platforms Intervene' (n 7).

<sup>145</sup>DeNardis and Hackl (n 7).

<sup>146</sup>Douek, 'The Siren Call of Content Moderation Formalism' (n 79); Douek, 'Content Moderation as Systems Thinking' (n 79) 530.

<sup>147</sup>Douek, 'Content Moderation as Systems Thinking' (n 79) 568–70.

mechanisms and state regulatory efforts to provide a dynamic solution to content moderation reform.<sup>148</sup>

Embracing the complexity of content moderation and perceiving the democratic legitimation of these processes hinges on establishing mechanisms that allow for the contingency and self-reference of power processes within platforms' governance structures, allowing the institutionalization of dissent in this social environment.<sup>149</sup> In traditional constitutionalism, the nation-state is able to institutionalize the dynamics of fundamental social dissent in organized opposition and political pluralism founded on representational politics.<sup>150</sup> Thus, the institutionalization of internal dissent through the establishment of rules and institutions regarding electoral disputes and the transference of power allows an inexorable link between societal dissent and nationwide consensus.<sup>151</sup> Through institutionalization, commitments cannot be abrogated unilaterally, which in turn maintains the societal commitments achieved by the government and opposition in their disputes of power.<sup>152</sup>

In the regime-specific system of Meta's platform governance, the Oversight Board may be able to institutionalize the multiple interests of users from different regions *vis-à-vis* the transnational governance apparatus. Thus the Oversight Board gives way to what Thornhill considers the freestanding forms of reflexive politics in different transnational contexts – in this case, in Meta Inc.<sup>153</sup> Therefore, institutionalizing the internal dissent within that system of governance perceives the categorically public character of its decisions over the coherent application of community standards and international human rights, the implementation of moderation systems through algorithmic inputs and the definitions of recommendation algorithms that mould what content users receive in their feeds. These are societal decisions that have public character despite not necessarily being tied to power politics in national political systems.

Higher sensitivity to contingencies concerning content-moderation procedures allows the Oversight Board to institutionally recognize, *vis-à-vis* Meta's Facebook and Instagram platforms, divergent approaches to the application of human rights and the company's community standards. The analysis of the Oversight Board in these parameters perceives

<sup>148</sup>Highlighting inconsistencies in Douek's account of a 'procedural standard picture' of content moderation, Klonick argues that a system thinking approach would entail 'individual decisions, automations, governance, governments, external influence, internal politics, constitutions, norms, legality, human judgment and biases, administration, bureaucracy, multistep processes, long legislative-like meetings, people, corporate courthouses, actual courthouses, stakeholders, economies, the media and iterative dynamic changes'. Kate Klonick, 'Of Systems Thinking and Straw Men' (2023) 136 *Harvard Law Review* 339, 359, 362. <<https://harvardlawreview.org/forum/vol-136/of-systems-thinking-and-straw-men>>. Douek, 'Content Moderation as Systems Thinking' (n 79) 548–54.

<sup>149</sup>Christodoulidis (n 26) 273–85; Teubner, 'Quod Omnes Tangit' (n 8).

<sup>150</sup>Niklas Luhmann, *Political Theory in the Welfare State* (Berlin: De Gruyter, 1990) 21–116. <<https://www.degruyter.com/document/isbn/9783110119329/html?lang=en>>.

<sup>151</sup>Teubner, 'Quod Omnes Tangit' (n 8).

<sup>152</sup>Luhmann, *Political Theory in the Welfare State* (n 150); Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (n 119) 5–6.

<sup>153</sup>Christopher Thornhill, 'The Sociological Origins of Global Constitutional Law', in *Sociology of Constitutions: A Paradoxical Perspective* (London: Routledge, 2016) 100. <<https://research.manchester.ac.uk/en/publications/the-sociological-origins-of-global-constitutional-law>>; Chris Thornhill, 'Niklas Luhmann and the Sociology of the Constitution' (2010) 10 *Journal of Classical Sociology* 315. <<https://doi.org/10.1177/1468795X10385181>>; Christodoulidis (n 26) 283–85.

the institution as the place where Meta's platform governance allows contextualized self-contestation, expanding the potential for collective decisions in tandem with the insurance that governance is responsive to users' preferences as shaped through debates of competing interests. In other words, systemic contextualized self-contestation expands input legitimacy in transnational governance.<sup>154</sup>

### Policy

Finally, as policy, digital societal constitutionalism reasserts a co-regulatory model that does not exempt social media platforms from liability while recognizing their role as moderators within regional-specific determinations. This approach can already be ascertained to some extent in the European Union's recently approved DSA regulation.<sup>155</sup> The DSA includes in Article 17 the mandate for online platforms to provide users access to an internal complaint system, while Article 18 provides that users are entitled to select 'out-of-court dispute settlement bodies' to resolve content-moderation disputes. While these provisions differ from the already established Oversight Board, which legally is an external independent institution established by Meta, they also showcase a regulatory approach that considers and values the role that platforms themselves can perform in dealing with content-moderation disputes.<sup>156</sup>

A democratic constitutional narrative from the societal approach would incentivize platforms to become more sensitive to their users' social and political environments, besides establishing internal complaint instruments and alternate dispute settlements. Such openness allows for localized governance mechanisms that respect the proportional representation of users both in content moderation adjudication and policy debates. In societal constitutional terms, external pressures must be able to influence the internal politics that lead to the constitutionalisation of functionally differentiated sub-systems.<sup>157</sup>

In other words, the Oversight Board must be able to fully institutionalize the internal dissent of its users regarding their expectations and interests *vis-à-vis* the governance exercised transnationally by Meta. Considering the disparity of the Oversight Board decision outputs showcased above, this institutionalization can be improved by the definition of a federalized system of oversight, distributed if not by country, then at least by region. This proposition follows societal constitutionalism's approach of generalization and respecification, employed here towards the traditional constitutional principle of separation of powers.<sup>158</sup> A framework of concurrent jurisdictions in accordance with regional specificities might lead to decisions more focused on the regional context where Meta's content-moderation practices have been contested, signalling to the company the need for specific differentiated policies in accordance with regional legal, social and political demands.

<sup>154</sup>Teubner, 'Quod Omnes Tangit' (n 8) 13; Scharpf, *Demokratiethorie zwischen Utopie und Anpassung* (n 79).

<sup>155</sup>David Wong and Luciano Floridi, 'Meta's Oversight Board: A Review and Critical Assessment' [2022] *Minds and Machines*. <<https://doi.org/10.1007/s11023-022-09613-x>>.

<sup>156</sup>*ibid.*

<sup>157</sup>Teubner, *Constitutional Fragments* (n 26) 117–23.

<sup>158</sup>Talcott Parsons and C Ackerman, 'The Concept of "Social System" as a Theoretical Device', in GJ DiRenzo (ed), *Concepts, Theory, and Explanation in the Behavioral Sciences* (New York: Random House, 1966); Alex Viskovatoff, 'Foundations of Niklas Luhmann's Theory of Social Systems' (1999) 29 *Philosophy of the Social Sciences* 481. <<https://doi.org/10.1177/004839319902900402>>.

Additionally, a more immediate way of expanding the Oversight Board's capability to institutionalize internal dissent would be to expand the institution's workload through procedural mechanisms that allow for the acceptance of a higher number of appeals from multiple regions and faster decision-making frameworks. This procedural solution was partially adopted by the Oversight Board in February 2023, with the introduction of new expedited procedures and summary reviews. In the former, Meta may request an expedited proceeding when referring a case to the Oversight Board, indicating 'urgent real-world consequences' and exceptional circumstances.<sup>159</sup> In the latter, the Oversight Board may issue a summary review when Meta acknowledges that the content in the particular case was wrongly removed and has already reversed the moderation decision.<sup>160</sup> Summary reviews stem directly from the Oversight Board experience in previous cases where the original moderation decision had been revised by Meta voluntarily. In the aforementioned 'Breast Cancer Symptoms and Nudity Case', the Oversight Board was explicit in maintaining its jurisdiction over content-moderation decisions reversed by Meta prior to its assessment, indicating that false positives represent a lack of appropriate human moderation in assistance to algorithmic moderation procedures, raising human rights concerns.<sup>161</sup>

Thus, walking the tightrope between transnational governance and local regulations can be assisted by reflexive regulations determining minimum representative requirements in institutions such as the Oversight Board or establishing local deliberation forums that bring governance closer to users and their experience on the platform.

## VII. Conclusion

A societal approach to the constitutionalisation of platform governance can be seen as a conciliation of the liberal and sovereigntist approach to internet governance in the specific context of content moderation.<sup>162</sup> It maintains the impossibility of one societal rationality grounded in local and regional social environments, dominating the transnational character of the internet. On the other hand, it recognizes that the governance exercised by platforms needs to become more responsive to each of the political spaces in which they are inserted, with the expansion of the system's internal dissent being one of the mechanisms able to provide such structural coupling.

Constitutionalism, deriving values from the notion of the state, developed a plethora of principles and understandings that shaped how powers are limited and which institutions are designed to reach important common goals and values. The theoretical landscape that subsides in digital constitutionalism can inform which policy decisions can be developed for the continued enlargement of the legitimacy and efficacy of governance within private social media platforms. This dynamic has been made clear by the specific arrangement developed by Meta's Oversight Board, incorporating structural and procedural elements from the US constitutional framework in an attempt to enhance the legitimacy of the power performed by Meta in content moderation.

Thus, by comprehending digital constitutionalism under a liberal prism, the Oversight Board extends an analogy regarding the platform's internal rules and

<sup>159</sup>Article 3. Section 7.1.2 Facebook, 'Oversight Board Charter' (n 54).

<sup>160</sup>Article 2. Section 2.1.2 and 2.1.3 Oversight Board, 'Oversight Board Bylaws' (n 56).

<sup>161</sup>Oversight Board, 'Case Decision 2020-004-IG-UA "Breast Cancer Symptoms and Nudity"' (n 60).

<sup>162</sup>Flonk, Jachtenfuchs and Obendiek (n 9).

international human rights law, reinforcing the principle of the rule of law by predefining the internal rules itself and attaching them to a globally recognized normative standard. This Supreme Court with policy privileges reflects constitutionalism to the extent it perceives the capacity for the rule of law to limit the exercise of power in a political environment.

Engaging with digital constitutionalism as an ideology, the Oversight Board promotes constitutional governance, balancing rights and interests through a technocratic and juridified approach that reduces social and political claims related to user interactions to matters of legal interpretation. As has been showcased by the adjudication of the removal of former US president Donald Trump, the Oversight Board also promotes the policy goal of the company to distance itself from specific regional constitutional orders, consolidating Meta's own approach towards freedom of speech and the management of political users on its platforms, fending off state regulations that can be more stringent.

The renewed legitimacy crises of Meta with the publication of the Facebook Files highlight the limitations of this approach. State constitutionalism may present a historical model that can influence the constitutionalisation of governance structures in social media platforms. However, this model also needs to comprehend constitutionalism from its social and political foundation, considering the paradoxical expected outcome of limiting totalizing political power by means of political power itself.<sup>163</sup>

Moving from a state-based perspective to a societal one allows the exercise of the necessary institutional imagination capable of addressing the issue of the large-scale application of human rights in private environments.<sup>164</sup> From a societal perspective of constitutionalism, it is necessary to critically address the possibilities and limits of the institutional devices developed to enlarge the legitimacy of platforms in their exercise of power when performing content moderation. In the case of Meta, for the Oversight Board to reflect a constitutional narrative within the company, its institutional design needs to foster a significant contextualized self-contestation process capable of enhancing the regime's learning capacity and expanding collective decision-making.

More representative structures and safeguards need to be established to reach this goal and account for the multiple social and political realities of users distributed around the globe. Although the company addresses its users without specific considerations to their place of origin, framing its governance as transnational in nature, policy outcomes and specific interpretations of community standards lead to different experiences for users in different regions.

In all, assessing the Oversight Board from a (digital) constitutional approach demonstrates how constitutionalism can develop solutions to legal and political issues in the digital age. In order to do so, however, digital constitutionalism as a theory must not avoid the complexity involved in digital governance, encompassing legitimacy standards for more transparent and accountable platform governance.

**Acknowledgements.** I thank the professors and colleagues Graziella Romeo, Gunther Teubner, Oreste Pollicino, Giovanni de Gregorio, Angelo Jr Golia, João C. Magalhães, Naomi Appelman, Marcelo Thompson, João Victor Archegas, Francisco de Abreu Duarte, and two anonymous reviewers for their comments on

<sup>163</sup>Teubner, 'Societal Constitutionalism' (n 66).

<sup>164</sup>Unger (n 91).

earlier drafts of this article and for the generous discussion of its theoretical claims. Part of this article was written during a stimulating research visit to the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. I thank professors Anne Peters and Armin Von Bogdandy for their hospitality and insights in multiple dienstagsrunden. An abridged version of this article was also presented at the Max Weber Workshop on Trust and Legitimacy in the Digital Age (European University Institute, 19 May 2022) and the 2023 MANCEPT Workshop on Theorizing Platform Content Moderation (University of Manchester, 13 September 2023). I thank the organizers and participants for a lively discussion of many of the themes explored here. All errors remain my own.