Introduction

The informational era has posed myriad constitutional challenges. Some are new: data overload and rapidly changing technologies require constant adaptations of regulation and intellectual property law. In addition, the globalized flow of data across borders and countries weakens the ability of states to regulate it. These new challenges also intensify old ones: the weakening of regulation, the growing access of private entities, governments and public institutions to personal information, lack of transparency, excessive power of private entities, severe privacy infringements, and so on. The Internet, for instance, constitutes a crucial platform that enhances people's access to information and provides a useful channel through which they can fulfil their freedom of speech. It also enables them to develop their creativity more easily. However, at the same time it is also a platform through which their constitutional rights are being constantly and increasingly infringed. The current issue of *Theoretical Inquiries in Law* explores several legal and constitutional aspects of those constitutional challenges, and the ways in which law should, does or fails to cope with them. The first six articles address various issues, including privacy protection, Internet regulation, consent and so on, and the last three articles are dedicated to three different aspects of intellectual property, antitrust and copyrights.

Julie Cohen, in the opening article, provides a thorough overview of regulatory challenges posed by the informational era. While traditional regulation has focused on preventing harms to public health and safety, in the informational era regulators need to cope with the complex transference of power from markets to platforms, overload and mediated information flows, and large-scale systematic harms. Consequently, regulation as we have come to know it should change and is in fact changing. The new regulatory models analyzed in this article combine traditional enforcement with modern policymaking in various ways: co-regulated public-private initiatives, the recruitment of professional experts to inspect ever-changing compliance, and the setting of industries' standards by consent. Some of these new forms of regulation pose challenges of their own, as they may be opaque and oriented towards minimal regulation, and they might fail to monitor complex proceedings proactively in real time. Cohen both introduces the new forms of regulation and discusses the challenges they raise.

Another aspect of regulation in the informational era is discussed by Michael Geist, who explores the recent shift in Canadian public involvement in shaping informational and digital policies. According to Geist, this shift is enabled by social media tools, which provide access to information, combined with minimal governmental interference. Although not always successful, public participation through social media has led to important changes in legislation and regulation — changes that seemed unlikely to occur in the past. The author demonstrates this evolving public participation by analyzing it in three prominent contexts — copyright, telecom and privacy — while focusing on the relationship between the government, high-end corporations and the involved public. He concludes by pointing to three major changes that are reflected in the participation of the public in policymaking: the recognition of the public as stakeholders, the Internet serving as both the subject of the policy and a tool for participation in its regulatory shaping, and the shifts in the hierarchy that has traditionally characterized the policymaking pyramid.

Moving to a different intersection of the state, private entities, the public and the informational era, Lisa Austin focuses on the ways in which the privacy of people is increasingly infringed by the state. First, the state's growing ability to collect personal information on citizens from Internet service providers (ISPs), as well as platform providers, makes it much easier for the state to surveil private people. Although one can argue that this method of information gathering resembles the traditional way of questioning neighbors, Austin argues that the sheer quantity of information and the enhanced access to it might render this kind of information gathering too invasive and unconstitutional. Second, the flow of information across borders challenges the protection of privacy, as it is not always clear which laws and of which state apply in each case. This, according to Austin, results in constitutional black holes. In both cases, traditional restraints over state power are deteriorating and consequently privacy is severely compromised.

Frank Pasquale explores a different constitutional aspect of the Internet: freedom of expression. In this context, Pasquale tackles the basic tension in regulation as Internet companies and digital platforms employ conflicting constitutional arguments: they describe themselves in some cases as mere conduits of information, and as such they deflect liability, while in other cases they describe themselves as content providers who are entitled to protection of their freedom of expression. The result of this dual conception of Internet intermediaries is that they enjoy constitutional protection of their freedom of expression, but at the same time are not obliged to promote others' freedom of expression despite their growing power. Pasquale argues that since digital platforms combine multiple functions as conduits, content providers and data

brokers, the development of new forms of regulation is required: regulation that can balance the rights and responsibilities of such dominant platforms.

Margaret Jane Radin tackles another aspect of the relationships between Internet platforms and their users: online boilerplate contracts. Radin argues that prevailing contract theory has remained mostly static over the years, and still relies on the assumption that parties calculate their risks and payoffs, and make rational decisions. Contrarily, as Radin shows, modern mass-market boilerplate contracts do not fit this paradigm. These contracts are sometimes formed by constructive notice, meaning that the buyer has not actually seen the terms she is bound by. Moreover, even if the buyer is presented with the terms, she is often unable to read or understand them. In this Article, Radin diverges from what she calls old-style Chicago law-and-economics rationality and utilizes a dual process theory — a more realistic model of information uptake, which has been widely recognized in modern psychology. Radin does not claim that mass-market standardized contracts do not have their place in modern society, or that buyers never accept terms rationally. Rather, she seeks to delineate certain contracts and terms that should not be formed by notice; and for those that should be formed by notice — how an appropriate notice should be determined.

Brett Frischmann analyzes the question of users' consent from another, innovative angle, by tying between social engineering and the informational era. While many scholars and articles (including those published in the current issue of *Theoretical Inquiries in Law*) focus on constitutional challenges such as data collection and use, discriminatory uses of information and so on, Frischmann unveils what constantly slips under the radar: the techno-social engineering of humans. This term refers to the way in which human behavior is nowadays designed and channeled by and through technology. Since this phenomenon is currently under-theorized, the author lays the ground for its further exploration by two strong and clearly defined examples: one deals with Facebook's experiment in transforming human emotions by feed manipulations, the other with activity watches distributed to school children by school district, enabling constant surveillance of the children. In both cases, Frischmann contends that users had not considered or valuated the lack of transparency, lack of informed consent and privacy infringement caused by the feed manipulation and activity watches. Rather, they accepted unquestionably the conduct of Facebook and the school district. The major problem, according to Frischmann, is not the mere manipulation or privacy infringement, but the way in which people naturally, gradually and unquestionably accept technological control over their lives.

Pamela Samuelson opens the part of this issue dealing with intellectual property and copyrights. Samuelson explores recent legal developments that

challenge the freedom to tinker — a longstanding practice of user innovation. Tinkering has played an important role in advancing technology, as millions of worldwide users share with others the fruits of their creativity, achieved by tinkering. Websites, open-source software, and open-access media are only some of the domains through which users' innovations are yielding cultural and intellectual benefits by tinkering. However, as Samuelson shows, intellectual property law, copyright law (and sometimes contract law) restrict the freedom of users to tinker with computer programs and other digital works, and consequently restrict innovative technological developments. Therefore, Samuelson argues that laws dealing with intellectual property, copyright and contracts should be interpreted in a manner that encourages tinkering rather than suppressing it, as long as the tinkering is not destructive.

Carys Craig suggests another way of interpreting intellectual property and copyright rules — one that leans on a relational understanding of rights. Craig bases her argument on the notion of technological neutrality, which prescribes that laws should develop independently of specific technological advancements. As the technological means of creating, storing and distributing information constantly change and evolve, intellectual property rights, some of which were conceived with a specific technological framework in mind, are respectively challenged and litigated. By thoroughly analyzing several Canadian cases, Craig illustrates three approaches to technological neutrality: restrictive, intermediate and expansive. The latter, she argues, is the most adequate one, as it provides a broad enough basis for a dynamic and flexible interpretation of intellectual property laws and copyrights *vis-à-vis* the rapid technological changes. Craig also shows that a relational approach to copyrights and intellectual property corresponds with the expansive approach and promotes it. The relational approach views rights in general and copyrights in particular as regulating and promoting the relationships between people rather than putting boundaries between them. Copyrights and intellectual laws, Craig concludes, should be interpreted in accordance with this approach in order to best fulfil their goals.

The last article dealing with intellectual property is by Ariel Katz, who challenges the mainstream understanding of intellectual property and antitrust rules as based mainly (or even exclusively) on economic and utility considerations. Contrarily, Katz directs our attention to the intersection of intellectual property and antitrust doctrines and the rule of law. Mainly, he argues that the prominent cases through which intellectual property and antitrust rules have evolved during the last centuries were based upon the conception that restraining persons' freedom should be grounded in recognized legal principles. This reading of the prominent intellectual rights cases, according to Katz, provides an adequate reply to the law-and-economics scholars who

contend that rulings in some of those cases are inefficient and therefore wrong. Katz's argument is both descriptive and normative, as it provides a thorough analysis of the development of intellectual property and antitrust doctrines and a framework through which past and current cases can be further explored and comprehended.

Also included in this issue is an article based on the Seventh Annual Cegla Lecture on Legal Theory, *Compounding Errors: Why Heightened Regulation and Taxation Are Bad Antidotes for Recessions and Income Inequality*, delivered by Richard A. Epstein at Tel Aviv University in December 2014. The Cegla Lectures on Legal Theory feature prominent legal scholars who are asked to address fundamental questions about law and legal institutions. In this article, Epstein contends that while there is no doubt recession and income inequality are a worldwide problem that should be dealt with, the current tendency to raise taxes and enhance government regulation might aggravate recession and inequalities instead of alleviating them. Epstein provides a quick overview of the widespread calls for an interventionist approach by organizations such as the OECD, scholars and politicians. He also mentions some examples of interventionist policies promoted in some states and countries. He then suggests outlines for adequate taxation and regulation policies, which are not necessarily aimed at abolishing all kinds of taxes and regulation, but rather aimed at averting their expansion. With regard to taxes Epstein advocates for flattening taxes, and with regard to regulation he advocates for a cautious level of intervention, which would incentivize innovation and development by granting intellectual property rights while encouraging a competitive market. In both contexts — taxation and regulation — the goal, according to Epstein, should be general growth rather than redistribution.

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