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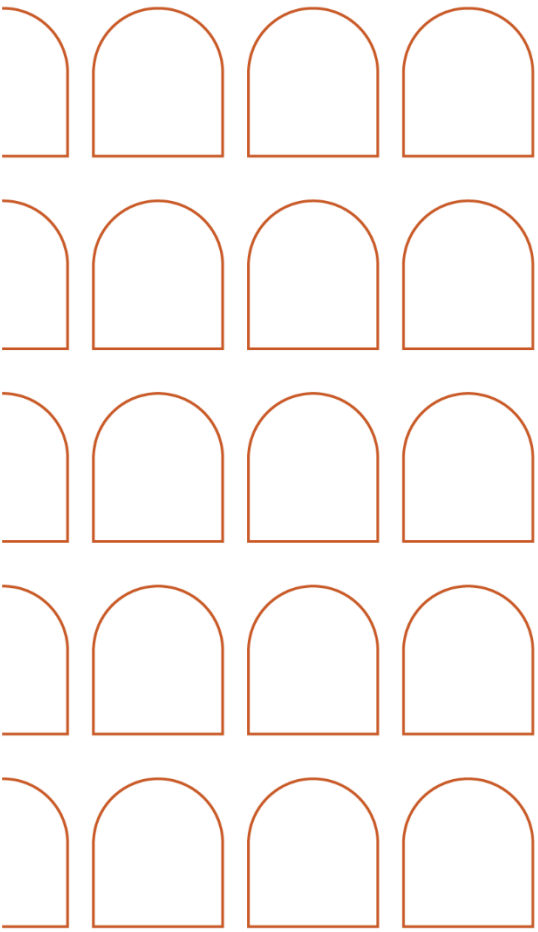

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Abstract

This paper explores the constitutional theories behind the regulation of content moderation activities of social media platforms across the Atlantic and discusses the effects of a change in the constitutional approach in the United States on the structure of the digital market of social media platforms. The paper argues that the current coexistence of regulatory models across the European Union and the United States results from an interlocking of constitutional theories that permits an equilibrium between the different paradigms of free speech online. The paper assesses the current risks to this equilibrium arising from a different interpretation of the scope of the First Amendment online in the United States.

Keywords

Freedom of expression online, social media platforms, content-moderation, Digital Services Act, First Amendment

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1. Introduction: the *Unity of Opposites* in the Regulation of Social Media Platforms

In a recent volume, Anu Bradford (Bradford, 2023) discusses a series of 'conflicts' between "digital empires". By this formula, she refers to the three main global regulatory actors of digital technologies: the United States (US), the European Union (EU), and the People's Republic of China (PRC). These 'empires' are embroiled in various types of conflicts involving different areas of the regulation of the digital world and the production of the technologies necessary for its development. This paper deals with one of these conflicts, which is the regulation of social media platforms between the United States and the European Union, and, more specifically, it focuses on the regulation of online public discourse (Post, 1990) on social media platforms. In the field of the regulation of social media platforms, the 'conflict' between the United States and the European Union has been commonly described as a 'clash' between an approach of non-regulation, that of the United States, versus an approach inspired by a fundamental rights-driven regulation, that of the European Union.

The paper explores the constitutional theories behind the content moderation activities of social media platforms across the Atlantic and the effects of a change in the constitutional theory in the United States on the digital market of social media platforms. The paper argues that there is much more in this kind of 'clash' between a US 'laissez-faire' approach and an EU regulatory approach than what appears: the application of different constitutional theories and behind them the room for a conflict of digital sovereignties (Perritt, 1998)(Pollicino, 2023) that could revolutionise the digital market of social media platforms. This potential conflict could develop across the Atlantic as a consequence of the different regulatory approaches towards social media platforms as constitutionally imposed by the different paradigms of freedom of expression. In the dynamic of the conflicts between digital empires on the transatlantic axis, well-described by Bradford in all its complexity (Bradford, 2023), it seems possible to argue that the current capacity of the European Union to regulate public discourse on social media platforms is linked to the very existence of the Section 230 of the *Communication Decency Act* (CDA) and the current interpretation of the First Amendment concerning social media platforms' freedoms to perform content moderation in the United States. *A strange unity of opposites in regulating social media platforms allows for the peaceful coexistence of US and EU digital sovereignties.* This equilibrium, however, could come into crisis if digital platforms were to receive a different kind of legal framing in the US legal system, generating a conflict of digital sovereignties and different paradigms of free speech online. The adoption of the *Digital Services Act* (DSA) in Europe, on the one hand, and the attempts to undermine Section 230 of the CDA in the US, on the other, do indeed introduce the germs of such conflict of digital sovereignties and paradigms of free speech online. This is not only a friction between different paradigms of freedom of expression in a world described as borderless as the digital one, it is also a conflict that could shake the economic structure of the transatlantic digital market. It is a conflict that concerns the scope of free speech online but also the business model of social media platforms. To use a physics metaphor, we are currently in a form of equilibrium that we know is an equilibrium but do not know if it is stable or unstable. A change in this equilibrium could lead to a change that is not predictable; will it lead to a new stability at the same or at a new point and after how many oscillations. Leaving metaphor, how the market for social media

platforms has functioned to date may mutate, and if it does mutate, we do not know when and what equilibrium will be found. This mutation could occur as a result of factors other than the market. Factors that influence the regulation of the market, in this case, are the protection of fundamental rights and, more specifically, of online free speech.

To explore this issue, the paper analyses the transatlantic regulation of social media platforms' content moderation, exposing the current coexistence of the US and EU paradigms of freedom of expression online and highlighting the possibilities of a new conflict of digital sovereignties that will profoundly affect the social media market. A new conflict that has its roots in the origin of Internet technology, more specifically in the long-standing dispute opened by *Licra v .Yahoo*,[1] which has never been convincingly and definitively resolved.[2] As I discuss in the final remarks of this paper, this clash of paradigms of digital sovereignties/freedom of expression could be avoided through an all-encompassing application of the geolocalisation/geopositioning technologies, which would, however, definitively change the business model of social media platforms. In addressing this research question, this paper places itself in the realm of studies concerning the regulation of online content across the Atlantic. This is a topic that has already been explored in many of its dimensions, such as the practices of content moderation (Celeste et al., 2023)(Gosztonyi, 2023), the debate on the legal framing as public forums *et similia* of social media platforms (Bassini, 2022)(Balkin, 2023), and the normative proposals of that strand of research christened "digital constitutionalism" (De Gregorio, 2022)(Celeste, 2023). This paper builds on the existing debate by offering a broader theory on the constitutional framing of social media platforms in the EU and US legal systems, demonstrating that the current coexistence of the US (non)regulation of platforms and the EU regulation is possible as long as the interpretation of the First Amendment remains the one that guarantees platforms the freedom they enjoy in the current legal and technological scenario. At the same time, this analysis demonstrates the thesis that the US regulation is driven by the fundamental rights of the US Constitution and not only by an economic approach of de-regulation.

Methodologically speaking, the comparison of EU-US[3] responds to the so-called prototypical cases logic (Hirschl, 2014, p. 256), as it compares the two main regulatory actors in the transatlantic dimension. From a technological and regulatory point of view, I focus in this paper on what the EU defines as "very large" (social media) platforms[4] because it is on this wavelength that the rift in regulation across the Atlantic develops. The potential EU-US conflict develops on the role of those "very large" social media in the digital public sphere (Habermas, 2023).

[1] *See Tribunal de Grande Instance de Paris*, *LICRA et UEJF v. Yahoo! Inc.*, RG 05308 (May 22, 2000); U.S. District Court for the Northern District of California - 169 F. Supp. 2d 1181 (N.D. Cal. 2001); *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

[2] What Greenberg (2003) advocated has not been realised.

[3] As well-structured *ex multis* in (Pollicino, 2021).

[4] *See* Art. 33 DSA. Trump's Executive Order also used a similar term ("large online platforms") to define the most important social media platforms. *Executive Order on Preventing Online Censorship*, Executive Order 13925 of May 28, 2020.

In the second section, this paper explores the regulation of social media platforms in the United States and the European Union from the perspective of freedom of expression, highlighting how their regulation in the United States is strictly connected with the application of the First Amendment. This section also stresses how the spaces for action granted to social media platforms in the field of content moderation by US regulation have been 'filled' by the EU regulation, as oriented by its constitutional paradigm of freedom of expression. The third section focuses on the US scenario, spotlighting the constant tensions in recent years towards the scope of application of Section 230 of the CDA. This section points out how these challenges may lead to a different application of the First Amendment online that could affect *the unity of opposites in the regulation of social media platforms' content moderation and the coexistence of the US and EU digital sovereignties.* The final remarks discuss the potential conflicts that could arise from a new regulation of social media platforms and its implications for the functioning of the social media market.

2. The Paradigms of Freedom of Expression, the Constitutional Framing of Social Media Platforms, and their Regulation in the Transatlantic Dimension

Before analysing the new possible developments in the US legal system, this section investigates the current regulatory landscape of social media platforms' content moderation. In addressing this issue, this section focuses on the different paradigms of freedom of expression across the Atlantic, the constitutional framing of social media platforms, and the resulting regulations in the US and the EU. These three aspects appear to intersect and be inseparably connected. Through this analysis, it is possible to give an overview of the constitutional theories behind the current regulation of social media platforms' content moderation activities.

2.1. The US Legal Framework as the Basis for the *Unity of Opposites* in the Regulation of Content Moderation on Social Media Platforms

As far as the US case is concerned, the starting point is that the regulation of digital and social media platforms in the United States involves two related and inseparable aspects: First Amendment theories and the federal regulation of the Internet.

Concerning the first, if Internet regulation has arisen because of the need to contain certain expressions not protected by the First Amendment, from obscene content (CDA) to copyright violations (*Digital Millennium Copyright Act* - DMCA), the first statutes also helped to cement a constitutional interpretation of the First Amendment for the online world. The Internet world has been portrayed by the US Supreme Court as the perfect tool for developing the purposes of the First Amendment and its model of democracy:[5] a model of democracy based on trust in

[5] "The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in

the *town hall* (Meiklejohn, 1960) and the *free marketplace of ideas* (Holmes dissenting opinion, *Abrams v. United States*: 250 U.S. 616 (1919)). The Internet was often depicted as the perfect place where the voices of all citizens could be heard without interference (Kosseff, 2017), a place characterized by an open democracy and minimal regulation of free speech. This attitude influenced[6] the development of Section 230 of the CDA,[7] comprising a non-liability clause for digital actors for users-generated content (§1, 230 CDA) and protection of online platforms' content moderation activities (§2, 230 CDA), which cannot lead to qualifying them as publishers. However, the result of the judicial interpretation of Section 230 of the CDA went beyond a mere construction of state non-interference (or relatively minimal state interference in online content) and a framework of non-liability for websites. The interpretation of the non-liability clause with the *Good Samaritan* clause allowed websites and digital actors to evolve as 'media' channels without responsibility (Tushnet, 2008), permitting them to develop their editorial criteria on what kind of users' content can be diffused in their online spaces. The fact that this consequence was or was not an original intention of the lawmakers of section 230 of the CDA (Kosseff, 2019, p. 57 and ff.) is discussed today. Some scholars argue that the range of areas in which Section 230 provided for content moderation was limited to obscene materials and a few other kinds of content (Candeub, 2021). However, it seems undisputed that this is not the resulting model of online content governance and that this 'originalist'/literalist interpretation has not found application: "from the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content'" (Statement of Justice Thomas respecting the denial of certiorari, *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020)*). As a matter of fact, Section 230 of the CDA created a system of freedom of expression online[8] that, while not framing online actors as publishers or distributors, endowed them with broad prerogatives to perform content moderation, and, thus, to decide what can and cannot exist on their platforms. In the context of a "new-school speech regulation" (Balkin, 2018a), for some scholars, Section 230 of the CDA has gone far beyond the scope of the First Amendment, granting online websites, and then social media platforms, greater freedom than the First Amendment itself (Goldman, 2019).

encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

[6] "[O]ur amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will 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, that we do not wish to have a Federal Computer Commission with an army of bureaucrats." Congressional Record Vol. 141, No. 129 (House - August 4, 1995). For a reconstruction on whether this approach is 'mandatory' under the First Amendment or merely one of the possible paths: (Note, 2018).

[7] In this paper, the relationship between Section 230 and public discourse will be the only focus, ignoring the multiple implications of Section 230 of the CDA. The paper also bypasses the *vexata question* of whether the traditional traits of the First Amendment are applicable online (Wu, 2018).

[8] This legal regime was built mainly from the leading case *Zeran v. America Online Inc*, 129 F.3d 327 (4th Cir. 1997) (Goldman and Kosseff 2020). However, as mentioned, recent readings question whether the freedom granted to digital actors was as extensive as it is today: (Candeub and Volokh 2021). This approach also seems to have been questioned by Justice Thomas in *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC,* 141 S. Ct. 13, 16 (2020): "Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is "provided by another information content provider."

Alongside this dynamic, it is worth remembering that, in the US system, freedom of expression (and even religious freedom) is generally attributed to all collective entities and corporate speech is protected (*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014)). Hence, social media platforms have their own free speech rights under the First Amendment. This is not irrelevant because it strengthens the thesis that platforms have the right to regulate the public debate on their digital spaces (also) on the basis of their own *Welteschaung*. This attribution of free speech prerogatives to social media platforms is not clearly expressed in any US Supreme Court judgments, except in a passage of a *concurring opinion* of Justice Thomas.[9] However, this attribution of freedom of speech prerogatives appears to result from the general First Amendment structure. It is not by chance that "when the free speech claims of end users and digital companies conflict, courts are likely to assign First Amendment rights to digital companies and not to end users. (...) [D]igital companies will repeatedly employ the First Amendment to defend against regulation" (Balkin, 2023, p. 1222).

The joint action of Section 230 of the CDA and First Amendment theories on free speech has granted the power to social media platforms to engage in editorial activities that, if made by a state actor, would not have been considered compatible with the First Amendment (Keller, 2019) (Bhagwat, 2021). For example, Facebook was allowed to remove users who spread disinformation,[10] Twitter was allowed to ban hateful content, and even former President Donald Trump.[11] This kind of editorial freedom has been deemed legitimate by courts where there have been legal disputes.[12] If, in the time of the Internet composed of thousands/millions of different websites, these aspects might have had a limited impact, today, in the time of the social media realm(s), they assume a very different significance (Bassini, 2022, p. 317). To summarise, social media platforms have been left free to regulate users' content without any form of state interference (Goldman and Mier 2021), even though theories and doctrines pushing to force platforms to act as state actors, *fori publici*, public accommodations or common carriers have recently been proposed from several sides (see *infra*).

Having analysed the First Amendment aspect of social media platforms regulation, it is worthwhile exploring the second element of this regulation, namely its federal aspect. From the viewpoint of the vertical division of powers, the federal regulation of Section 230 of the CDA has guaranteed users access to the platforms against US Member States' actions—as stated in the *Packingham* ruling (*Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (U.S. 2017))—as well as protecting the platforms against forms of interference by US Member

[9] "Internet platforms of course have their own First Amendment interests." *Biden v. Knight First Amend. Inst. at Columbia Univ*., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

[10] See *Federal Agency of News LLC v Facebook Inc* WL 137154 (ND Cal 2020). See also *Federal Agency of News LLC v Facebook Inc* WL 3254208 (ND Cal 2019).

[11] Regardless of the qualification of Trump's tweets as 'fighting words', a category of expression not protected by the First Amendment, or of the actual danger of that incitement.

[12] *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014).

States. On the basis of the federal pre-emption of Section 230 of the CDA,[13] the regulation of platforms was carried out by the federal power, limiting the US Member States' spaces of intervention in online content moderation. This federal pre-emption has assumed a very pervasive character, including reducing the possibility of adequately enforcing specific policies in criminal matters (Dyer, 2014). A twofold factor drove this federal limitation of States' prerogatives. On the one hand, the federal scope of the First Amendment, and on the other, the use of the Interstate Commerce Clause, which imposed a non-fragmented regulatory regime for the Internet world throughout the United States (Goldsmith and Sykes 2001). This application of the Commerce Clause has often been related to the extraterritorial nature of the Internet (*American Libraries Association v. Pataki*, 969 F. Supp. 160 (SDNY 1997)) (Denning, 2013). However, in this historical period of revival of US Member States' powers,[14] there has been no shortage of positions to challenge the Commerce Clause coverage of Section 230 of the CDA. In fact, the advancement of geo-blocking/geo-positioning technologies has made some authors wonder whether allowing states to regulate social media platforms differently in the various US states' legal systems would be possible (Goldsmith and Volokh 2023a, 1085). To date, the dual action of the post-incorporation First Amendment and the federal pre-emption embodied in Section 230 of the CDA has protected the current architecture of online public discourse against those attempts to territorially fragment the legal status of social media platforms.

This appears to be the US system as developed up until today. From this framework, it is possible to outline what kind of federal paradigm of freedom of expression has enabled social media platforms to structure online public discourse following their own 'editorial' preferences, "unfettered by federal or state regulation" (*Zeran v. America Online Inc*, 129 F.3d 327 (4th Cir. 1997)). But why is it important to stress the double dimension of the space of actions granted to social media platforms and their protection under the First Amendment and the federal pre-emption? It is essential because those social media platforms are also active in the EU Single Market and are subject to a different paradigm of freedom of expression. In this sense, the US legal framework lays the basis for the *unity of opposites* in the regulation of content moderation on social media platforms. In the US, social media platforms cannot be obliged to implement forms of content moderation in the areas of online public discourse, and their freedom of expression protects those forms of content moderation they implement on their own initiative.

2.2 The EU Legal Framework as the Shaping of the *Unity of Opposites* in the Regulation of Content Moderation on Social Media Platforms

Since US tech companies owning social media platforms also operate in the EU Single Market, European legislation has entered the picture of social media regulation and, more specifically, of public discourse on social media. In the European Union, the constitutional paradigm of freedom of expression appears different from that of the US, both at the European Convention

[13] "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3)(1996).

[14] It is possible to think about how even established penumbra rights are not immune from pro-state interpretations of the Constitution: *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. 215 (2022).

on Human Rights (ECHR) level—which, according to Art. 52 of the Charter of Fundamental Rights of the European Union (CFR) is an interposed parameter for the scope of interpretation of the EU fundamental rights—and at the level of the Member States (for an overview, see: (Pollicino and Romeo 2016)). This different free speech paradigm, together with a divergent concept of market regulation, first led to applying the more stringent regime of Section 512 DMCA in the *E-Commerce Directive* (2000/31/EC) and then to a more vigorous intervention in the circulation of online content through the DSA. From the very beginning, the European paradigm took a different path, generalising the residual mechanism of the US system, the *notice-and-take-down system* (art. 14 *E-commerce Directive*), allowing EU Member States to request the removal of illegal content from digital platforms. After this first step in the content-regulation of online public discourse, the EU Commission developed codes of conduct for limiting the circulation of certain content online, first with the 2016 *Code of Conduct on countering illegal hate speech* and then with the *Code of practice on disinformation* of 2018. Codes of conduct started to introduce robust reporting systems to remove content considered incompatible with the EU public discourse without going so far as to impose monitoring obligations on platforms (art. 15 *E-commerce Directive*). In addition to hateful speech online, the removal of disinformation was also encouraged. Disinformation is not a category protected by the EU paradigm of freedom of expression and information, although it might not always be classified as illegal speech (Pollicino, 2020). The European constitutional approach towards freedom of expression differs profoundly from that of the US. It does not protect, *inter alia*, hate speech or disinformation (Pitruzzella and Pollicino 2020). As a consequence, the EU institutions have applied this paradigm online, providing for the exclusion of hate speech and the limitation of disinformation. Moreover, other rights inherent to public discourse and freedom of expression, such as the right to be forgotten online (Case C-131/12, *Google Spain*), have been developed in the European legal system. Both with the creation of new rights, such as the right to be forgotten, and with soft law tools, such as the codes, the EU has regulated online public discourse by imposing content-based 'rules' on social media platforms.

The further step in this system was the enactment of the DSA, with which the EU provided for a series of democratic responsibilities for "very large platforms",[15] which impact both content moderation and the freedom of social media platforms to indiscriminately remove content. For the very large platforms, a series of obligations in relation to content is provided, as also envisaged by the application of the codes (art. 45 DSA); yet, a mechanism for contesting the removal of users' content is established (art. 20 and 21 DSA), which inaugurates a dynamic that recalls a possible and partial horizontal application of freedom of expression online (Teubner, 2017). This theory has yet to be fully consolidated in the current legal framework, but a limitation of the editorial powers of social media platforms is undoubtedly evident. What is of interest here is that this regulatory approach is not limited to content moderation in terms of removing constitutionally unprotected content that can undermine the democratic processes, it also incorporates efforts to apply procedures to the content moderation of social media platforms to guarantee some users' rights (Ortolani, 2023). Such a regulation of online public discourse is part of the *European Democracy Action Plan*,[16] which has the regulation of

[15] Which include the fight against disinformation and other systemic risks: see Article 34 and 35 of the DSA.

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 3.12.2020, COM(2020) 790 final.

the digital public sphere as one of its cornerstones. Moreover, this regulatory approach has been complemented by an EU Regulation ruling the modalities by which online political advertising takes place on social media platforms (Regulation (EU) 2024/900). The EU regulatory framework appears to be at the antipodes of the US regulation created by Section 230 of the CDA, being characterised by the imposition of rules on content moderation in accordance with the European paradigm of freedom of expression.

Turning now to the legal framing of social media platforms, it is worth investigating the attribution of a right to freedom of expression to social media platforms in the EU multilevel constitutional system. In this sense, the European approach is characterised by a different framing of social media platforms compared to the US legal system. Social media platforms appear not to be qualified as holders of an autonomous freedom of expression, unlike in the US, and, therefore, not considered as media actors.[17] Social media platforms and search engines were delegated censoring powers (Bassini, 2019)(Monti, 2020), but they were not guaranteed the protection regime of media. This legal framing has an effect, of course, in a legal system such as the EU multilevel system that appears not to recognise freedom of speech to corporations:[18] in the European multilevel system, imposing rules on corporate speech appears, in fact, more feasible than on other collective actors, such as media.

To summarize the EU regulatory approach, the imposition of content rules by the Union first took place through codes of conduct, such as the *Code of conduct on countering illegal hate speech online* and the *Code of practice on disinformation*, and then with the DSA. In this sense, the general rules concerning the European public discourse and even quasi-journalistic responsibilities—concerning disinformation—were imposed on social media platforms without, however, qualifying these communication channels as publishers/media. In this way, the European Union started indirectly shaping the terms of service of social media platforms, leading them to adapt to the rules of European public discourse. This regulatory approach has led social media platforms to develop terms of service that are more stringent than public discourse rules set by EU Member States' laws. Hence, social media platforms found themselves incorporating a content moderation system foreign to that prescribed by the First Amendment paradigm, which they had initially imported to Europe (Klonick, 2018). Ultimately, this regulatory approach has forced US platforms to adapt to a freedom of expression paradigm similar to the European paradigm instead of that of the US. This adaptation to European rules by social media platforms has been possible because, in the United States, social media platforms are free to formulate their own content-moderation policies, and it matters little whether their elaboration is the result of endogenous pressures or internal corporate decisions. The transatlantic governance of online content on social media platforms relies on this perfect interlocking of constitutional theories that prevents a new *Yahoo v. Licra* case. The freedom granted in the US to social media platforms makes *a strange unity of opposites in the*

[17] This approach appears to result from the jurisprudence on digital platforms, search engines in particular. Indeed, the Court of Justice in the Google Spain case did not recognise Google's freedom of expression as one of the interests to be balanced: Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317. The German Constitutional Court has clearly stated in relation to search engines that digital platforms do not enjoy the same rights as the press: German Constitutional Court, Judgment no 1 BvR 276/17, para 9.

[18] See European Court of Human Rights, *Krone Verlag GmbH & co. KG v. Austria*, 19 September 2012.

regulation of social media platforms possible. By adapting to the European paradigm of free speech, social media platforms have been allowed to operate in the EU Single Market. Such a "Brussels effect" (Bradford, 2020) has been due to the importance of the EU digital market for the US social media platforms, but it has been made possible thanks to the absence of an opposite US regulatory approach imposing a different model of online content moderation.[19] In the meantime, social media platforms have modified their global policies, boosting a "Brussels effect" while maintaining a single business model for all digital markets. Adopting the most stringent system allows them to operate in all markets without differentiating their terms of service regarding content moderation to comply with the various jurisdictions. In this sense, the establishment of Facebook's Oversight Board (Klonick, 2020) was also part of this idea of building a kind of global platform constitutionalism.

In conclusion, if the US legal framework has been the basis for this *unity of opposites*, the European legal framework has concretely shaped this *unity of opposites*. It is an equilibrium between these two regulatory approaches that has ensured social media platforms operate in two digital markets oriented and driven by different paradigms of freedom of expression, such as the US and the EU. One question recurs, however: what if the US regulation should change? In the next section, past and current challenges to Section 230 of the CDA and the existing regulation of online public discourse are exposed.

3. The Challenges to Section 230 of the CDA and the Risks for the *Unity of Opposites* in the Regulation of Content Moderation on Social Media Platforms

In the previous section, analysis has shown how a particular interlocking of constitutional theories allows the current coexistence of the US and EU regulatory approaches. This equilibrium, however, could vary and change as a result of the challenges to the current US regulatory approach. But how can the US regulation of social media platforms change? (Citron and Franks 2020) The dominant constitutional interpretation on which the architecture of Section 230 of the CDA and online public discourse is based relies on an orthodox understanding of the First Amendment, i.e., the prohibition of state intervention in public discourse and the freedom of speech of collective actors (aka social media platforms). However, the constitutional doctrines of the First Amendment provide various facets of protecting public discourse. As Klonick (Klonick, 2018) pointed out, when communication channels were restricted, the interpretation of the First Amendment developed towards an application of this right against private actors, i.e., by binding private actors to comply with the content-based parameters of the First Amendment. These theories have also been proposed in relation to social media platforms by scholars debating the application of the state action doctrine (Gillespie, 2018) or the public forum doctrine (Nunziato, 2019).[20] Other scholars have also discussed doctrines such as the fairness doctrine (Napoli, 2021) to guarantee online pluralism or the public accommodations doctrine to prevent content moderation by social

[19] It is impossible to know whether there would still have been a "Brussels effect" in the absence of this interlocking of constitutional theories.

[20] However, this doctrine only seems to be applicable in relation to public power censorship on social media: *Lindke v. Freed,* 37 F.4th 1199 (6th Cir. 2022); *Biden v. Knight First Amend. Inst. at Colum. Univ*., 141 S. Ct. 1220 (2021).

media platforms (Volokh, 2022). The federal courts have rejected these theses, although a concurring opinion by Justice Thomas in *Biden v. Knight First Amendment Institute* has laid the groundwork for a renewed discussion of the role of social media platforms in the light of the common carrier doctrine (Volokh, 2021). All of these theses and doctrines have in common the goal of framing social media platforms as neutral actors with regard to the users' content disseminated on them. Additionally, as already mentioned, it is also on the side of the federal pre-emption that some authors have started to question Section 230. According to them, the Commerce Clause could not cover such a pervasive limitation of the US Member States' powers (Goldsmith and Volokh 2023a) (Goldsmith and Volokh 2023b). Aside from these doctrinal reconstructions, Section 230 of the CDA and the architecture of online public discourse behind it have been challenged twice (to date).

The first challenge came from the federal government. It was the Trump administration's Executive Order (EO) to counter online censorship on social media platforms (*Executive Order on Preventing Online Censorship*, Executive Order 13925 of May 28, 2020). The Executive Order originated from Twitter placing a flag on one of the fake contents circulated by the then President of the United States. According to its editorial prerogatives, Twitter flagged Donald Trump's content and debunked it. The Executive Order reacted against this content moderation activity and, departing from the role played by social media platforms in the online public discourse, claimed:

> The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. (...) [T]hese platforms function in many ways as a 21st-century equivalent of the public square. Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

Starting from this assumption, Trump's Executive Order proposed a different interpretation of Section 230 of the CDA:

> [T]he immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Ultimately, the EO contested the possibility by social media platforms of using Section 230 to engage in content moderation activities outside the goal of protection of minors.[21] Regardless of the populist spirit (Martinico and Monti 2024) with which the EO was issued, it seemed to take into account specific constitutional theories aimed at applying the First Amendment content rules against social media platforms, framing those platforms as neutral content transmitters. The EO embraced a different interpretation of Section 230 of the CDA but was primarily based on a different First Amendment interpretation. It aimed to limit the editorial

[21] "Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike". *Executive Order on Preventing Online Censorship*, Executive Order 13925 of May 28, 2020. Cf. Wright and Krzepicki (2020).

prerogatives of private actors in the name of their role in the online public sphere. However, the Order was not really a legal instrument that could effect changes to the dominant interpretation of Section 230 of the CDA and even less modify it. It attempted to produce effect via the federal administration, particularly the Federal Communications Commission (FCC) and Federal Trade Commission (FTC),[22] but it did not have any particular results. Eventually, this challenge to Section 230 and the regulation of social media platforms did not find any immediate support in the jurisprudence of the Supreme Court or of the federal circuits. Nor did it lead to legislative reform of Section 230. Nevertheless, it is an element to consider in the dynamics of contestations of Section 230 of the CDA and the structure of the online public discourse.

Alongside this challenge, the second attempt to modify the architecture of public discourse built on Section 230 came from the US Member States. In particular, from two states governed by Republicans, Texas and Florida. These two states have proposed statutes limiting the power of social media platforms to conduct content moderation. This challenge is brought on two pillars of the current architecture of Section 230 of the CDA, namely, the libertarian/orthodox interpretation of the First Amendment and the federal pre-emption linked to the Interstate Commerce Clause. The action of these two legislations is not based on a different understanding of Section 230 of the CDA but on the will to create a different way of functioning with social media content moderation in Florida and Texas. Those statutes have also inspired other states, and similar legislations have been proposed by other US Member States.[23]

Texas and Florida legislatures have enacted laws that basically require social media platforms to act in a content-neutral manner with respect to users' content and prevent them from de-platforming political candidates or censoring political content. Chapter 143 of the Texas law (HB 20), 87th Leg., 2d Spec. Sess. (Tex. 2021), entitled "Discourse On Social Media Platforms" provides that:

> A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state.

Florida Statute, at Section 501.2041 (Fla. Stat. Fla. Stat. § 501.2041 (2022)), looks at both censorship and algorithmic favour, ruling:

> (h) A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate as defined in s. 106.011(3)(e) (…) (j) A social media

[22] "To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard." *Executive Order on Preventing Online Censorship*, Executive Order 13925 of May 28, 2020. Cf. (Wright and Krzepicki 2020).

[23] See the Georgia "Common Carrier Non-Discrimination Act" (Senate Bill 393) (2022); or the Michigan "Social Media Censorship Prevention Act" (House Bill 5973)(2022).

> platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast.

The two laws share the ambition to change the paradigm of online public discourse in their respective states by eliminating the editorial role of social media platforms as established under the current interpretation of Section 230 of the CDA and of the First Amendment online. The challenge unfolds from states claiming their role in sub-regulating public discourse.

What is of interest here is to note that the challenge to Section 230, for the first time, has seen the federal circuits proceed in a non-unified manner. Both laws were appealed before federal courts with different results (Garfield Tenzer and Margulis 2022). Surprisingly, the Fifth Federal Circuit has supported the interpretation of the First Amendment proposed by the Texas Statute; but the Eleventh Federal Circuit upheld the 'traditional' interpretation of Section 230 and the First Amendment online. The Eleventh Federal Circuit clearly identified the legal dispute:

> The question at the core of this appeal is whether the Facebooks and Twitters of the world—indisputably 'private actors' with First Amendment rights—are engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms. The State of Florida insists that they aren't. (*NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022)).

The Court concluded:

> We hold that it is substantially likely that social-media companies—even the biggest ones—are 'private actors' whose rights the First Amendment protects, *Manhattan Cmty.* , 139 S. Ct. at 1926, that their so-called 'content-moderation' decisions constitute protected exercises of editorial judgment, and that the provisions of the new Florida law that restrict large platforms' ability to engage in content moderation unconstitutionally burden that prerogative. (*NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022))

The Eleventh Federal Circuit thus upheld the 'traditional' US regulatory approach, stating that the First Amendment protects the freedom of social media platforms to engage in content moderation activities, applying to users' content their rules and editorial decisions. Interestingly, the Circuit has addressed the typology of this editorial operation by defining it as a "curating" process.[24] On the contrary, in a ground-breaking decision, the Fifth Federal Circuit upheld Texas law by embracing a different interpretation of the First Amendment and stating that:

> Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say. Because the district court held otherwise, we reverse its injunction

[24] "Accordingly, a social-media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby participate in the community it has created. In that way, the platform creates a virtual space in which every user—private individuals, politicians, news organizations, corporations, and advocacy groups—can be both speaker and listener. In playing this role, the platforms invest significant time and resources into editing and organizing—the best word, we think, is *curating* —users' posts into collections of content that they then disseminate to others. By engaging in this content moderation, the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints." *NetChoice, LLC v. Attorney Gen.*, 34 F.4th 1196, 1203 (11th Cir. 2022).

and remand for further proceedings (*NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022)).

The Fifth Circuit relied on the argument already proposed by Justice Thomas in *Biden v. Knight First Amend. Inst* that social media platforms should be considered as common carriers.[25] The Court also highlighted the contrast between the goal of Section 230 of the CDA to exclude the qualification of platforms as publishers and the protection of editorial decisions of content moderation under the First Amendment.[26] The two judgments, *Netchoice v. Paxton* and *Netchoice v. Attorney General*, have finally secured the *writ of certiorari* from the US Supreme Court, which will decide on the scope of the First Amendment online, the validity of Section 230 in terms of content moderation, and the possible room for US Member States to implement their legislation.[27]

If the US Supreme Court should embrace a new interpretation of the First Amendment, this would change the paradigm of Section 230 of the CDA but also the perfect interlocking of constitutional theories across the Atlantic that permits the *unity of opposites* in the regulation of social media platforms. The equilibrium achieved would thus be altered. This section has illustrated how the perfect interlocking that has allowed for the coexistence of EU and US regulations has been challenged. From the collapse of this interlocking of constitutional theories, numerous consequences on the social media market could follow, which are introduced in the next section.

4. Final Remarks: What Comes After the End of the *Unity of Opposites*?

In the current vulgate on the regulation of social media platforms and online content moderation, it is common to present an atrophic US system and a hyperactive EU one. This description does not represent entirely the actual state of things. The US legislator has regulated the world of the Internet according to the US constitutional cornerstones of the free marketplace of ideas and state non-interference in free speech online. The court system has, to date, been consistent with these cornerstones, despite the 'power' in the online public sphere now held by social media platforms. The regulation of online free speech of a triangular

[25] "Given the firm rooting of common carrier regulation in our Nation's constitutional tradition, any interpretation of the First Amendment that would make Section 7 facially unconstitutional would be highly incongruous. Common carrier doctrine thus reinforces our conclusion that Section 7 comports with the First Amendment." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022).

[26] "We have no doubts that Section 7 is constitutional. But even if some were to remain, 47 U.S.C. § 230 would extinguish them. Section 230 provides that the Platforms 'shall [not] be treated as the publisher or speaker' of content developed by other users. Id. § 230(c)(1). Section 230 reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not 'speak[ing]' when they host user-submitted content. Congress's judgment reinforces our conclusion that the Platforms' censorship is not speech under the First Amendment." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022).

[27] Other states support this thesis: Amicus Briefi, No. 22-277, 22-555: Brief of Missouri, Ohio, 17 other States, and the Arizona Legislature in support of Texas and Florida, p. 6 and ff. (*Ashley Moody, Attorney General of Florida, et al., v. NetChoice, LLC dba NetChoice, et al. NetChoice, LLC dba NetChoice, et al., v. Ken Paxton, Attorney General of Texas, et al.*).

kind[28] is, nevertheless, dependent on the state's actions, which may or may not regulate the speech of citizens as much as that of platforms. This three-directional dimension of the regulation of public discourse could shrink again to a bi-dimensional one (State-citizens) if a different interpretation of the First Amendment were to impose on social media platforms a neutral way of functioning with respect to users' content.

The original US constitutional approach, as enshrined in Section 230 of the CDA, has allowed social media platforms to implement their own terms of service outside the strict parameters of the First Amendment and allowed EU regulation to coexist with the US regulation without impacting the business model of social media platforms. The freedom social media platforms enjoy in the US legal system has permitted them to import the EU regulatory paradigm into (also) the US market, applying the rules imposed by the EU institutions on online content moderation. As a consequence, social media platforms have been able to include the limitation of disinformation and the ban on hate speech in their terms of service, among others. Besides, "global companies find it too expensive to develop practices solely for the European Union so their compliance with EU regulations affects digital communication globally" (Balkin, 2023, p. 1218)**.** Thus, the interlocking of constitutional theories across the Atlantic has made the *unity of opposites* (EU-US) feasible in regulating social media platforms and the peaceful coexistence of the US and EU digital sovereignties. Thus, a new *Yahoo vs. Licra* case has been avoided. This coexistence of digital sovereignties has also been achieved because of the willingness of social media platforms not to pursue a conflict with the content rules imposed on online public discourse by the European Union. Social media platforms did not sow the seeds of the conflict of digital sovereignties. They adapted their content-moderation policies to the European free speech paradigm, rather than challenging it using the First Amendment. They could have kept their terms of service consistent with the idea of the free marketplace of ideas, for example, by refraining from censoring hate speech or disinformation, and challenged the EU regulation on this ground claiming their freedom of expression as guaranteed by the First Amendment. It is difficult to predict which solution would have been reached in this case. This challenge would have certainly inaugurated a conflict of digital sovereignties and different paradigms of freedom of expression. While social media platforms instead embraced the European rules,[29] it is fundamental, however, to stress that the regulatory approach deriving from the current interpretation of the First Amendment and Section 230 has allowed the expansion of European legislation on content moderation (the "Brussels effect").

This equilibrium could be altered by a change in the US regulatory approach. The modification of Section 230 of the CDA could irreparably tilt such an equilibrium; predicting whether the current state of equilibrium is stable or unstable is quite difficult. We do not know whether the variation of one of the conditions of this equilibrium—the current interpretation of Section 230 of the CDA—will lead to a new equilibrium in the same 'place' or another. We do not know how many oscillations there will be. Outside of the metaphor, if, for example, platforms were forced

[28] State-platforms-citizens: (Balkin, 2018b). On how the balance between these three actors in the EU has evolved, see the in-depth doctoral thesis by (de Abreu Duarte, 2024).

[29] It will be interesting to see if Elon Musk will start this new potential challenge to the EU regulatory paradigm, as it might be suggested by his withdrawal from the *Code of Practice on Disinformation*: (Vander Maelen & Griffin, 2023).

in Europe to remove hate speech while "guaranteeing" it in the US, the conflict of digital sovereignties would be clear.

In terms of content moderation, the "Brussels effect" was possible due to the interlocking of constitutional theories and the space left open by the current dominant US constitutional theory. If the US constitutional theory on the First Amendment online and Section 230 was to be altered, the conflict of digital sovereignties and freedom of expression paradigms**,** which has thus far been latent in the world of the Internet and its regulation (Lessig and Resnick 1999)(Goldsmith and Wu 2008), would re-emerge with full force and affect the business model of social media platforms. In such an eventuality, it is unlikely that either of the two "digital empires" would agree to be regulated by the other. It would fall upon social media platforms to decide where to operate and which rules to adhere to.

In such a scenario, social media platforms could be required to implement geo-localisation/geo-positioning technologies capable of guaranteeing two opposing paradigms on the two sides of the Atlantic. However, this equilibrium mutation would lead to a significant change in the digital market and definitely fragment it. By imposing the implementation of geo-positioning (King, 2011) and geo-blocking (Trimble, 2017) to build different content moderation systems on the two sides of the Atlantic,[30] the transatlantic digital market for social media platforms would be severely affected. Furthermore, even if the new equilibrium could be based on the employment of those technologies by social media platforms, it is not a foregone conclusion that these technologies would be easily implemented, nor would the courts accept this kind of solution. Might the US jurisprudence also require the protection of political speech that has value in the US but is 'produced' in Europe (e.g., content violating EU content rules posted on social media by a US politician during an institutional visit to Europe)?[31] Will the Court of Justice of the EU be satisfied with limiting the removal of certain illegal content to the territory of the Union?[32] Without going to these extreme hypotheses, will the business model of social media platforms still be sustainable? After all, Section 230 of the CDA has been made an icon as "The Twenty-Six Words That Created the Internet" (Kosseff, 2019), given its role in the economic development of the digital world. Whether this paradigm shift will be economically sustainable is one of the other possible issues of the eventual breakdown of this interlocking of constitutional theories. Such a disturbance of the equilibrium would inevitably change how these technologies have worked until now; what kind of new equilibrium would be established is to be discovered.

[30] There are US scholars who believe that, in such scenario, the advancement of geo-localisation/geo-positioning and geoblocking technologies would invalidate the use of the Commerce clause for regulating the digital world and could make it possible to require platforms to even adapt to various standards in different US Member States (Goldsmith & Volokh, 2023a, p. 1090).

[31] Cf. (Zick, 2013)

[32] In other words, will the Court of Justice 'limit' the territorial scope of content removal requests? Cf. C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, ECLI:EU:C:2019:821.

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