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Ending The Digital Wild West?

**Online Content Regulation in the European Union
and the United States**

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Abstract

We live in times of great salience of internet governance. In times when the democratic world has generally recognised that the digital industry and modern big tech companies have produced not only progress but also new challenges which desperately need addressing, such as the efficient spread of illegal or otherwise harmful content online. The European Union has been particularly active on this issue: its Digital Services Act passed in 2022 greatly updates the rules around the responsibilities of online platforms for how they manage content. In the USA, however, no such updating has occurred yet. This comparative qualitative analysis based on primary and secondary sources as well as interviews unpacks the main reasons for the regulatory divergence in the period between 2016 and early 2023, which, if lasting, could lead to increasingly different internet experiences for Europeans and Americans, or big complications for the internet companies operating in both markets, and be an indicator of further divergences in other digital policy areas. The paper identifies the different legal frameworks within which policymakers on the two sides of the Atlantic operate as one part of the explanation given especially how the First Amendment jurisprudence ties Americans' hands regarding government regulation of online content. The second part of the explanation consists of recognizing how the political conditions in the EU have in recent years been favourable to sweeping new digital regulations – with the Union assigning high priority to its digital agenda and reaching broad consensus around its general goals which facilitated the negotiations about specific policies and instruments – while the US government has been far less consistently focused on the issue, and its political class far more polarized about the nature of the problem of online content moderation as well as appropriate responses.

Key words

European Union, United States, online content regulation, platform governance, Digital Services Act, Section 230, e-Commerce Directive, digital sovereignty, First Amendment

General note: Opinions expressed in this paper are those of the author(s) and not necessarily those of the EIF.

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1. Introduction

In 1996, the United States Congress passed a revised version of US telecommunications laws – one small part of which, called Section 230 of the Communications Decency Act would in the years and decades to follow prove arguably indispensable for the development of the modern internet as we know it. In what was dubbed “the twenty-six words that created the internet” (Kosseff, 2019), the provision stipulated that providers of interactive computer services, or digital platforms, could not be held liable, i.e. legally responsible, for the content that users post on them. Equally, the providers would be free to moderate such content on their platforms according to their own standards. With these legal assurances, companies like Google and Facebook could grow to become the giants we know today without having to fear constant litigation (Ibid.).

Section 230 and other legal provisions setting the rules for the nascent digital industry were a product of their time. Their aim was usually first and foremost to support innovation and ensure that unnecessary legal obstacles would not stand in the way of new technology with great potential. This motivation was not present only in the US, but also on the other side of the Atlantic, where, in 2000, the EU passed the so-called e-Commerce Directive. The directive provided similar, albeit more restrictive, protections for platform providers. Since then, the commercial internet has come a long way: In a relatively short time span, it has become an integral part of the lives of billions of people, greatly reshaping how we communicate and how we find, sort and share information and news. The digital economy has progressed and grown enormously in recent decades as firms in the sector have been gradually developing and optimizing their business models based on data collection and monetization, and algorithmic content curation (Moore & Tambini, 2021) with several big tech companies like Google/Alphabet, Amazon, Apple, Microsoft, and Facebook/Meta amassing huge amounts of power and influence in the process. At the same time, if part of the internet’s (or, later, social

media's) early appeal stemmed from its promise to strengthen liberal societies and undermine authoritarian regimes, such hopes have proved to be overblown, to say the least (Diamond, 2019; Hynes, 2021).

In light of these new realities, do the old rules governing the internet, as so many have now come to argue, warrant some fundamental rewriting? Do we need new approaches to tackle the spread of illegal or in some way harmful content online? Do today's platforms' business models create new risks that the law should reflect? Is there a dangerous mismatch between the lack of public oversight of how content is managed on dominant platforms like Facebook or Twitter and the great importance they have come to have for public discourse in modern Western societies? Such questions have become prominent in both the EU and the US (and, of course, beyond) at least since 2016. Answers to these and other connected questions in digital policy will affect the future internet experience of hundreds of millions, potentially billions of people. And to what extent the EU and the US policymakers converge or diverge in their approaches to online content may in the medium to long term determine whether we witness increasing fragmentation (or "balkanization", in Lemley's (2021) words) of the internet rules (and therefore the online user experience) along national or regional lines even within the democratic or Western world.¹

This paper sheds light on recent developments around online content regulation on both sides of the Atlantic. At first sight, one may easily surmise that the EU has been more active on this front. Most importantly, in 2022, it passed the so-called Digital Services Act (DSA), which updates the e-Commerce Directive by imposing new obligations on platforms regarding their content moderation practices. In contrast, no equivalent regulatory output has occurred in the

¹ Lemley lamented in his 2020 lecture on the "Splinternet" that the EU's regulations "will end up either moving European consumers to separate European internet companies and internet technologies or, perhaps, co-opting U.S. companies in ways that still end up dividing the U.S. experience from the European experience" (2021, p. 1401).

US, which leads to the central research question of this work: What explains the divergence between the EU's and the US's approaches to online content regulation?

The paper provides a two-fold explanation. First, I discuss how European and American policymakers operate within two different legal frameworks that shape their options and incentives when it comes to government regulation of speech or online content. What is possible in the EU is not always possible or is more complicated in the US due to the First Amendment jurisprudence, and where Europeans feel the need to defend fundamental rights, Americans might be required by law, or even just prefer to, not intervene in the free exchange of ideas. Second, I describe how the regulatory divergence has equally been a product of very different political dynamics in each case. In the EU, political conditions have in recent years proved favourable to sweeping regulation of digital technologies as the Union has considered it one of its top priorities, not least given its determination to ensure Europe's digital sovereignty. In contrast, regulation of digital platforms has not enjoyed the same priority status in the USA, more preoccupied with its competition with China, for example, and the prospects of a fundamental reform of Section 230 have been inhibited further by inner political polarisation between Democrats and Republicans, with the former camp primarily concerned about liability for what gets posted and spreads on platforms, and the latter worrying much more about what gets removed.

2. Literature Review

Ever since the dawn of the modern and popularly used internet in the 1990s, government regulation of online content and the internet's effects on societies have of course been prominent subjects of academic and policy debates. While the hopes of some early cyber-utopians that cyberspace could form a uniquely free sphere untouched by government power have never materialised (see for example Barlow, 1996), for a long time, these debates indeed

largely revolved around the internet's potential to empower people on the one hand and government censorship or misuse of the technology on the other (Zittrain, 2019). An early significant split emerged between those who were largely optimistic about the internet's potential to promote democratization around the world by facilitating direct communication and organization of great numbers of people (a belief initially perhaps encouraged by the period of general confidence in the future of democracy after the fall of the Iron Curtain and later seemingly reinforced by the rise of social media and their use by protestors in authoritarian regimes) and those who, by the early 2010s, increasingly challenged this predominant perspective, highlighting how the new technology can be instead used by authoritarians for repression (Soriano, 2013; Hynes, 2021).

In recent years, internet governance debates have undergone a significant shift as there has been a spike in scholarly examination of the systemic effects of digital technologies and media on democratic societies and of the power and practices of the suddenly so important big tech companies. This trend was exacerbated particularly in the aftermath of the 2016 US Presidential Elections (and also the subsequent Cambridge Analytica scandal)² that brought to public attention some of the vulnerabilities associated with the modern internet in Western democracies (e.g. foreign electoral interference, disinformation, misuse of personal data in political campaigns etc.) (Persily & Tucker, 2020a). The image of the digital industry quickly changed. In what was dubbed the era of "techlash"³, the big tech companies were beginning to be routinely criticised as "BAADD – big, anti-competitive, addictive and destructive to democracy" by experts, policymakers and even the public (The Economist, 2018). Accordingly, this era has given birth to a strong strand of literature characterised by a relative consensus about the negative effects of the rise of platforms such as Google or Facebook, and the rise of

² To a lesser extent, the Brexit referendum had a similar effect.

³ Defined in the online Cambridge Dictionary as "a strong negative feeling among a group of people in reaction to modern technology and the behaviour of big technology companies."
(Available at: <https://dictionary.cambridge.org/dictionary/english/techlash>)

digital media more broadly, on public discourse: including by having democratized the spread of information in a way that has facilitated the spread of false information⁴ without accountability, by profiting from engagement fuelled by unethical amplification of deceiving or hateful content, and by financially undermining traditional media with historically entrenched journalistic norms and obligations⁵ (The LSE Commission on Truth and Technology, 2018; Wardle & Derakhshan, 2017; Nielsen & Ganter, 2022; Jungherr & Schroeder, 2021). Connected critiques then focus on the ethical and privacy aspects of the business model (Zuboff, 2019) or the implications of the sheer dominance (and anti-competitive behaviour) of the tech giants (Wu, 2018).

When it comes to possible responses to these challenges by regulating digital platforms and/or their content moderation practices, we of course find heterogenous opinions. On a general level, scholars and pundits differ in whether they are more concerned about the continuation of the status quo or government overreach in attempting to change it. Some maintain that democratic governments should interfere with platforms' content moderation as little as possible to avoid sliding into censorship or destroying the value that the internet and platforms bring to people. They argue that platforms should never be treated as publishers given their unique function and scale, and that allowing them to self-regulate continues to be the more efficient way of addressing content with tricky definitions such as hate speech or misinformation than government-imposed rules (Samples, 2019). Others similarly warn against any partnering between government agencies and platforms when it comes to content moderation decisions (Greene, et al., 2022). For some, such as Chander and Le (2014), the big digital platforms – by connecting people in one place where they can interact rather than being dispersed on many

⁴ As a note on terminology, Wardle and Derakhshan (2017) distinguished dis-, mis- and mal-information: deliberately false, just false, and (partly) true but deliberately harmful information respectively.

⁵ Effectively, we have witnessed a process of separation of information production and distribution, moving the latter away from legacy media to modern private and largely unregulated companies (see especially Nielsen & Ganter, 2022 and Jungherr & Schroeder, 2021 for more discussion about the relation between legacy media and digital platforms).

different websites – represent the true fulfilment of the internet’s promise to give everyone a voice and thus any regulatory threats to these platforms that could endanger this benefit should be considered very sceptically.

In contrast, some strike a tone of emergency, arguing first and foremost for doing something: For Zuboff (2019; 2022), for example, the underlying business model of digital platforms based on data collection about their users and its monetization is fundamentally at odds with democracy and needs to be regulated as such. Applebaum and Pomerantsev (2021) write that “[o]ur democratic habits have been killed off by an internet kleptocracy that profits from disinformation, polarization, and rage.” For many scholars, the sheer dominance of a few platforms is the most pressing problem given their unchecked power to “amplify or silence certain messages, and to do so at a scale that can alter major political outcomes” (Fukuyama, 2021, p. 39; see also Tutt, 2014). In contrast to Chander and Le, these scholars may be more prone to mourn the demise of an old, de-centralised, in their view more democratic internet full of different blogs and websites (Derakhshan, 2015).

In any case, policymakers in the democratic world have a wide array of options when it comes to potential new regulation of the digital economy and big tech companies, more or less radical, each with different trade-offs. Generally, using Gorwa’s (2019) classification, they have to balance between three options: continued reliance on industry self-regulation (with perhaps more dialogue and pressure), “co-governance” mechanisms (e.g. third-party oversight, increasing user participation etc.), and direct “external governance”, which may involve “comprehensive privacy and data protection regulation, the repudiation of intermediary liability protections, and the use of competition and monopoly law” (p. 863). Among those who agree that relying solely on self-regulation of the industry is no longer feasible, many specific proposals have been put forward, often escaping simple categorisation (Moore & Tambini, 2021; Persily & Tucker, 2020b). When it comes to the question of content and intermediary

liability, voices exist calling for platforms to be treated more as traditional publishers and not as mere intermediaries since that does not reflect the reality of how they operate today (Cetina Preusel & Martínez Sierra, 2019), potentially also making them liable for third-party content, even if this meant that the scale on which platforms like Facebook or Twitter operate would be untenable (Waldman, 2021; Shapiro, 2020). More prominent have so far become less radical proposals that would maintain the basic liability exemption enshrined in laws such as Section 230 or the e-Commerce Directive but would introduce new systemic obligations for the platforms – what Woods and Perrin (2021), for example, call “duty of care” – regarding transparency, oversight, risk assessments etc. Such a “process-based approach” (Stockmann, 2022, p. 7) is broadly speaking the one adopted by the EU in the DSA.

3. Methods and Scope

This paper is designed as a qualitative comparative case study. The focus of the paper is deliberately kept on democratic countries with the aim of examining the current regulatory dynamics and challenges facing democracies when it comes to regulating online content, as opposed to the very different and longstanding dynamics of online censorship in authoritarian states. The scope is equally limited to two case studies to allow for deeper analysis, although it of course limits what generalizations one can draw from the findings.

Within the democratic world, the United States and the European Union provide the most relevant comparison. As already outlined, the apparent gap between the EU’s and the US’s regulatory outputs regarding online content in recent years invites us to explore this divergence in more detail given that it has been occurring despite the close political and economic ties between the two regions, relatively similar starting points in the form of a largely hands-off approach to the digital industry adopted in both cases in the 1990s and early 2000s (De Gregorio, 2022), and similar shifts in public discourse since 2016 (the techlash has occurred on

both sides of the Atlantic). In addition, the EU and the US are simply the most important policy hubs in the democratic world whose decisions about internet governance may be consequential for the rest of the world. Indeed, since the birth of the internet over there, the US has been the country most crucial for its development and management and is the home of most of the biggest digital platforms today (Leiner, et al., 2009; Chander, 2013; Schmidt, 2021). The EU, for its part, not only provides a crucial market for most tech companies but has also demonstrated the ability to set regulatory standards that get effectively exported beyond its borders as they get emulated by policymakers abroad or as the companies decide to apply EU rules in other markets as well to ease operations (a dynamic dubbed “the Brussels Effect” by Bradford, 2020).

Two additional scope boundaries warrant a brief explanation: Firstly, this paper takes 2016 as an approximate starting point, given its already described importance as a year when the “conventional wisdom concerning the effect of the Internet on democracy abruptly shifted” (Persily & Tucker, 2020a, p. 1) and a “sense of urgency” (Interview 3) developed among many policymakers in the democratic world. The paper thus explains the divergent developments in the USA and the EU from 2016 up until the first half of 2023. Secondly, what I mean by online content regulation are regulations addressing the spread of illegal or problematic content online and (re-)defining the obligations and/or liability status (in other words, intermediary liability) of big digital platforms regarding hosting and managing third-party content. The limited scope of this paper does not allow for direct analysis of other related efforts in areas such as privacy, competition and beyond.

To understand the regulatory developments as well as the legal and political contexts in both case studies, I rely mainly on a qualitative analysis of a mixture of primary and secondary sources. Academic articles and books published by experts, especially in the fields of political science, media studies and law (or, indeed, the ever-growing strand of literature at the

intersection of these fields explicitly focused on issues of platform governance (Gorwa, 2019)) form the core of my analysis. In addition, I analysed relevant primary policy documents and public statements of policymakers.

I complement this with interviews conducted in the second half of 2022 with policymakers and experts on digital policy in the EU and/or the US. The interviews were semi-structured and each lasted around 30 minutes. The aim of the interviews was to allow me to directly question the experts about the EU-US regulatory interactions and divergence dynamics not covered in detail in the literature, and to get insights from people with often first-hand and up-to-date knowledge of the topic and relevant developments. The interviewees have been anonymized, and the list of all conducted interviews can be found in the appendix.

4. Part One: Legal Frameworks

“Congress shall make no law (...) abridging the freedom of speech...”

First Amendment of the US Constitution, 1791⁶

Already before the onset of the internet, two distinct legal traditions regarding the regulation of speech developed in Europe and the United States. The core difference between them concerns the level of protection granted to free speech and consequently the government’s ability to limit it. While freedom of expression is treated as a fundamental right in both the US and the EU, in the European legal tradition, other ideals such as human dignity and non-discrimination are considered to be as important as free speech (Carmi, 2008; Haupt, 2021). European law is therefore inclined to search for a balance between several rights and values of which freedom of expression is but one. Consequently, governments have more leeway to limit freedom of expression if such measures aim to prevent related harms and can withstand the test of

⁶ Available at: https://www.senate.gov/civics/constitution_item/constitution.htm

proportionality (Ibid.).⁷ The US, in contrast, is exceptional among the world's democracies in the extent to which its law treats free speech as more important than other ideals. The principal goal of US law is to avoid government censorship of speech or its interference in what is sometimes called the marketplace of ideas, much less so to prevent potential harms caused by the speech (Ibid.). Central in this context is the First Amendment of the US Constitution, and its subsequent interpretation by American courts, especially the US Supreme Court. Since the early twentieth century, the Court has interpreted the First Amendment broadly, producing a series of important precedents that have cemented the large sensitivity of the American law to any potential government encroachment on free speech (Zoller, 2009). This general difference between Europe and the US regarding free speech has emerged gradually and was often shaped by different historical experiences of European states and North America, including the impact of the Nazi period on the European sensitivity to human dignity (Carmi, 2008; Bradford, 2020, p. 159). The importance of these different legal cultures for this analysis lies in the way in which they continue to shape the options and incentives of policymakers on the two sides of the Atlantic to actively regulate content on the internet.

The primary difference concerns legal feasibility of such regulation: For better or worse, the First Amendment jurisprudence significantly inhibits Americans' ability to regulate online content like the Europeans. To begin with, there are types of speech/content that may be defined as illegal in Europe, but the First Amendment as currently interpreted strictly prohibits the US government from censoring – for example, hate speech. Illegal hate speech is one of the categories of illegal content that fall into the scope of the new Digital Services Act (DSA). The EU's efforts to curb online hate speech – on which the DSA builds – had, however, already started in 2016 when the European Commission initiated a so-called “Code of conduct on countering illegal hate speech online” – a non-legislative, voluntary initiative designed to

⁷ Even though there are of course variations in where exactly different European states have struck the balance between free speech and other ideals in their national laws.

convince major digital platforms to act more swiftly and transparently upon notifications about hateful content (European Commission, 2022a). The Commission was successful in persuading Facebook, Microsoft, Twitter and YouTube to join the framework, and other platforms have joined since then (Ibid.). The Code was a sort of “first test” of how to address the swift rise of online hate speech that the EU identified back then, especially in relation to the migration crisis and a series of terrorist attacks, and the product of a growing consensus within Brussels on the need to actively tackle the issue (Interview 2). Indeed, the consensus went beyond Brussels. In Germany in particular, political elites tried already in 2015 to curb the spread of extremist and racist speech online in relation to the migration inflows that the country faced back then, and their efforts culminated with the Bundestag passing in 2017 a so-called “Network Enforcement Act” (or “NetzDG”) that legally obliged big digital platforms operating in Germany to quickly remove clearly illegal content upon notification (Gorwa, 2021). A common mantra in the context of these efforts in both Germany and the EU was that what is illegal offline must be illegal online, too (Chini, 2022; Gorwa, 2021, p. 4).

Unlike in Europe, however, there is no such category as illegal hate speech in the United States. According to the Supreme Court’s long-standing interpretation of the First Amendment, established in the *Brandenburg v. Ohio* decision in 1969, the law protects all speech unless it constitutes a direct “incitement to imminent lawless action” (Zoller, 2009, p. 898). Any speech failing to live up to this criterion is lawful however hateful (or false) it may be. Again, with this level of permissiveness, the US goes much further than even the EU states more protective of free speech, such as the Netherlands (Bradford, 2020, p. 157). In the offline world, this simply means that, for instance, the far-right rally that took place in Charlottesville, Virginia in August 2017 and included, among other groups, neo-Nazis carrying flags with Swastikas shouting racist slogans would be illegal in Europe, but such rallies are currently protected by the First Amendment in the US (Wildman, 2017; Interview 1). This difference, then, has simply spilled

over from the offline world to the online world: Washington could not have reacted to the rise of online hate speech as proactively as Brussels since it lacks a legal basis for the regulation of this type of speech altogether.

The existence or non-existence of illegal hate speech is but one straightforward example of the often complex ways in which the First Amendment jurisprudence ties American lawmakers' hands. In fact, whenever Americans ponder any online content regulation, even relatively modest, they enter a difficult terrain full of potential constitutional issues. An American equivalent of the DSA is unlikely not only because the First Amendment protects some kinds of speech that European law finds unacceptable. If this was the only hindrance, American lawmakers could simply adopt DSA-like legislation with different, more limited, categories of illegal content. After all, the DSA does not create new categories of illegal content, rather it “set[s] out EU-wide rules that cover detection, flagging and removal of illegal content, as well as a new risk assessment framework for very large online platforms and search engines on how illegal content spreads on their service” (European Commission, 2022b). The issue is that many of these rules and obligations would be problematic in terms of the First Amendment in their own right because of its huge sensitivity (as currently interpreted) to any potential infringement of free speech (Interview 7). For example, any law that would require platforms to restrict only illegal content but that would “foreseeably cause platforms to restrict legal speech” as well (for example by incentivising them to rather over-block content to avoid potential legal issues), may not survive judicial scrutiny in the US (Keller, 2021). It would be much harder to justify this as an acceptable trade-off than in European law. Laws obliging platforms to decrease the reach of certain content – instead of outright removing it – could also be problematic in terms of the First Amendment (Ibid.). Even privacy-related rules – both regarding digital platforms and in the offline world as well – face many First Amendment risks in the US as they can be interpreted as inhibiting speech (Chander & Le, 2014, pp. 516-522; Schwartz & Peifer, 2017, p. 134).

Potential First Amendment hurdles for any content-relating regulation by the government, in short, are plentiful in the USA.

To emphasize, the absence of such big hurdles in Europe does not mean that the EU's rules can ignore their impact on free speech since freedom of expression is treated as a fundamental right in the EU. Indeed, at least in theory, the DSA explicitly aims to defend freedom of expression among other rights – as the EU website states: “The horizontal rules against illegal content are carefully calibrated and accompanied by robust safeguards for freedom of expression and an effective right of redress – to avoid both under-removal and over-removal of content [emphasis added] on grounds of illegality” (European Commission, 2022b). What the above-described legal differences mean instead is that while the EU policymakers have enough legal leeway to engage in this complex balancing act of finding the right rules for the platforms, even at the cost of proportional negative effects on free speech, the US “aggressive” (Interview 7) First Amendment jurisprudence simply renders most of such balancing attempts either impossible or unlikely.

While it may often not be entirely clear how American courts would apply the First Amendment principles to any particular law, their past judgments simply create a generally unfavourable legal environment to almost any government interference in (broadly defined) speech. And what is important to underline is that the broad interpretation of the First Amendment by American courts did not change with the arrival of the internet and first online services and has not fundamentally changed since then. In 1997, the Supreme Court unanimously affirmed in *Reno v. American Civil Liberties Union (ACLU)* that the provisions of the Communications Decency Act “which imposed criminal penalties for the transmission or display of obscene and indecent online content” (Schroeder & Kosseff, 2022) were too broad and thus unconstitutional given the First Amendment (Section 230 survived). The Court also took the opportunity to, for the first time, “comprehensively address freedom of speech on the Internet” (Tutt, 2014, p.

283): In explaining the Court's opinion, Justice Paul Stevens manifested a strong belief in the unique positive potential of the internet, referring to it as the new marketplace of ideas, and concluded that government regulation would only distort it (Schroeder & Kosseff, 2022; Tutt, 2014). What his reasoning and wording revealed might have been a certain cyber-optimism not uncommon in the era⁸, but also a reflection of what Schwartz and Peifer (2017) in their relevant analysis of transatlantic data privacy law termed a legal "marketplace discourse" of the USA concerned with protecting the free exchange (of data; or, in this case, ideas), contrasting with the EU's legal discourse focused on individual rights that need to be proactively protected, including human dignity.

Later in the same year, the US Court of Appeals for the Fourth Circuit decided in *Zeran v. America Online* to interpret broadly the central provision of Section 230 that online platforms are not liable for third-party posts, establishing that this liability exemption applies regardless of whether the platforms "knew or had reason to know" about illegal content (Kosseff, 2021, pp. 16-18). The contrary interpretation of becoming liable upon notice would, the Court reasoned, put too much legal burden on the platforms and have negative effects on free speech as protected by the First Amendment (Ibid.). In these and other seminal cases involving digital platforms in the nascent years of the industry, American courts thus doubled down on their aversion to government interference in speech and bolstered the legal protections for digital platforms in the US.⁹

⁸ These were the times when Section 230 was introduced in Congress by Representatives Chris Cox and Ron Wydenby with the explicit aim to "establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet" (cited in Kosseff, 2021, p. 14) as online services provide "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" (p.13) and when, few years later, President Bill Clinton satisfyingly observed in one of his speeches how the internet had already changed American society and wondered out loud how it could change China, wishing it "good luck" in its attempts to crack down on the internet, which in his view was akin to "[nailing] Jello to the wall" (cited in Merkel-Hess & Wasserstrom, 2010).

⁹ Protections that were thus larger from the start than in Europe where the liability exemption for platforms in the e-Commerce Directive was largely conditional on the lack of knowledge of illegal content (Interview 7; Schmon & Pedersen, 2022).

These precedents as well as the dominant judicial approach to the issue still hold. In 2017, the Supreme Court explicitly drew on the *Reno vs ACLU* decision in explaining its ruling in *Packingham v North Carolina* that registered sex offenders cannot be banned from accessing social media because a “fundamental First Amendment principle is that all persons have access to places where they can speak and listen (...) [and today,] it is cyberspace (...) and social media in particular (cited in Post, 2017). Most recently, the Supreme Court took on two widely watched cases involving the issue of the responsibility of big digital platforms for real-life consequences of their operations. In both *Twitter v. Taamneh* and *Gonzalez v. Google*, the Court examined whether the companies can be held liable for causing harm in the form of terrorist attacks by providing their services (and therefore communication means and even revenue) to terrorist groups, such as ISIS, or even spreading their content via algorithms (Lennett, 2023; Shanes, et al., 2023). The Court declined to hold the companies liable in this case, and avoided directly opening the issue of Section 230 in the process (Ibid.).¹⁰

To summarize, the current First Amendment jurisprudence severely limits what American lawmakers can do to regulate digital platforms – and what they thus attempt to do in the first place. The Supreme Court might decide to change some of the relevant doctrines (i.e. both the internet pre-dating precedents regarding free speech in general and also the more recent judgements around the nature of digital platforms and the applicability of Section 230 protections) in the future, but until then, Americans are incentivized to pursue other venues of potential regulation, for example antitrust. European lawmakers, for their part, may have shared Washington’s anti-regulation attitude towards the growing digital economy in the late 1990s and early 2000s, but their approach to the digital industry has never been shaped by constitutional free speech absolutism (De Gregorio, 2022; 2021; Chander 2013). In recent years, therefore, they have been able to translate their growing frustration with the status quo

¹⁰ Instead ruling that social media companies simply cannot be held liable for the attacks under the Anti-Terrorism Act (ATA) (Shanes, et al., 2023).

around digital platforms into legal reforms because they were able to act unrestrained by the legal barriers that exist in the US.

Still, legal systems are only one part of the picture. To begin with, it should be perhaps more explicitly noted at this point that to focus solely on the legal feasibility of online content regulation and ignore its desirability in the first place would provide an incomplete account of the transatlantic difference. Law and culture are of course intertwined. Far from simply creating legal barriers, the American First Amendment jurisprudence, as already noted, reflects the balance that Americans historically struck between free speech and other ideals – a balance involving a clear preference for liberty over dignity (Carmi, 2008). Undoubtedly, in this regard, the US and Europe continue to differ culturally. Barrett et al.'s (2021) analysis of US and UK official policy documents produced between 2016 and 2020 and dealing with the effects of digital media and technologies on democracy, for example, confirmed that “[w]ithin the United Kingdom, we found freedom of expression commonly discussed as one value that needed to be considered alongside many other concerns. (...) In the United States, there was a different approach to freedom of expression that elevated it above other ideas” (p. 534). The underlying value differences thus clearly to some extent continue to shape how new digital policy challenges are framed in Europe and America – differences that go beyond the borders of the EU or the difference between common law and civil law systems, as the example of the UK shows. Many Americans thus quite simply might not want to move in Europe’s direction in the first place, especially when it comes to some of the long-standing differences in sensitivity to issues like hate speech.

Nevertheless, these cultural differences should not be overestimated in the context of online content regulation. First and foremost, this is because shifts in attitudes regarding this issue have been apparent across the board in the US since 2016. Perhaps most interestingly, the same

American companies that once prided themselves in being free speech absolutists¹¹ have undergone an enormous shift in recent years towards much stricter content moderation (Douek, 2021). For example, by 2020 they were willing to greatly limit the spread of what they deemed to be dangerous lies about the Covid-19 pandemic and Facebook decided in October 2020 to no longer tolerate Holocaust denial (famously legal in the USA) on its platforms (Ibid.).¹² The US political establishment has also become very critical of the power and protections that the once-beloved American tech companies enjoy, most notably Section 230, as we will see in the next part of the paper. Finally, recent surveys show a majority of the American public supporting not only stricter content moderation of harmful content – including hate speech or misinformation – by the platforms but also new government regulation of social media, including regarding the issue of liability for content (Teale, 2021; Blow, 2020). There are thus many indications that demand for new rules governing social networks and online content has been growing in the USA as well as in Europe in recent years. Moreover, just as cultural value-based differences exist between the EU and the US, so they do, with increasing visibility, within the USA, which is polarised on an increasing number of issues, including this one. So while it is true that when EU Commissioner Věra Jourová visited Washington after the introduction of the Code of Conduct against Illegal Hate Speech, she had to face remarks from Trump White House officials that the EU was engaging in censorship (Jourová 2022), she would likely not hear the same feedback from the Biden administration. Cultural differences per se should thus be seen as a relevant but secondary reason for the regulatory divergence, important mainly in their perseverance in the form of entrenched legal norms and doctrines.

¹¹ Twitter was once called “the free speech wing of the free speech party” by its general manager, Tony Wang (Halliday, 2012).

¹² Unlike the US government, they can do this because they are private companies not bound by the First Amendment protections of certain speech, plus Section 230 explicitly gives them the right to moderate content on their platforms as they wish (Kosseff, 2021).

Nonetheless, a full explanation of the post-2016 developments still requires us to go beyond understanding the legal frameworks in which American and European policymakers operate. For one, however stringent the legal framework the American lawmakers face may be, it does not make any changes to the status quo governing how digital platforms moderate content impossible. Most importantly, perhaps, it does not inhibit American politicians' ability to fundamentally update laws such as the criticized Section 230. So why has Congress not done so? Secondly, we have seen that the European policymakers do not face the same legal barriers as the Americans and might be more culturally sensitive to certain issues, but why exactly have they moved with such relative vehemency and speed towards sweeping legislation like the DSA? Answering these questions requires a closer look at the recent political dynamics in each case.

5. Part Two: Political Conditions

“We are determined to take up these challenges with the US, and all other willing partners. However, if necessary, we are ready to lead the way on our own.”

Charles Michel, President of the European Council, 2021¹³

In the EU, the recent initiatives to regulate online content and digital platforms should be understood as part of a much broader digital agenda that has gained steam in recent years. In her first State of the Union Address in 2020, the EU Commission President Ursula von der Leyen identified digital policy as one of the top priorities of her Commission, proclaiming that “We must make this Europe's Digital Decade. (...) We want to lead the way, the European way, to the Digital Age: based on our values, our strength, our global ambitions.” (European Commission, 2020). These words reflect a big resolve in the EU to ensure, broadly speaking, its relevance and some level of independence in the global digital economy vis-à-vis especially

¹³ Speaking about the EU's digital agenda (See European Council, 2021).

the United States and China and to protect its values and interests in the digital sphere (Burwell & Propp, 2022; Roberts, et al., 2021). In practice, this means, among other things, focusing on the EU's competitiveness in emerging technologies such as microelectronics, super-computing, or artificial intelligence, improving the EU's digital infrastructure, as well as trying to set global regulatory standards for digital technologies (Ibid.). In the EU policy discourse, all these plans and ambitions have come to often be grouped together under the umbrella term of digital sovereignty.

Europe's search for digital sovereignty itself reflects a broader determination within the EU institutions to become more independent and geopolitically conscious – this affects also other policy areas such as security or trade, where there has been a lot of talk about strategic autonomy (Schmitz & Seidl, 2023; Burwell & Propp, 2022). This determination has long roots, (especially in some member states such as France) but it has progressively intensified and become more explicit at the EU level in the last decade and in particular in recent years, often in connection with specific events and crises. For example, the Snowden revelations about US surveillance of European citizens already in 2013 greatly impacted EU privacy regulations (as it happened during the process of forming the new General Data Protection Regulation) while the Trump administration's unpredictable policy towards the European allies exacerbated calls for less dependency on the US including with regard to security (Burwell & Propp, 2022). The Covid-19 pandemic, for its part, highlighted vulnerabilities associated with dependence on external supply for certain critical goods and also, importantly, exposed (and increased) the power of the big tech (American!) rulers of the – suddenly so crucial – digital world (Ovide, 2021; Burwell & Propp, 2022). As, for instance, Apple and Google became crucial stakeholders in contact tracing efforts thanks to their duopoly on smartphones' operating systems (Griffin, 2020) and Google, Facebook, Twitter and others were making decisions with potentially big impacts on the public discourse amidst a flood of pandemic-related misinformation (Sander &

Tsagourias, 2020), the pandemic brought the salience of the EU digital policy vis-à-vis the tech giants to new heights.

Addressing the power of big tech companies has thus come to form a key part – in recent years increasingly so – of the digital sovereignty agenda of the EU. European leaders have grown more and more impatient with the status quo where the decisions of a few foreign companies about how they manage content on their platforms may have great impacts on the public discourse and protection of fundamental rights in Europe (we have already seen the alarm in the European political circles about the spread of hate online in the 2015-2016 period) and they have also become very critical of arguably uncompetitive behaviour of the tech giants (Mansell, 2021; Roberts, et al., 2021). A consensus has emerged that it was no longer acceptable to rely on self-regulation of the industry, and new, updated rules for the digital economy were needed. A prominent articulation of European ambitions in this area came in 2018 from French President Emmanuel Macron. During his speech at the Internet Governance Forum, Macron presented his vision of the EU finding its own model of internet regulation fitting between the “Californian” model of self-management of powerful private companies¹⁴ and the “Chinese” model of extensive government control of the internet (Macron, 2018). This was an open call to fundamentally rethink what was already clearly beginning to be rethought in many political circles across the West – the general preference for self-regulation of the digital industry and hands-off approach to government internet regulation (with the exceptions of relatively uncontroversial topics such as child pornography, terrorist content or copyright issues) would have to give way to new approaches to the modern digital world in which the democratic state would play a more active role (Rone, 2021).

¹⁴ In other words, an explicitly drawn contrast between European values and the American laissez-faire approach to the digital industry.

The passage of the Digital Services Act, as well as its twin Digital Markets Act (concerned with ensuring competition in the digital economy), have been some of the main results to date of the EU's mission to tame big tech and to, in words of some of the legislation's proponents, "end digital wild west" (ALDE Party, 2022). Favourable political conditions were crucial for the success (and speed of passage) of the DSA. To begin with, the increasing importance of the digital agenda for the EU and its explicit identification as one of the top EU priorities by 2020 (in fact, one of the two main priorities together with the green transition at least until the outbreak of the war in Ukraine in February 2022) naturally helped to ensure ongoing attention to and work on an array of digital policy issues, including around online content, within the EU institutions. Moreover, the EU has been able to avoid political disagreements over its digital policies killing its ambitious efforts, despite the number of different member states, institutions, and other stakeholders involved. This has been a noteworthy achievement. To be sure, different European governments certainly differ in their preferences regarding the rules and in their primary concerns – for example, whereas the governments of Germany or France have proved particularly sensitive to issues such as hate speech or disinformation respectively, the governments of Hungary and Poland have – not unlike Republicans in the USA, as we shall see – expressed strong concerns about censorship against conservative viewpoints by the big tech companies (Rucz, 2022; Dutkiewicz & Czarnocki, 2021). Nonetheless, perhaps because the DSA has generally not become a salient domestic political issue in EU's member states (Ibid.), member states have not let these national differences significantly constrain their negotiations in Brussels – that of course occur farther away from domestic political quarrels. National variations in a way even fuelled the EU's collective efforts – when member states started passing national laws redefining the liability status and obligations of platforms (e.g. in Germany with the "NetzDG", but also in France or Austria), it further exacerbated Brussels' desire to come up with EU-wide regulations to harmonize rules across the Single Market (Cornils, 2020, pp. 77-79; Interview 6)

Crucially, the digital sovereignty mindset of the EU, however abstract a concept at first sight, seems to have actually facilitated to a great extent the process of negotiating and passing specific policies. As Schmitz and Seidl (2022) argue, the concept of digital sovereignty has functioned as a “coalition magnet” within the EU, being broad enough to accommodate different opinions about specific steps to be taken but reflecting a widely shared desire to bolster the EU’s technological and geopolitical status and defend its values with which many different factions within the EU could identify. Indeed, as a high-rank policy official from the European Commission told me in relation to the Commission's work on the DSA, DMA etc.:

In our narrative, there was this strong [message]: we embrace the digital transformation (...) but we want this the European way [in terms of our values]. (...) With this whole narrative, we went to the Parliament and to the Council and found overwhelming support – in principle. Then of course you have negotiations on the details but you saw that we got the DSA and DMA through in record speed and there was never any member state that would question the narrative, would question the necessity – there was no member state who said we don’t need this (...), same in Parliament (Interview 6).

In this way, the EU (and the Commission in particular) has thus been able to generate enough political will and consensus within Brussels to push through a series of significant legislative reforms in the digital policy area, including regarding content moderation. We find very different political conditions when we turn to the United States.

In the US, to begin with, reforming the rules of platform governance has not enjoyed the same priority status as in the EU. Firstly, the US lacks an equivalent focused and ambitious digital agenda underpinned by concerns about defending its values and relevance.¹⁵ Where such concerns are present in the US – and where the US government, therefore, concentrates its attention – it is in regard to its technological and geopolitical competition with China, which has led to laws such as the CHIPS and Science Act aiming to bolster the American

¹⁵ And a European Commission-like actor that would push such an agenda forward.

semiconductor industry vis-à-vis Chinese competitors (The White House, 2022), or discussions about national security risks associated with the popularity of the social media site TikTok owned by the Chinese through which large amounts of data are collected about American citizens (Kohli, 2022). But the US, unlike the EU, remains a technological superpower and the same concerns can thus hardly underpin regulation of Facebook or Google¹⁶ as the US is of course the home base of these companies – as well as of most of the biggest digital platforms worldwide: as of December 2021, around 78% of the world’s 100 largest platforms in terms of market capitalization were American, compared to 3% European (Schmidt, 2021). As Chander and Sun (2021) write, “[t]he fact that the largest internet companies are based in the United States also means that data about Americans is typically stored in the United States” (p. 19). To a large extent, therefore, the US enjoys “digital sovereignty by default” (Ibid., p. 18). To be sure, some aspects of the EU’s digital sovereignty agenda have been perceived rather sceptically in the US, raising concerns about protectionism (Chander & Sun, 2021, p. 19; Burwell & Propp, 2022).

Secondly, the Trump administration proved uninterested in coordination with the EU on digital policy, including the issue of online content, in the crucial years between 2016 and 2020. This reflected a much broader tendency of the administration towards a rather transactional, short-termist style of politics, its generally lukewarm commitment to a close collaboration with its long-term European allies as well as a lack of serious interest in technology and digital policy within the administration in the first place, as several interviewees told me (Interview 1, Interview 3, Interview 5). Thus, for example, when the EU proposed in 2020 to the Trump administration the establishment of a US-EU platform for negotiating and coordinating trade and tech policies, it encountered indifference from the White House (Interview 5). This has changed with the Biden administration, which has manifested a much larger appetite for

¹⁶ If anything, they can be used to caution the US government against overregulating its own tech companies in order not to help Chinese competitors, as Zuckerberg did during a hearing in Congress (Hynes, 2021, p. 164).

collaboration with the EU on these (and other) issues and for moving on internet regulation (Interview 1, Interview 5, see also Biden 2023). Meanwhile, however, the EU had already moved on many of the points of its digital agenda alone, including content regulation. As an American expert on the topic told me during our interview, talking about the US-EU Trade and Technology Council that was eventually established in June 2021: “For years, as an EU watcher, I would see the US efforts at collaborating push the EU to get its act together, and now, we may even see a reverse” (Interview 1). The four years of the Trump administration thus gave the EU a head start on online content and platform regulation and between 2016-2022 further increased the gap between the salience of digital policy in the EU and the US.

Furthermore, another big reason for the lack of regulatory development around online content in the US has been the fact that the political establishment in the US is fraught with disagreements over what the problem with dominant digital platforms’ content moderation is in the first place, and the issue has become vastly politicised. At first sight, the political disagreements over the issue might not be evident as both many prominent Republicans and many prominent Democrats (including former President Trump as well as current President Biden and both the former Democratic speaker of the House of Representatives Nancy Pelosi and the current Republican speaker of the House Kevin McCarthy) have since 2016 repeatedly criticized big tech as too powerful and expressed the view that Section 230 needs fundamental changes or even be repealed (Bedell & Major, 2020; Lima, 2019; Lima & Gold, 2018). There have also been a series of bipartisan congressional hearings with big tech CEOs in recent years where representatives of both parties questioned the companies’ chiefs about their practices and responsibilities, including regarding content moderation (Douek & Lakier, 2022).

However, a closer look reveals that the critique of the power of the platforms over speech comes from opposite directions from Democrats and Republicans. On the one hand, Democrats, not unlike many EU policymakers, have repeatedly criticised what they perceive as insufficient

responses of the platforms to the spread of harmful content online, including hate speech or misinformation, profiling themselves as the party concerned about the protection of minorities and healthy democratic discourse (Anand, et al., 2022). Republicans, on the other hand, have been accusing the big tech companies of an anti-conservative bias that impacts their content moderation and thus skews the public debate in favour of the liberal left (Gold, 2018; Vaidhyathan, 2019).¹⁷ Instances such as Trump's de-platforming in 2021 (in the aftermath of the US Presidential election and the January 6th Capitol insurrection) by Twitter, Facebook and other social networks of course only added oil to the fire of this narrative (Douek & Lakier, 2022). In contrast to the long-standing conservative rejection of almost any government regulation of the internet and private companies, in recent years, voices arguing that "protecting free speech requires extensive state intervention into the operation of private platforms" to prevent them from engaging in censorship have been getting stronger in conservative political, but also judicial, circles (Ibid.).

The two parties thus attack two different parts of Section 230: For Democrats, mainly the part which holds that platforms are not liable for third-party content is problematic, and for Republicans, it is the part that says that they can moderate the content as they please without liability. In other words, while both Republicans and Democrats complain about the lack of accountability of big digital platforms for their content moderation practices, they differ in their primary concern regarding what these companies should be held accountable for. For Republicans, the crucial problem is that Section 230 allows the companies to misuse their power in order to censor unwanted views, specifically conservative ones that do not fit well with the views of the content moderators or owners of the platforms. In contrast, Democrats tend to think that the platforms need to be held more accountable for the consequences of what they do not do (and as per Section 230, do not have to do) – that is, they do not care enough about the

¹⁷ Donald Trump has for example attacked Google for skewing the search results against him, and Facebook for having favoured Hillary Clinton during the 2016 elections (Scola, 2017; Gold & Plucinska, 2018).

negative consequences of the spread of lies, conspiracies and hate on their platforms. Even though this disagreement is of course not absolute and not unbridgeable (both Parties, in effect, criticise the mismatch between the great power of the big tech companies and their lack of accountability for how they yield it), it has, like so many issues in American politics nowadays¹⁸, come to be just politicized enough and entangled in the left-right culture war of today's USA, that it has the power to prevent, overshadow or kill a lot of genuine bipartisan policy efforts on this issue. As Senator Brian Schatz (D-Hawaii) put it to Axios, when it comes to big tech, Section 230 and the like, too often, “theater interferes with the policymaking” and “members [of Congress] are getting political upside for proposing things that make no sense or have no chance” (cited in McGill & Gold, 2021).

Consequently, while there has been a great number of proposals to update (or repeal) Section 230 introduced in Congress in recent years, these very often only mirrored the partisan disagreement and failed. Republicans have introduced bills with such self-explanatory titles as “Abandoning Online Censorship Act”, “Ending Support for Internet Censorship Act” or “Protecting Constitutional Rights from Online Platform Censorship Act” while Democratic proposals included several bills targeting civil rights violations, or the proposal of the then-presidential candidate Beto O'Rourke that would push the big platforms to police and delete hateful speech even more or else lose the Section 230 immunity (Bates, 2021; Bedell & Major, 2020). While there also have been bipartisan proposals, the only law amending Section 230 passed in the 2016-2022 period was a law (known as FOSTA) erasing the Section 230 liability protections from platforms if they facilitate sex trafficking – a topic on which the two parties could agree (Jurecic, 2022). In other instances, the proposed bills have so far fallen victim to the Democrats-Republicans split over the issue. This split even affects tech regulation more broadly when demands regarding content moderation are used as a bargaining tool – for

¹⁸ The already mentioned competition or “innovation war” (Interview 5) with China is one of the few issues on which both parties tend to agree.

example, Republicans at one point made their support for Democratic Senator Amy Klobuchar's proposed American Innovation and Choice Online Act that addresses the issue of self-preferencing¹⁹ conditional on it including provisions limiting the ability of the platforms to moderate content (Perault & Szóka, 2022). The above-mentioned Congressional hearings with CEOs of the big tech companies also often became partisan and theatre-like when it came to content moderation – with the Republicans grilling the companies' officials over the supposed anti-conservative bias, and Democrats instead highlighting the spread of hate and lies online (Douek & Lakier, 2022; Lima & Gold, 2018).

Therefore, while in both the EU and the USA, the years since 2016 have been marked by vivid discussions – in public discourse, academic and expert community as well as in political circles – about the problems associated with the largely unregulated online space and too powerful big tech companies and about possible solutions, only in the EU has there been a political environment largely favourable to sweeping reforms regarding the relevant law. In Brussels, the EU policymakers have been able to unify behind the banner of digital sovereignty and push forward their digital agenda. In Washington, there has been both less political determination to act to regulate the big tech and online content, and more politicised disagreements about what to do.

6. Conclusion

To sum up, this paper has argued that the primary reasons for the differences between the EU's and the US's approaches to online content regulation boil down to different legal options and barriers facing European and American policymakers, and to different political dynamics in the EU and the US between 2016 and early 2023. In particular, the First Amendment jurisprudence

¹⁹ i.e., when companies extensively favour their own products on their own platforms at the expense of competitors, an issue addressed by the DMA in the EU.

significantly limits what the US government can or attempts to do in this context, and there have been much more favourable political conditions in the EU for new online content regulation than in the US, both in terms of the prioritization of the issue and – even more so – in terms of the ability to find consensus on specific policies.

My research could however obviously be expanded and improved in a number of ways: In focusing only on online content and the question of intermediary liability, I leave out other very much connected issues like data protection, antitrust action against big tech etc. which would provide a fuller picture of the transatlantic divergence on digital platforms' regulation. It was also difficult for me to access enough information about lobbying. While I believe that it is not one of the main factors explaining the 2016-2022/2023 divergence on online content – not least since big tech lobbying has been huge both in Washington and in Brussels in recent years (Lombardi, 2022; Zakrzewski, 2022; Gold & Plucinska, 2018) – it would be worth having a closer look at how lobbying both by the big tech companies and by other stakeholders such as media organizations, NGOs etc. shapes online content regulation in Brussels and Washington. It would also make sense to explore more in detail the dynamics within the EU to understand better the importance of individual member states in pushing for new regulations, or to explore specifically how the developments within the EU have been impacting the debate about online content regulation in the US.

Finally, it needs to be noted that this paper discusses a very fast-evolving topic and what was true yesterday might change tomorrow. In the US, the 118th Congress that convened in January 2023 will undoubtedly see another wave of proposals to regulate big tech and amend Section 230 as well as new attempts to bridge the partisan divide after years of limited progress (Fung, 2023) – the Biden Administration will certainly push for this as the President made clear in a recent op-ed, calling on Democrats and Republicans to unite on big tech, and, among many other things, to “fundamentally reform Section 230” (Biden, 2023). While the Supreme Court

did not change its interpretation of Section 230 in the Taamneh and Gonzalez rulings, it might produce important decisions regarding the law in the foreseeable future, especially if it considers controversial laws passed by Republicans in Florida and Texas aiming to limit the digital platforms' ability to moderate content (Lennett, 2023).

Also noteworthy, Elon Musk's takeover of Twitter in late 2022 and the subsequent publication of parts of the company's past internal communication (so-called "Twitter Files") has again exacerbated the American public debate about social media content moderation (Grynbaum, 2022). In line with the above-described political split on the issue, Musk's takeover and policies aimed at reversing Twitter's content moderation policies and his free speech rhetoric have been generally cheered by Republicans – suddenly finding a big tech CEO apparently eager to fight censorship –, and more often criticized by Democrats, expecting a rise in the spread of lies and hate on the platform (irritatingly to many of the left as a result of decisions of one extremely wealthy and powerful individual) (Wise & Hanrahan, 2022). Musk's approach to the EU rules will likely be a saga to watch. He has already withdrawn the company from the EU's voluntary Code of Practice against Disinformation but has promised to obey the law of the EU (Euronews, 2023) – it remains to be seen to what extent this will be a smooth process.

This is, however, also a general point. It is generally yet to be seen how the DSA and the DMA will be fully implemented and work in practice and to what extent this will satisfy the EU's ambitions. Also unknown is the extent to which the EU rules will spread globally regardless of what the USA does. At the same time, the EU's regulatory machine continues to move forward – e.g. with the proposed Data Act or Artificial Intelligence Act and others, all with possibly big implications. Of course, this all happens as the technologies and business models in question continue to develop themselves, and policymakers thus too often play a catch-up game with the industry. For example, with the rise of the so-called AI large language models (like ChatGPT), many new regulatory questions arise. What should be the liability regime regarding the outputs

of a system that produces its content by drawing information from other sources but only based on prompts by users, all while having been developed and owned by a particular company? At this time, it is unclear how Section 230 or the EU rules will apply to these modules (including whether the DSA could be interpreted as covering them, or the AI Act will explicitly do it) (see Botero Arcila, 2023; Hacker, et al., 2023; Perault, 2023; Bambauer & Surdeanu, 2023 for more discussion of this topic). Policymakers will once again have to balance addressing the potential risks of the new technology on the one hand and not stifling innovation too much on the other. In short, the game of rewriting the internet rules has only begun. Both the EU and the US appear determined to do much more and at least for the moment, under the Biden administration, to do as much as possible in coordination and dialogue within the Trade and Technology Council.²⁰ To what extent the two blocks will converge or diverge on the issue of online content and other digital policies from 2023 onward remains to be seen. As this analysis has hopefully illustrated, absolute convergence is very unlikely given the different historically entrenched traditions around free speech. However, sudden judicial reinterpretations of some of the prevalent legal doctrines and changing political conditions could suddenly break the ice of inaction in the USA and potentially bring it much closer to the EU's side. The perceived success or failure of the EU rules in practice will also undoubtedly play a big role in the desire of others to emulate them. In any case, this paper hopefully provides relevant background information and a useful lens through which to analyse future developments.

²⁰ The latest Joint Statement of the Council stated: "the United States and the European Union are committed to deepening our cooperation on technology issues, including on artificial intelligence (AI), 6G, online platforms and quantum" (The White House, 2023).

References

- ALDE Party, 2022. *EU Parliament and Council sheriffs end Digital Wild West with DSA agreement*. [Online]
Available at:
https://www.aldeparty.eu/eu_parliament_and_council_sheriffs_end_digital_far_west_with_dsa_agreement
[Accessed 12 December 2022].
- Anand, M. et al., 2022. All the Ways Congress Wants to Change Section 230. *Slate*, 19 December.
- Applebaum, A. & Pomerantsev, P., 2021. How to Put Out Democracy's Dumpster Fire. *The Atlantic*, 11 March.
- Bambauer, D. E. & Surdeanu, M., 2023. Authorbots. *Journal of Free Speech Law*, 3(2), pp. 375-388.
- Barrett, B., Dommett, K. & Kreiss, D., 2021. The capricious relationship between technology and democracy: Analyzing public policy discussions in the UK and US. *Policy & Internet*, 13(4), pp. 522-543.
- Bates, C., 2021. *A Review of Proposals to Reform Section 230*, Washington: Hatch Center.
- Bedell, Z. & Major, J., 2020. What's Next for Section 230? A Roundup of Proposals. *Lawfare*, 29 July.
- Biden, J., 2023. Republicans and Democrats, Unite Against Big Tech Abuses. *Wall Street Journal*, 11 January.
- Blow, N. T.-D. C., 2020. Is the Techlash Real? An exploration of attitudes towards Big Tech among American and European consumers. Brunswick, 3 February.
- Botero Arcila, B., 2023. Is It a Platform? Is It a Search Engine? It's Chat GPT! The European Liability Regime For Large Language Models. *Journal of Free Speech Law*, 3(2), pp. 455-488.
- Bradford, A., 2020. *The Brussels Effect: How the European Union Rules the World*. Oxford: Oxford University Press.
- Burwell, F. G. & Propp, K., 2022. *Digital Sovereignty in Practice: The EU's Push to Shape the New Global Economy*, Washington: Atlantic Council.
- Carmi, G. E., 2008. *Dignity Versus Liberty: The Two Western Cultures of Free Speech*. [Online]
Available at: <https://ssrn.com/abstract=1246700>
- Cetina Preusel, R. & Martínez Sierra, J. M., 2019. Algorithms and the News: Social Media Platforms as News Publishers and Distributors. *Revista De Comunicación*, 18(2), pp. 261-285.
- Chander, A. & Le, U. P., 2014. Free Speech. *Iowa Law Review*, Volume 100, pp. 501-547.
- Chander, A. & Sun, H., 2021. *Sovereignty 2.0*. [Online]
Available at: <https://scholarship.law.georgetown.edu/facpub/2404/>
- Chander, A., 2013. How Law Made Silicon Valley. *Emory Law Journal*, Volume 63, pp. 639-694.

- Chini, M., 2022. 'What is illegal offline is illegal online': EU tightens rules for internet giants. *The Brussels Times*, 23 April.
- Cornils, M., 2020. *Designing Platform Governance: A Normative Perspective on Needs, Strategies, and Tools to Regulate Intermediaries*, s.l.: AlgorithmWatch.
- De Gregorio, G., 2021. The rise of digital constitutionalism in the European Union. *International Journal of Constitutional Law*, 19(1), pp. 41-70.
- De Gregorio, G., 2022. Digital constitutionalism across the Atlantic. *Global Constitutionalism*, 11(2), pp. 297-324.
- Derakhshan, H., 2015. The Web We Have to Save. *Medium.com*, 14 July.
- Diamond, L., 2019. The Road to Digital Unfreedom: The Threat of Postmodern Totalitarianism. *Journal of Democracy*, 30(1), pp. 20-24.
- Douek, E. & Lakier, G., 2022. *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*. [Online]
Available at: lawreviewblog.uchicago.edu/2022/06/06/douek-lakier-first-amendment/
- Douek, E., 2021. Governing Online speech: From “Posts-as-trumps” to proportionality and probability. *Columbia Law Review*, 121(3), pp. 759-834.
- Dutkiewicz, L. & Czarnocki, J., 2021. The DSA proposal and Poland. *DSA Observatory*, 22 October.
- Euronews, 2023. Twitter will respect EU laws to combat disinformation, Elon Musk says. 6 June.
- European Commission, 2020. *State of the Union Address by President von der Leyen at the European Parliament Plenary*. [Online]
Available at:
https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655
- European Commission, 2022a. *The EU Code of Conduct on Countering Illegal Hate Speech Online*. [Online]
Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en
- European Commission, 2022b. *Questions and Answers: Digital Services Act*. [Online]
Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2348
- European Council, 2021. *Digital sovereignty is central to European strategic autonomy*. [Online]
Available at: <https://www.consilium.europa.eu/en/press/press-releases/2021/02/03/speech-by-president-charles-michel-at-the-digitaleurope-masters-of-digital-online-event/>
- Fukuyama, F., 2021. Making the Internet Safe for Democracy. *Journal of Democracy*, 32(2), pp. 37-44.
- Fung, B., 2023. Senators warn Big Tech on Section 230: ‘Reform is coming’. *CNN*, 8 March.
- Gold, A. & Plucinska, J., 2018. U.S., Europe threaten tech industry's cherished legal 'shield'. *Politico*, 8 October.
- Gold, A., 2018. GOP thinks bashing tech companies will rally base. *Politico*, 8 July.

- Gorwa, R., 2019. What is platform governance? *Information, Communication & Society*, 22(6), pp. 854-871.
- Gorwa, R., 2021. Elections, institutions, and the regulatory politics of platform governance: The case of the German NetzDG. *Telecommunications Policy*, 45(6).
- Greene, D., Collings, P. & Schmon, C., 2022. Online Platforms Should Stop Partnering with Government Agencies to Remove Content. *EFF*, 12 August.
- Griffin, R., 2020. Covid-19 has made Europe's technological dependence on the US clearer than ever. *SciencesPo.fr*, 20 August.
- Grynbaum, M. M., 2022. Elon Musk, Matt Taibbi, and a Very Modern Media Maelstrom. *The New York Times*, 8 December.
- Hacker, P., Engel, A. & Mauer, M., 2023. *Regulating ChatGPT and other Large Generative AI Models*. [Online]
Available at: <https://doi.org/10.48550/arXiv.2302.02337>
- Halliday, J., 2012. Twitter's Tony Wang: 'We are the free speech wing of the free speech party'. *The Guardian*, 22 March.
- Haupt, C. E., 2021. Regulating Speech Online: Free Speech Values in Constitutional Frames. *Washington University Law Review*, Volume 99, pp. 751-785.
- Hynes, M., 2021. *The Social, Cultural and Environmental Costs of Hyper-Connectivity: Sleeping Through the Revolution*. Bingley: Emerald Publishing Limited.
- Jourová, V. (2022) 'Democratic Resilience: Our Response to Disinformation in the Digital Age'. Interviewed by Cristiano Lima, Atlantic Council, 22 June.
- Jungherr, A. & Schroeder, R., 2021. *Digital Transformations of the Public Arena*. Cambridge: Cambridge University Press.
- Jurecic, Q., 2022. The politics of Section 230 reform: Learning from FOSTA's mistakes. *Brookings*, 1 March.
- Keller, D., 2021. *Six Constitutional Hurdles For Platform Speech Regulation*. [Online]
Available at: <https://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation-0>
- Kohli, A., 2022. Why the FBI Is Concerned About TikTok. *TIME*, 3 December.
- Kosseff, J., 2019. *The Twenty-Six Words That Created the Internet*. Ithaca: Cornell University Press.
- Kosseff, J., 2021. A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not). *Berkeley Technology Law Journal*, 37(2).
- Lacking. What Does it Mean for the Future of Big Tech Accountability?. *Tech Policy*, 21 May.
- Leiner, B. M.; Cerf, V. G.; Clark, D. D.; Kahn, R. E.; Kleinrock, L.; Lynch, D. C.; Postel, J.; Roberts, L. G.; Wolff, S., 2009. A Brief History of the Internet. *ACM SIGCOMM Computer Communication Review*, 39(5), pp. 22-31.
- Lemley, M. A., 2021. The Splinternet. *Duke Law Journal*, Volume 70, pp. 1397-1427.
- Lennett, B., 2023. The Supreme Court Finds Terrorism Cases Against Twitter and Google

- Lima, C. & Gold, A., 2018. Lawmakers clash over claims of Google's anti-GOP bias. *Politico*, 11 December.
- Lima, C., 2019. How a widening political rift over online liability is splitting Washington. *Politico*, 9 July.
- Lombardi, P., 2022. Big Tech boosts lobbying spending in Brussels. *Politico*, 22 March.
- Macron, E., 2018, Internet Governance Forum, *IGF 2018 Speech by French President Emmanuel Macron*. [Online]
Available at: <https://www.intgovforum.org/en/content/igf-2018-speech-by-french-president-emmanuel-macron>
- Mansell, R., 2021. European Responses to (US) Digital Platform Dominance. In: D. Y. Jin, ed. *The Routledge Handbook of Digital Media and Globalization*. New York: Routledge, pp. 141-149.
- McGill, M. H. & Gold, A., 2021. What the Big Tech hearings really accomplished. *Axios*, 30 April.
- Merkel-Hess, K. & Wasserstrom, J. N., 2010. Will the Real Chinese Internet Please Stand Up?. *Dissent Magazine*, 11 February.
- Moore, M. & Tambini, D., 2021. *Regulating Big Tech: Policy Responses to Digital Dominance*. Oxford: Oxford University Press.
- Nielsen, R. K. & Ganter, S. A., 2022. *The Power of Platforms: Shaping Media and Society*. Oxford: Oxford University Press.
- Ovide, S., 2021. How Big Tech Won the Pandemic. *The New York Times*, 21 October.
- Perault, M., 2023. Section 230 Won't Protect ChatGPT 365. *Journal of Free Speech Law*, 3(2), pp. 365-374.
- Perault, M. & Szóka, B., 2022. Content Moderation Sacrificed in Left-Right Deals on Tech Reform. *Lawfare*, 7 December.
- Persily, N. & Tucker, J. A., 2020a. Introduction. In: N. Persily & J. A. Tucker, eds. *Social Media and Democracy*. Cambridge: Cambridge University Press, pp. 1-9.
- Persily, N. & Tucker, J. A., 2020b. *Social Media and Democracy*. Cambridge: Cambridge University Press.
- Post, D., 2017. Supreme Court unanimously overturns North Carolina's ban on social-media use by sex offenders. *The Washington Post*, 3 July.
- Roberts, H.; Cows, J; Casolari, F.; Morley, J.; Taddeo, M.; Floridi, L. 2021. Safeguarding European values with digital sovereignty: an analysis of statements and policies. *Internet Policy Review*, 10(3), pp. 1-26.
- Rone, J., 2021. The return of the state? Power and legitimacy challenges to the EU's regulation of online disinformation. In: B. Haggart, N. Tusikov & J. A. Scholte, eds. *Power and Authority in Internet Governance: Return of the State?*. New York, NY: Routledge, pp. 171-194.
- Rucz, M., 2022. The DSA Proposal and Hungary. *DSA Observatory*, 11 March.
- Samples, J., 2019. Why the Government Should Not Regulate Content Moderation of Social Media. *Cato Institute*, 9 April.

- Sander, B. & Tsagourias, N., 2020. The covid-19 Infodemic and Online Platforms as Intermediary Fiduciaries under International Law. *Journal of International Humanitarian Legal Studies*, Issue 2, pp. 331-347.
- Schmidt, H., 2021. *Plattform-Ökonomie*. [Online]
Available at: www.netzoekonom.de/plattform-oekonomie/
- Schmitz, L. & Seidl, T., 2022. *Protecting, Transforming, and Projecting the Single Market: Open Strategic Autonomy and Digital Sovereignty in the EU's Trade and Digital Policies*. [Online]
Available at: <https://doi.org/10.31235/osf.io/wjb64>
- Schmitz, L. & Seidl, T., 2023. As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy. *JCMS: Journal of Common Market Studies*, 61(3), pp. 834-852.
- Schmon, C. & Pedersen, H., 2022. Platform Liability Trends Around the Globe: Taxonomy and Tools of Intermediary Liability. *EFF*, 25 May.
- Schroeder, J. & Kosseff, J., 2022. Happy 25th Anniversary to the Supreme Court Decision That Shaped the Internet We Have Today. *Slate*, 26 June.
- Schwartz, P. M. & Peifer, K.-N., 2017. Transatlantic Data Privacy Law. *The Georgetown Law Journal*, Volume 106, pp. 115-179.
- Scola, N., 2017. Conservatives' culture wars come to Silicon Valley. *Politico*, 27 December.
- Shanes, A. J., Sweeney, H. & Jovanovic, S., 2023. The Taamneh and Gonzalez Rulings, Explained. *Lawfare*, 19 May.
- Shapiro, M., 2020. For Democracy's Sake, Social Media Platforms Must Be Deemed Publishers Under Section 230. *Editor & Publisher*, 20 November.
- Soriano, M. R. T., 2013. Internet as a Driver of Political Change: Cyber-pessimists and Cyber-optimists. *Journal of the Spanish Institute of Strategic Studies*, Issue 1, pp. 332-352.
- Stockmann, D., 2022. Tech companies and the public interest: the role of the state in governing social media platforms. *Information, Communication & Society*.
- Teale, C., 2021. Lawmakers See 2022 as the Year to Rein in Social Media. Others Worry Politics Will Get in the Way. *Morning Consult*, 15 December.
- The Economist, 2018. How to tame the tech titans. 18 January.
- The LSE Commission on Truth and Technology, 2018. *Tackling the Information Crisis: A Policy Framework for Media System Resilience*, London: London School of Economics and Political Science.
- The White House, 2022. *FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*. [Online]
Available at: www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/
- The White House, 2023. *U.S.-EU Joint Statement of the Trade and Technology Council*. [Online]
Available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/31/u-s-eu-joint-statement-of-the-trade-and-technology-council-2/>

- Tutt, A., 2014. The New Speech. *Hastings Constitutional Law Quarterly*, 41(2), pp. 235-298.
- Vaidhyathan, S., 2019. Why Conservatives Allege Big Tech Is Muzzling Them. *The Atlantic*, 28 July.
- Waldman, S. R., 2021. The 1996 Law That Ruined the Internet. *The Atlantic*, 3 January.
- Wardle, C. & Derakhshan, H., 2017. *Information Disorder: Toward an interdisciplinary framework for research and policy making*, Strasbourg: Council of Europe.
- Wildman, S., 2017. Why you see swastikas in America but not Germany. *Vox*, 16 August.
- Wise, L. & Hanrahan, T., 2022. Republicans Cheer Musk's Twitter Deal, While Democrats See Perils. *The Wall Street Journal*, 26 April.
- Woods, L. & Perrin, W., 2021. Obliging Platforms to Accept a Duty of Care. In: M. Moore & D. Tambini, eds. *Regulating Big Tech: Policy Responses to Digital Dominance*. Oxford: Oxford University Press, pp. 93-111.
- Wu, T., 2018. *The Curse of Bigness: Antitrust in the New Gilded Age*. New York, NY: Columbia Global Reports.
- Zakrzewski, C., 2022. Tech companies spent almost \$70 million lobbying Washington in 2021 as Congress sought to rein in their power. *The Washington Post*, 21 January.
- Zittrain, J. L., 2019. Three Eras Of Digital Governance. *SSRN*, 23 September.
- Zoller, E., 2009. The United States Supreme Court and the Freedom of Expression. *Indiana Law Journal*, 84(3), pp. 885-916.
- Zuboff, S., 2019. *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: PublicAffairs.
- Zuboff, S., 2022. Democracy Can Still End Big Tech's Dominance Over Our Lives. *TIME*, 5 May.

Appendix: Interviews

Interview	Description	Date of Interview
Interview 1	US Digital Policy Expert	July 2022
Interview 2	Policy Official European Commission	October 2022
Interview 3	European Digital Policy Expert	October 2022
Interview 4	European Digital Policy Expert	October 2022
Interview 5	US Digital Policy Expert	October 2022
Interview 6	Policy Official European Commission	October 2022
Interview 7	European Digital Law Expert	November 2022