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Michael
FitzGerald

European Global Unilateralism:
Normative Foundations and
Descriptive Limits
in the Context of Online Speech
Regulation

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About the Author

Michael FitzGerald is a researcher currently enrolled on the doctoral programm in law at the European University Institute in Fiesole. In 2022, Michael graduated as Valedictorian from his LL.B. in Global Law at Tilburg University in the Netherlands. In 2023, Michael received his LL.M. degree from the Europa-Institut at the University of Saarland. Michael's doctoral research will examine the emergence of a coherent European digital constitutionalism in respect to online speech regulation, with particular attention to the problematics inherent in the EU's hegemonic prerogatives in the structuring of online speech beyond the borders of the Member States.

Preface

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Editor

Lehrstuhl Univ.-Prof. Dr. Thomas Giegerich

Universität des Saarlandes

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66041 Saarbrücken

Germany

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A. Introduction

The European Union (EU), today, commands a 'unilateral power to regulate global markets'.[1]

This power is without parallel in the modern world. In an influential 2012 article, Anu Bradford coined the phrase ‘The Brussels Effect’ to describe this phenomenon and to articulate the peculiar alignment of conditions in Europe which had facilitated the EU legislator’s ascendancy to its current position as a ‘global regulatory hegemon’.[2]

Since 2012, the EU has further capitalised on this hegemony and has begun to inscribe a muscular regulatory vision upon the global online ecosystem. With the adoption of the Digital Services Act (DSA) package in 2022, the EU extends its discipline from the domain of data privacy to the regulation of online content, pressing upon the prerogatives of the self-regulating private platforms and establishing parameters for the substance and movement of online expression and speech standards.

This paper investigates the descriptive limits and the normative foundations of this European unilateral power as it manifests in regard to the creation and enforcement of speech standards online. The paper’s scope of inquiry has been motivated by a concern, or a rebuttable presumption, that European unilateralism contains a contradiction with European values. The *prima facie* case regarding the existence of a contradiction progresses as follows; first, unilateral action implies an absence of consent; second, Article 2 of the Treaty on European Union (TEU) lists respect for democracy and the rule of law as among the Union’s founding values; third, a democratic conception of the rule of law requires consent between government and governed;[3] fourth, the Union’s founding values, pursuant to Article 3(5) and Article 21(1)&(2) TEU, are applicable to the Union’s ‘relations with the wider world’. Thus, given the Union increasingly imposes its norms on third countries unilaterally, some form of abstract disjunction between values and means appears evident.

This motivation performs a generative function within the following paper. The paper is not structured to arrive at a definitive dogmatic answer to this abstract concern. Rather, the paper seeks, in the context of this motivation, to establish; first, the conditions by

[1] *Bradford*, The Brussels Effect (accessed 16/07/23), p. 3.
[2] Id. p. 42.
[3] See *inter alia*; European Commission for Democracy through Law (‘Venice Commission’), ‘despite differences of opinion, consensus exists on the core elements of the Rule of Law (...) (1) Legality, including a transparent, accountable and democratic process for enacting law’, 106th Plenary Session Venice, 11-12 March 2016 at p. 5 (accessed 01/08/23).

which the EU unilaterally imposes its speech norms online and; second, the normative foundations which underpin the values that the EU promotes, by comparison to the distinct value system of a comparable Western democracy, the United States (US). The paper is organised in such a manner as to generate responses to a series of four research questions to which the paper will ultimately return. These research questions are as follows; first, what are the factual conditions necessary to exercise unilateral power in the context of online speech standards? Second; do these conditions imply a coercive potential or do they depend upon a European predisposition toward promulgating universally acceptable standards? Third; what are the normative foundations underpinning the distinctions between US and European speech standards? And finally; if European unilateralism is coercive, how can this coercion be squared with the founding values of the Union in Article 2 TEU?

B. Dynamics of Regulatory Change

1. Regulatory Empires: Transatlantic Pattern and Discontinuity

The dynamic of global regulatory unilateralism is intimately connected to technological development.[4] Technological innovations compress distance and intensify the interconnections between jurisdictions resulting in a perception of 'world shrinkage';[5] a process of 'annihilation of space by time'.[6] Conversely, however, technological innovation also has the effect of expanding the scope of the norms which a dominant jurisdiction may unilaterally export. The rise of the internet and the exponential development of digital technologies have heralded a 3rd phase of globalisation,[7] often dated from the *Mauerfall* in November 1989, in which the repertoire of unilateral power has significantly expanded.[8]

Before the internet era, the content of unilateral regulation predominantly concerned product standards and industrial process requirements.[9] Today, however, while continuing to promulgate such technical standards, the unilateral regulator may also impose a more fundamental set of norms. These norms condition the parameters of

[4] *Tabachnik &* Koivukoski, p. 1.
[5] *Thomas,* p. 9.
[6] *Marx, p.* 539.
[7] *Tabachnik & Koivukoski,* p. 67.
[8] *Bradford* (n1).
[9] *Vogel,* p. 6.

civil discourse and rights protection, affecting the political process and constitutional order of states around the world. The prerogatives of the global regulator have never before been so broad, and the stakes involved have never been higher.

In 1990, a 'noteworthy discontinuity in the politics of regulatory stringency took place on both sides of the Atlantic'.[10] Throughout the 1960s, 70s and 80s, the United States had provided the 'benchmark for European consumer and environmental activists' who were critical of the EEC's lenient regulatory approach.[11] In 1988, George Bush Senior campaigned on an interventionist regulatory platform and, in 1990, his administration supported Democratic lawmakers in the passage of a trifecta of important environmental legislation.[12] The same years saw the beginnings of a 'steady expansion in the adoption of more stringent risk regulation in Europe'.[13] However, in 1992, President Bush 'dramatically reversed course'[14] and, Bush's interventions in the late 90s would represent the 'last major expansion' of US risk regulation.[15] On the other hand, the European expansion marked only the beginning of an augmentation of European regulatory stringency which was to gather pace and intensify until the present day.

It is beyond the scope of this paper to examine in detail why this discontinuity emerged. Determining the causation of regulatory macro-dynamics requires balancing numerous contributing factors which have subtly varying relevance depending on the particular policy area concerned. However, this moment of transatlantic discontinuity can be distilled to derive a number of insights which are important for scrutinising the conditions and normative foundations of European regulatory unilateralism in the online context.

First, without speculating as to whether the emergence of the internet played any role in catalysing the discontinuity, it is extremely relevant that the discontinuity took place when it did. The early 1990s saw the beginnings of the internet's democratisation, and its entry into common usage. In 1990, only three million people had internet access and their distribution was extremely concentrated, with 73% of users located in the US

[10] *Vogel,* p. 2.
[11] Id. p. 10.
[12] Id. p. 219.
[13] Ibid.
[14] Id. 223.
[15] Id. 219.

and only 15% in Western Europe.[16] This period also saw the first claims regarding online harm appear upon the docket of the US Court system; in 1991, the New York Southern District heard a libel complaint in *Cubby v Compuserve*; 'one of the earliest cyberlaw cases of any kind to be decided' anywhere in the world.[17] While some more prescient legislators and judges in Europe were watching attentively to see how the US legal system would characterise the emerging technologies, by and large the understanding of the internet on either side of the Atlantic in this period was extremely limited. It would not be before 1996 that the US Congress would enact legislation specifically regarding online behaviour.[18] That legislation, providing a liability shield for online intermediaries in 47 US Code § 230, known as 'Section 230', was passed in 1996 and it flew 'under the radar'[19] as an obscure provision within a comprehensive 1996 reform to the Telecommunications Act. With the notable exception of two Senators; Chris Cox and Ron Wyden, who were the drafters of Section 230, the attention of the media and of congressional debate was focused upon the Act's provisions regulating, *inter alia*, cable television providers and long distance phone companies.[20] Section 230 which would later be referred to, variously, as 'the 26 words which created the internet'[21] or the '*Magna Carta* of the internet',[22] was quietly adopted as though it was 'invisible',[23] almost unnoticed in the media and within congress.[24] It would still be several years before the EU would express its equivalent vision in the E-Commerce Directive of 2000.[25] It would transpire to be extremely significant that, at the very moment the EU began to expand its centralised regulatory capacity in the early 1990s, the internet should begin its transformative rise, catalysing the 3rd Globalisation, compressing communicative distances and, at that time unbeknownst to the EU, expanding the material scope of the unilateral regulator's arsenal.

The second insight that can be derived from the discontinuity of the early 1990s regards the normative foundations of transatlantic regulation. The discontinuity

[16] University of Sheffield, Internet Use 1990 (accessed 01/08/2023).
[17] *Edwards*, p. 93
[18] 47 US Code. § 230 of the Communications Decency Act, Telecommunications Act of 1996, Title V.
[19] *Kosseff*, p. 3.
[20] Ibid.
[21] *Kosseff*.
[22] *Franks*, p. 161.
[23] Id. p. 74.
[24] Franks 161
[25] Directive (EU) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive).

encourages caution in ascribing the cause for regulatory stringency to a deep normative root within European or American society. While a regulatory approach within a particular policy area might be argued to derive from such a root, the argument can only be sensible where that regulatory approach has either emerged as a new field of regulation since the discontinuity in the early 1990s or where the regulatory approach can be determined to have been consistent both before and after the discontinuity. For example; Europeans have, since medieval times, been more comfortable than Americans with the risks inherent in 'natural' food production methods whereas Americans tend in larger part to favour eliminating natural contaminants through increased pasteurisation, genetic modification and biotechnology.[26] On the other hand, Americans have historically been more concerned with cancer risks than Europeans and thus the US approach toward regulating carcinogens has tended to be consistently stricter than in the EU.[27] In these cases, the historical evidence suggests a strong likelihood of a causal correlation between a deep, normative root and a regulatory approach, but only with regard to particular issues.

In many cases, the regulatory targets either emerged after 1990 or were not subject to risk regulation before that period. Many regulations adopted by the EU address new risks that either did not exist or have become markedly more salient since 1990, including regulation relating to climate change, GM foods, antibiotics and chemicals and, of course, risks that have become more pronounced in the online context including, *inter alia*, privacy, surveillance, disinformation and various forms of dangerous speech.[28] In regard to such risks; the correlation of the regulation to a normative root is less pronounced, but it is not precluded, nor is it unlikely that such a correlation exists.

On the other hand, reductive broad-brush characterisations of the opposing cultures cannot be generalised to explain the transatlantic divergence as a whole. The changing pattern of transatlantic regulatory dynamics allows for the swift repudiation of a variety of arguments which seek to explain Europe's contemporary stringency on the basis of a European constitutional tradition of statism, interventionism and precaution as distinct from American individualism and hostility to 'big government'.[29] As David Vogel

[26] *Vogel*, p. 5.
[27] Id. p. 35
[28] Id. p. 6.
[29] Id. p. 31.

succinctly observes; ‘a variable cannot be explained by a constant’.[30]

Examples of such unsustainable positions are as follows; first, it has been widely argued that Europeans have long been ‘more risk averse and suspicious of technology’[31] than Americans and that Europeans are intrinsically more concerned in the present with the eventual fruition of risks such as the ‘environmental impact on future generations’.[32] This explanation is insufficient to explain why the US, for three decades prior to 1990, displayed and institutionalised risk-averse cultural attitudes and interventionist regulatory approaches while the EU exhibited a markedly more lenient approach. Second, it has been speculated that Europeans are ideologically aligned with government regulation while Americans are predisposed toward unrestrained free enterprise. While this speculation does describe a broad historical trend of divergence, and European governments have generally speaking tended to be considerably more interventionist than the US throughout history,[33] this explanation also fails to explain why the shoe was on the other foot for three decades. A number of other explanations, deriving from, *inter alia*; relative economic performance, distribution of ‘actual risks’, influence of the business lobby and special interests; distinct institutional arrangements and electoral systems; can also be determined insufficient as attempts to explain a variable on the basis of a series of relative constants.[34]

Vogel explains the transatlantic shift on the basis of three factors; shifts in public opinion and intensity of public pressure, the changing preferences of influential policy makers and the emergence of new transatlantic thresholds for risk evaluation.[35] Regarding the first two factors, it will suffice for the present purposes to observe that Vogel’s explanation remains somewhat general; that transatlantic differences in the degree of partisan polarisation, both in political office and throughout society, hobbled American regulatory endeavour should be apparent, *prima facie*, from the consistent US congressional gridlock, regarding uncontroversial and highly popular regulatory issues, over the last number of decades.

Vogel’s third factor (risk thresholds), however, begins to point towards the most important development; an institutional reformation which began in the EU in 1986.

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[30] Ibid.
[31] *Bodansky*, p. 64.
[32] *Levy &* Newell, p. 11.
[33] *Vogel*, p. 31.
[34] Id. p.23 – p. 34.
[35] Id. p. 34.

Vogel's emphasis is upon the emergence of the precautionary principle for risk assessment within the Maastricht Treaty of 1992, by which the EU legislator could regulate commerce against 'uncertain, unproven or disputed' risks and the CJEU would typically defer to the precautionary impulse of the legislator.[36] The introduction of precaution, however, as an explicit threshold at Maastricht, was only one node within a vast reticulation of reform which began in the late 1980s, continued through the 1990s and into the late 2000s, from the Single European Act, through Maastricht, ultimately to Lisbon in 2009, which radically unbound the EU's supranational legislative, regulatory and judicial capacities.[37]

This period saw, *inter alia*, the emergence of co-decision and the increasing pervasiveness of qualified majority voting (QMV). Co-decision rendered the pro-regulation parliament an 'equal partner' to the Council in the ordinary legislative procedure, while QMV institutionalised a new supranational power; for the majority to compel reticent Member States to act against their sovereign will and the will of their people. In addition, the Single European Act delegated substantial discretion to the Commission in order to complete and maintain the internal market. As Giandomenico Majone emphasises, the EU institutions, particularly the Commission, throughout this period of reform, were vested with significant regulatory authority and bureaucratic expertise.[38] The Member States aimed to restrict their supranational power through 'tight budgetary discipline';[39] perhaps unintentionally, however, the Member States allowed the Commission, in particular, in the absence of traditional sovereign power to 'tax and spend' or imperial powers to wage war, to begin to construct an 'empire of laws and regulations'.[40]

The only way for the Commission to expand its influence 'was to expand the scope of its regulatory activities', and this expansion in both qualitative and quantitative terms began to prove 'well nigh irresistible' especially given that the economic, political and administrative costs of regulatory enforcement tended to fall not upon the EU institutions but upon the Member States themselves.[41] This period radically altered the institutional balance of the Union and reinscribed, in an indelible manner, the frontiers

[36] Id. p. 9.
[37] *Wouters, Cuyckens and Ramopoulos* in: Halberstam/Reimann (eds.), p. 191 – p. 194.
[38] *Majone*, The rise of the regulatory state in Europe (accessed 01/08/2023).
[39] *Bradford* (n1) p. 43.
[40] Ibid.
[41] *Majone*, p. 87

of political antagonism; the primary power struggle throughout this period in the EU was between Member State and Union, rather than between the partisan Right and Left, as in the US.

After this period of reform concluded with the Lisbon Treaty in 2009, a new focal point of antagonism emerged upon the global stage; an emerging societal opprobrium and anxiety arose that was directed toward the private sector, particularly toward finance and big tech.[42] The fallout from the financial crash in 2008, followed by a series of high profile revelations, from the Snowden Files to the Cambridge Analytica scandal, focused public scrutiny upon the prerogatives of the online platform. A pair of comprehensive Eurobarometer surveys from 2016 on media pluralism & democracy and on data privacy respectively indicated an extremely high level of concern and support for the regulation of online platforms.[43] Due in large part to the depth of institutional reforms in the EU, and the supranational accumulation of competences, the EU institutions found a way to coexist and legislate with a single voice to produce far-reaching tech regulation.[44] In Europe, even the populists and progressive parties could find mutual ground with the centre-right on internet issues.[45] In the same period, the US Congress calcified further into partisan polarisation and inaction.

From the Lisbon Treaty on, a triangulation in the geometry of European power, indeed, in the geometry of global constitutional orders writ large, became increasingly intermediated.[46] Constitutionalism's 'congenital mission of limiting power'[47] was no longer purely a vertical vector, between the government and governed, but a limitation conducted by the supranational state on behalf of the people against a new form of gestating corporate sovereignty; the private intermediary.[48] Thus while the US Congress stagnated, the EU institutions mobilised, and their interventions were not easily classifiable. They were perceived less as vertical suppression of private activity than as limitations conveyed horizontally, within a relative equality of arms, toward a new private superpower.

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[42] *Bradford,* 2020, p. 132.
[43] Id. p. 140 – 160.
[44] *Vogel*, p. 35.
[45] Ibid.
[46] *De Gregorio*, p. 40.
[47] *Pollicino*, p. 8.
[48] *Balkin*, The Future of Free Expression in a Digital Age, (accessed 01/08/2023).

2. Conditions to Exercise Global Regulatory Unilateralism

The following subsection will explain how this relatively recent dynamic of European regulatory stringency coincided with a peculiar constellation of factors to produce the 'unilateral power to regulate global markets' which Bradford terms 'The Brussels Effect'. Given that China is 'unlikely to replace the EU as a source of global standards anytime soon',[49] the US is the only other jurisdiction which possesses hegemonic potential and this paper will primarily refer to the US where comparison is necessary to place the European approach in context.

Bradford's phenomenon is essentially a 'global occurrence' of a dynamic which had been previously observed by Vogel in 2005,[50] and coined as 'The California Effect', describing a similar phenomenon at work within the interplay of American federal states. Vogel observed that California could, at times, and under certain conditions, raise the *de facto* regulatory standards across all of the other US states simply by imposing ordinary regulation applicable within its own territory. Vogel's observation provided an important antithesis, and rebuttal, to William L. Cary's 1974 inference about the devolution of standards within US corporate law, often referred to as 'The Delaware Effect', which spawned an influential family of theories linking globalisation, and the lifting of barriers to trade and establishment requirements, to a so-called 'race to the bottom' in regulatory standards.[51]

Bradford's work has contributed to Vogel's repudiation of this scholarship in a number of crucial respects; firstly, and most importantly, while Vogel's characterisation had remained anecdotal and non-exhaustive, and predominantly focused on the degree of market power wielded by the regulator, Bradford articulates a precise schema of conditions which must be present in order for the phenomenon to take place. Secondly, while the existing literature, derived from Vogel, on upward regulatory races, or the 'ratcheting-up' of standards, had focused almost exclusively on environmental regulation, Bradford's trans-substantive account underlined the effect of the phenomenon across a wide variety of sectors which had been largely overlooked. This section aims to apply this schema to the context of European online content regulation.

Bradford's schema asserts that five conditions are required to exert unilateral

[49] *Bradford*, 2020, p. 268.
[50] Id. 5.
[51] *Cary*, p. 666.

regulatory power. In order for a country or, in the case of the EU, a supranational organisation, to propagate its standards unilaterally and globally, that entity must have; a sufficiently large domestic market; a sufficiently functional and enforceable regulatory capacity and a predisposition toward the promulgation of stringent regulatory standards. Finally, these stringent standards must target markets which are both inelastic and non-divisible.

Sufficient market power is perhaps the quintessential criterion; it is a precondition which is essential to exercise unilateral power, and it is the most intuitive. Daniel Drezner[52] and Chad Damro[53] assert that market size is a self-sufficient proxy for regulatory power. Drezner describes the gravitational pull which large markets exert upon transnational corporations (TNCs), dragging them into the scope of their regulatory discipline.[54] Regulators control access to their markets on the basis of compliance with the minimum standards outlined in their legislation. In order for companies to gain access to those markets they must acquiesce to the state's regulatory discipline. Where a state's market is insubstantial, and that state demands compliance with onerous norms, companies may forego that market on the basis of a cost-benefit analysis; judging that the costs inherent in adjusting its production to the local regulation outweigh the benefits to be gained from accessing the market. Where a state or entity's market is sufficiently large, the adjustment costs will rarely outweigh the opportunity benefits of market access. The EU's market is one such sufficiently powerful market.[55] Between Bradford's 2012 and 2020 assessments, the EU underwent gradual decline in its GDP relative to comparable economies.[56] However, the EU's internal market remains sufficiently massive to sustain leverage over a majority of major TNCs.

The EU's market power is especially pronounced with regard to information technology companies which, in the parlance of the EU legislation, are categorised as 'information society service providers' (ISSP).[57] The market for intermediary platform services, within this category of ISSP, has effectively been captured by a handful of platform

[52] *Drezner*, p. 841.
[53] *Damro.*
[54] *Drezner* (n52).
[55] *Bradford*, 2020, p. 26.
[56] Id. p. 266.
[57] E-Commerce Directive, 2000, Article 2 (a) & (b); 'within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.'

companies, referred to in the Digital Markets Act as 'gatekeepers',[58] whose importance within the market as a whole cannot be overstated. The EU is a crucial market for each of these digital behemoths and represents, for example, 25% of Facebook's global revenue, ranking in second behind the US market, whereas Google represents an extraordinary 90% of the market in online search services within the EU, while representing approximately 75% in the US.[59] In summary, the benefits of access to the EU market tend to outweigh the costs. However, unquestionably, the US and China also command access to markets large enough to compel such behaviour. In order to understand why Brussels, rather than Beijing or Washington, tends to dictate global standards, it is necessary to examine Bradford's remaining conditions.

The unilateral regulator must also have sufficient regulatory capacity, expressed through sophisticated institutional structures which are capable of promulgating highly technical rule-sets, and command the resources and expertise sufficient to enforce them, including the authority and mechanisms to impose sufficiently punitive sanctions for non-compliance. China's limited unilateral influence over behaviour abroad, for example within financial regulation where the jurisdiction commands vast capital reserves, can in part be ascribed to its insufficient regulatory capacity and lack of 'independent bureaucratic institutions overseeing national market rules'.[60] The EU and the US, on the other hand, possess significant and nuanced regulatory capacity. While the effectiveness of the US administrative state has been long established,[61] the EU's regulatory capacity, as explained in the previous subsection, expanded significantly through reform treaties beginning in the late 1980s.

The EU also demonstrates regulatory capacity in its mature sanctioning mechanisms. While the EU's sector-specific, progressive and highly deterrent fine structure typically suffices to ensure compliance, the Commission theoretically leverages a 'nuclear option' through denial of market access. The organic evolution of this sanctioning system is exemplified in the new mechanisms for the enforcement of the DSA; a significant problem with GDPR enforcement has been the unwillingness, or inability, of poorly-resourced national Data Protection Authorities to effectively enforce the regulation (particularly the Irish Data Protection Commission, given that the majority of

[58] Reg. 22/1925, on contestable and fair markets in the digital sector (Digital Markets Act), Article 2(1).
[59] *Bradford*, 2020, p. 142.
[60] Id. p. 31.
[61] *Bradford* (n1) p. 14.

major digital platforms have their European headquarters in Dublin).[62] The DSA, on the other hand, decisively centralises the enforcement (at least with regard to the very large online platforms (VLOPs), vesting the Commission with power to impose fines of up to 6% of worldwide turnover upon VLOPs.[63]

Beyond sufficient market power and capacity; the regulator concerned must manifest a sufficiently harmonious and interventionist political will, with a 'propensity to promulgate strict regulatory standards',[64] and a sufficient degree of independence from, or synergy with, the competitive interests of the business lobby. Such a political spirit only typically develops within an affluent society – but will not emerge or be consistently sustained in all affluent societies – as Vogel demonstrates in regard to the US post 1990. This condition does not necessarily require that the unilateral regulator is the strictest jurisdiction; the EU's online speech standards, for example, are 'considerably less stringent in comparison to countries such as China, Iran, or Russia' but the EU's less stringent standards prevail because the majority of major platforms decide to forego those heavily censored markets in favour of adopting the relatively more liberal approach pursued in Europe.[65]

Bradford's final two criteria; inelasticity and non-divisibility; can be considered distinct from the first three criteria because they do not concern qualities inherent to the regulator. Rather, they concern qualities that the market must possess in order to produce emanative unilateral effects. A market's elasticity refers to its propensity to transform appreciably in response to environmental change; an inelastic market is one which does not change in a relevant manner in response to a relevant change. A relevant behavioural adjustment in response to a regulatory change would be that the addressee of the regulation seeks out a new environment with a preferable regulatory framework. This is the type of behaviour which leads to what Cary described in 1974 as 'The Delaware Effect' in incorporation standards; a 'race to the bottom'.[66] The crucial factor which differentiates the addressees of EU regulation from those of the American state regulation which Cary describes is that the EU typically regulates inelastic consumer markets rather than mobile and elastic capital markets. Consumers

[62] *Gstrein & Bealieu*, Extraterritorial application: promoting European values or power?, p. 3 (acc. 01/08/23)
[63] Digital Services Act, 2022, Article 74(1).
[64] *Bradford* (n1) p. 5.
[65] *Bradford*, 2020, p. 163 – 164.
[66] *Cary* (n51).

tend toward inelastic responses to regulatory change; they do not tend to adjust their geographical location on the basis of being inconvenienced by regulation. Large corporations, on the other hand, seek out the optimal regulatory environment for their operations and, given that jurisdictions benefit economically from courting corporate activity and investment, jurisdictions engage in competition to attract corporations by lowering their regulatory standards. However, the EU tends overwhelmingly to regulate consumer and consumer-adjacent markets and, thus, corporations simply have no other option than to comply and submit to Drezner's 'gravitational pull';[67] the massive and inelastic market, the users of online services, to which the EU controls access.

Finally, and crucially; for the Brussels Effect to occur, the conduct regulated must be indivisible; it must sufficiently incentivise the application of a homogenous approach, either due to economies of scale or due to legal or technical difficulties in reliably applying plural standards. This is due to the fact that, where conduct or production is divisible, then the entity concerned will typically only adjust to the onerous regulator's standard within the jurisdiction concerned. To demonstrate via well-known and tangible examples; Coca-Cola's production is divisible. This is why Coca-Cola provides subtly different beverages depending on the chemical regulation and sugar content limits applicable, as well as the consumer preference, in various jurisdictions.[68] Likewise, McDonalds often differentiates its standards. However, for example, when faced with an EU regulation banning the use of a carcinogen called azodicarbonamide, which McDonalds was in the practice of using to bleach its bread, McDonalds discontinued the chemical's use globally, despite the US Food and Drug Administration, for example, having approved the bleach.[69] The factors contributing to such decisions also include; domestic pressures from advocacy groups for example or; the particular notoriety of, or societal approbation toward, a particular procedure; the usage of azodicarbonamide can be considered as having been 'non-divisible' because its standardisation was incentivised by the companies' 'existing need to adjust' to the EU standard, and the economic synergies which emerge from homogenisation.[70] Finally, and most intuitively, labour law standards are a paradigmatic example of a divisible regulatory target;[71] companies inclined to pay the statutory minimum wage will variegate wages

[67] *Drezner* (n52).
[68] *Bradford*, 2020*,* p. 181ff.
[69] Ibid.
[70] Ibid.
[71] *Bradford* (n1) p. 18 – 19.

on the basis of the labour regulation applicable in a given jurisdiction rather than paying according to the most protective law across their entire operation. This makes an intuitive economic sense.

The markets which make up the online platform economy, on the other hand, are considered non-divisible regulatory targets and, therefore, where the EU regulates these markets, the regulations tend to promulgate through the Brussels Effect. This non-divisibility emerges from the following factors; either the markets cannot reliably be subjected to jurisdictional segmentation without incurring legal risk (legal non-divisibility) or; the markets cannot, owing to the state of the current technology, be separated (technical non-divisibility) or; if they can theoretically be separated, their separation is sufficiently difficult and expensive that the data controller is incentivised toward adopting a single uniform global standard which would meet the regulatory minimums in every jurisdiction (or the majority of jurisdictions) in which it is active (economic non-divisibility).[72] Regardless of whether there is any *de jure* mimesis abroad, or extraterritorial application, the platform companies will offer the EU's *higher standard* of service to foreign users; thus rendering disparate conflicting norms obsolete.

The difficulty with the notion of a '*higher standard*' is that it relies on a value judgement and, like the protection of human rights, the prioritisation of a higher standard in regard to one value will typically restrict the enjoyment of another. In order to illustrate this, the following section will introduce the distinctions and overlaps between the US and the European constitutional notions of free expression in order to emphasise the significance of the differences that exist even between broadly similar Western democratic cultures. Through unilateral modes of norm propagation, the culturally contingent and historically situated European model of free expression is arguably in the process of obliterating these distinctions, gradually rendering the conflicting values obsolete in the online context.

[72] Ibid.

C. Normative Foundations

1. The River to the Source: Constitutional Divergence

This section will examine the normative origins and constitutional divergence from which the contemporary distinctions between the US and European approach to speech protection can be derived. The nature of a society's constitution, however, is a highly contested concept. There is no single pattern or referent to which even codified constitutions adhere. Those societies, such as in the US or India, which codify their supreme law in a single document display significant heterogeneity in their approach. According to Rosalind Dixon, constitutions may be drafted trustfully or distrustfully.[73] An approach founded in trust results in a framework text which enumerates basic principles which require significant interpretation and discretionary gap-filling in order to be applied. The drafters, in this case, trust that the judicature will faithfully complete the constitution through their case law. As in the example of the 8,000 word amended Constitution of the US, where a US constitutional lawyer speaks of the 1st Amendment, they typically refer not only to sparse 45 words codified in that text, but to a nuanced and highly articulated body of case law derived from the provision; in the US constitutional discourse, they speak also of the right's *penumbra*.[74]

On the other hand, as is more typically the case in continental European civil law, a constitution or legal code may be drafted to minimise judicial discretion through specificity. The Indian constitution, for example, comprises 145,000 words, though India manifests a hybrid legal system between the civil and common law families.[75] When the *Praesidium* of the European Charter Convention proposed its Constitutional Treaty for the EU in 2004, which was ultimately rejected by referendums in 2005, the original text in French contained 448 Articles and 63,000 words.[76] Such prolixity, theoretically, may allow the judge to adhere closely to its Montesquieuian ideal as *la bouche de la loi*; the mouthpiece of civilian law.[77] Nevertheless, given that the realities with which the law must reckon are infinitely various, and given that the relationship between language and meaning is rarely simple, no legal text can eliminate the

[73] *Dixon*, Constitutional drafting and Distrust, p. 820 (accessed 01/08/2023).
[74] *Langenbucher*, p. 506.
[75] *Dixon* (n73).
[76] *Action Committee for Democracy*, Explanatory Memo, p. 2 (accessed 01/08/2023).
[77] *Montesqieu*, p. 180; 'the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.'

necessity of judicial interpretation. Thus, in all cases, a constitution is dynamic and changes over time through the meaning imputed, and the penumbrae interpolated, by judges. Secondly, even where constitutions are laid down in a single document, there is significant contestation regarding their nature and legitimacy. This discourse coincides closely with discourses of legal positivism and natural law; the abstract question being whether the constitutional text refers for its legitimacy to an existing concept of the polity or nation which it claims to represent, or whether the text performatively establishes the polity and *calls the nation into being*. In aphoristic terms, whether the Constitution is located in a text or in a 'state of mind'.[78] For example, while the US is a sovereign federal state which, it may be argued, was *called into being* by the ratification of its constitution in 1789, it may equally forcefully be argued that the relevant 'constitutional moment' did not occur until the ratification of the 1791 Bill of Rights which contained, *inter alia*, the 1st Amendment; perhaps the quintessential provision of US constitutionalism. It may further be argued that the relevant 'constitutional moment' came with the US Reconstruction or 'Second Founding' between 1865 and 1870 with either the 13th Amendment's abolition of slavery or the 14th Amendment's establishment of birthright citizenship and extension of the Bill of Rights' equal protection to all citizens.[79] Others have argued this process of 'constitutional ferment' persisted through the New Deal in the 1930s, the Civil Rights Movement in the 1960s, or persists until the present day.[80]

These questions become increasingly complex in societies which compose their constitutional order from a variety of texts. The 'European legal order' is founded upon the pillars of two distinct, but intimately interrelated organisations; the Council of Europe (CoE) and the EU.[81] The notion of a European constitution, therefore, is a composite textile stretched between these two organisations, and between four supreme documents at the regional level which are derived from traditions common to their contracting parties. From an EU perspective, the 'constitutional character' of the existing applicable treaties has been established by the Court of Justice (ECJ) since *les Verts* in 1986 wherein the Treaty was proclaimed 'the basic constitutional charter'

[78] *Foner*, The Strange Career of the Reconstruction Amendments, p. 2004; 'If the Constitution is not a text but a state of mind, as Ackerman contends, constitutional change is taking place constantly' (acc. 01/08/2023).
[79] *Neuborne*, Federalism and the Second Founding (accessed 01/08/2023).
[80] *Ackerman*.
[81] *Ukrow*, p. 239.

of the EU (then, EEC).[82] In addition, the EU Charter of Fundamental Rights (the Charter) was incorporated into this constitutional fabric, by static reference, in Article 6(1) of the Treaty on European Union (TEU) at Lisbon in 2009. Finally, pursuant to Article 6(3) TEU and Article 52(3) of the Charter, the Convention, the jurisprudence of the Strasbourg Court and the constitutional traditions common to the Member States are general principles of Union law. The Convention, as the 'constitutional instrument of European public order',[83] provides a minimum 'floor of rights' and a 'cornerstone' of European rights protection,[84] *inter alia*, regarding the freedom of expression in its Article 10.

European and US approaches to free speech protection share much in common. Both societies derive from their liberal enlightenment traditions a reverence for the freedom of expression as a fundamental norm. Both consider the right an essential foundation for democratic society,[85] which must be applied indiscriminately and which is applicable equally to ideas that are favourably received as well as ideas that 'offend, shock or disturb'.[86] Both protect 'listeners' rights to receipt of information as well as 'speakers' right to expression,[87] and offer different levels of protection to different categories and contexts of speech, with particularly strong protection for political speech, the freedom of the press and topics of public interest.[88] Both traditions, finally, consider the freedom to be subject to certain limited exceptions.[89]

The transatlantic jurisprudential doctrines for delineating these fields of exception and gradation of protection differ very markedly. The Strasbourg Court, after determining the existence of a restriction of Article 10(1) in the facts of a given case, must follow a relatively formulaic three-step test which is provided for in the limitation clause of Article 10(2) in order to determine if the restriction of the right amounts to a violation of the Convention. In order for a given restriction to be legitimate, and thus result in no

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[82] *Halberstam/Reimann* (n37) p. 203.
[83] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156.
[84] *Heller & van Hoboken*, Freedom of Expression: A Comparative Summary, p. 5 (accessed 01/08/2023).
[85] *Handyside v United Kingdom*, App No 5493/72, A/24, [1976] 7th December 1976 § 49; *Whitney v. California,* 274 U.S. 357 (1927), Dissenting Opinion of Justice Brandeis.
[86] Ibid; *Handyside* § 49; *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216; *Cohen v. California* :: 403 U.S. 15 (1971).
[87] *Magyar Helsinki Bizottság v. Hungary* [GC], § 156; *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).
[88] *Von Hannover v. Germany* (no. 2) [GC], §§ 109- 113; *Von Hannover v. Germany* (no. 3), § 46; *Axel Springer AG v. Germany* [GC], §§ 89-95; *Tănăsoaica v. Romania*, § 41; *Gertz v. Robert Welch, Inc.* :: 418 U.S. 323 (1974).
[89] *Lopes Gomes da Silva v. Portugal*, no. 37698/97, ECHR 2000 § 33; *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

violation, pursuant to Article 10(2), it must be prescribed by law and be necessary in a democratic society for the furtherance of a *numerus clausus* of legitimate aims. This approach is similar to the ICCPR model, and demonstrates a traditionally Civilian deference to the code. *Les juges ne sont que la bouche qui prononce les paroles de la loi* – at least in principle and in the character of the formula. In reality, traditional distinctions of legal family have significantly converged and the Strasbourg Court treats the text as a 'Living Instrument' which it creatively interprets and elaborates.[90] The US judicial approach, and the 1st Amendment itself, in principle and in phrasing, is more typical of its common law inheritance; the succinct concision of the text - 'Congress shall make no law (.) abridging the freedom of speech' - is an unfinished canvas which is to be completed by inductive judicial elaboration from concrete cases. Despite these differences in method, the two jurisdictions often reach 'similar outcomes'.[91]

Nevertheless, crucial concrete distinctions have emerged. These distinctions may be organised as falling into two buckets. The first bucket contains distinctions in the legal treatment of substantive categories of speech and the second contains distinctions in the status of private entities. Both of these distinctions have become increasingly salient in the online context. In the first bucket, we may consider a variety of speech categories which have shown a tendency toward exponential propagation in the online context, such as hate speech, disinformation, false statements, incitement to violence, defamatory speech, insult and various forms of extremist and terrorist content. Many of these concepts are ill-defined and overlap significantly. For example, the concept of hate speech has no authoritative definition.[92] In this context, the phrasing in ICCPR Article 20 is most relevant given that the US has specifically made a reservation in regard to that Article.[93] ICCPR Article 20(2) prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. The CoE 'claims to be the first and only international intergovernmental organisation which has adopted an official definition' of hate speech,[94] and the Convention's European public order, as well as many constitutional traditions of European states, abide by the ICCPR, considering any flagrant hate speech to be 'clearly unlawful' and thus excluded

[90] *Tyrer v United Kingdom*, App No 5856/72, A/26, [1978] ECHR 2.
[91] *Heller & van* Hoboken (n84) p. 7.
[92] Id. p. 8.
[93] Id. p. 7
[94] European Parliament LIBE Committee, p. 30.

from the Convention's protection.[95] Certain extremist hate speech, like Holocaust denial, has been treated as an *abus de droit* under Article 17 of the Convention.[96] In cases of doubt regarding whether speech amounts to hate, the Court typically applies the standard Article 10(2) limitation formula, with a particular set of criteria deriving from the *Delfi* case to be applied in the intermediated online context.

On the other hand, hate speech is 'fully protected' by the US 1st Amendment, unless it is defamatory, manifests a 'true threat' or an incitement to violence. In addition, thresholds for reaching these fields of exception are high. For example, the applicable standard for incitement to violence is 'immanent lawless action'; a doctrine derived from a 1969 case in which the US Supreme Court (USSC) restricted the State of Ohio from punishing a Ku Klux Klan leader for a speech advocating violence against black people and Jews. The USSC found this KKK leader's speech to be protected because its advocacy for illegal acts of violence was not sufficiently immanent.[97] Regarding disinformation; both jurisdictions protect the right to promulgate falsehoods at the constitutional level (USSC/ECtHR),[98] though there is currently a 'wave of regulation sweeping across Europe targeting disinformation on online platforms' and this may be a field of swift development for Strasbourg case law.[99]

In the second bucket, we may consider distinctions regarding; the speech rights of legal persons; the legal obligations of private entities to secure free expression; net neutrality laws and; as previously discussed, the variable permeability of liability shields for internet intermediaries. Some of these latter aspects will be discussed in the following section.

In order to accurately understand a society's speech norms, it is necessary to examine the values which the society balances against freedom of expression. In today's context, in the aftermath of the GDPR and a *Zeitgeist* of anxiety surrounding emerging surveillance capitalist tech within the digital economy, it is tempting to consider the freedom of expression's diametric equivalent within the European legal order to be the right to privacy. The corollary argument might maintain that the transatlantic divergences in the protection of speech derive from the insufficiency of this constitutional counterweight within American legal culture; an insufficiency which might

[95] *Delfi AS v Estonia* (2015) ECtHR 64669/09.
[96] *Heller & van* Hoboken (n84) p. 8.
[97] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[98] *Heller & van* Hoboken (n84) p. 9.
[99] *Fathaigh & van Hoboken*, Regulating Disinformation in Europe, p. 9 (accessed 01/08/2023).

stem from a cultural ambivalence, or lack of concern, which Americans evince toward the notion of privacy. This hypothesis has a tempting simplicity; after all, Europe codifies both values in its 'constitution', in Convention Articles 8 and 10 respectively, whereas only free speech is explicitly codified in the US Constitution, in its 1st Amendment, while privacy is a 'penumbral' right, interpolated within other rights.[100]

While this reasoning points in a helpful direction, it is neither comprehensive nor strictly accurate. It is inaccurate simply because, as James Q. Whitman observes, American law 'is obsessed with privacy' and Americans are 'just as obsessively attached to *their* privacy as Europeans'.[101] Whitman's elegant thesis ultimately underlines that it is more accurate to say that Americans do not adequately protect a *European* concept of privacy, while Europeans often do not adequately protect the *American* concept. In addition, privacy standards are a manifestation of a deeper normative foundation. 'European and American sensibilities about privacy grow out of much larger, and much older, differences over basic legal values' and privacy is a 'member of a much wider class of legal protections'.[102] There is a value in European legal culture which is absent from US constitutionalism and this value is an 'evolution of the spirit of Roman law', as the German jurist Rudolf von Jhering observed, 'from the material to the immaterial';[103] more concretely, an evolution of the Roman law of insult toward the German law of personality. This law of personality, in the modern era, is frequently referred to as deriving from values, variously described as 'respect', 'reputation', 'honour' or, perhaps most inclusively, 'dignity'. This deeper value, which is of an ancient derivation, is the umbrella under which Europ ean rights, *inter alia*, to privacy and protection from insult, take shelter.

On the other hand 'dignity is quite alien to the American tradition'[104] and in its place is the equally fundamental norm of 'liberty'. There is a popular narrative that this reverence for the protection of dignity, honour and informational self-determination within German and European law derives from the indignities of war, fascism and the Holocaust.[105] Whitman argues the derivation is much deeper; a 'centuries-long, slow-

[100] *Griswold v. Connecticut*, 381 U.S. 479 (1965) § 484-85; 'these penumbral rights of "privacy and repose."'.
[101] *Whitman*, The Two Western Cultures of Privacy, p. 1158 (acc. 01/08/23, *emphasis* added).
[102] Id. p. 1158 ff.
[103] Id. p. 1184.
[104] Id. p. 1221.
[105] Id. p. 1165.

maturing revolt' against the sharp hierarchies which characterised European society throughout the seventeenth, eighteenth and nineteenth centuries. Uncomfortably for Europeans, Whitman asserts that the fascist period was a crucial phase within this 'continuous history of the extension of honour throughout all echelons of continental society'.[106] Whitman lobbies reasonable arguments to support this position, for the purposes of this paper, the crucial takeaways are as follows.

First, the notion of privacy is culturally, geographically and temporally contingent. Privacy takes 'disconcertingly diverse forms' and 'seems to differ strangely from society to society'.[107] This extreme variety can be demonstrated in regard to a vast historical and contemporary ethnographic literature. However, salient differences emerge even between ostensibly similar Western-industrial and liberal societies like Europe and the US. These differences have resulted in significant privacy-related controversies and 'major trade conflicts over the protection of consumer data' throughout recent decades.[108] Secondly, given this diversity, to deem one standard of privacy to be higher than another is a value judgement which relies upon contingent intuitions about the content of what is reasonable and appropriate. Thus, such arguments reduce complexity to a dichotomy between good and bad values, which often results in the erasure of pluralistic and competing visions of privacy, and the erasure of the persistent presence of an 'other' against whom European norms of 'honour' and 'dignity' have been constructed. Third, European privacy is best understood as a feature of a broader European value of 'dignity' which has deep historical roots and which is unknown to US law. Finally, in respect to speech norms; the content of the freedom of expression in a given society can be understood and delineated in respect to the 'constitutional magnitude' of the values which constrain and oppose it. In the US, the freedom of speech is paramount. This value is relatively unconstrained and 'almost always wins out over the countervailing values' except where the expression immanently threatens the liberty of another person, construed as physical autonomy and self-determination.[109] In Europe, the freedom of expression is countervailed and often outweighed by a value of human dignity, with the result that speech may be constrained in a much wider variety of circumstances than in the US.

[106] Id. p. 1166.
[107] Id. p. 1154.
[108] Id. p. 1156.
[109] Id. p. 1176.

In the following section, the concrete effects of these fundamental distinctions will be examined in regard to the distinct development of internet regulation on either side of the Atlantic.

2. Up-River: Secondary Law and Guidance

In the mid 1990s, first in the US, and then in the EU, legislators were in the process of developing a first generation of internet regulations. Though the EU's Data Protection Directive (DPD) of 1995 would exert phenomenal influence on global internet governance, particularly through mimetic *de jure* transplantations,[110] this Directive cannot be termed internet regulation, *per se*, because the DPD was, in reality, a codification in EU law of privacy norms 'already established across many European countries in the 1970s',[111] and was prefigured in CoE Convention 108 of 1981 and, thus, the principles upon which it was founded long predated the internet's emergence. In regard to legislation specifically aimed at regulating the internet, the US Congress would be the first to move with the adoption of Section 230 in 1996. Given that, as indicated in section one of this paper, US congressional polarisation and gridlock had already begun to calcify with President Bush's regulatory *volte-face* in 1992, it is perhaps only because this obscure provision, and the internet itself, was so little understood at the time, that it achieved adoption.[112] In 1998, the US congress would follow this up with the more sectoral-targeted instrument of the Digital Millennium Copyright Act. From then until the present day, discounting topical amendments, such as 2018's FOSTA and SESTA Acts which carved out exceptions for sex trafficking offences within Section 230's blanket intermediary liability immunity,[113] and despite hundreds of legislative reform proposals tabled throughout the past decade,[114] the US Congress would cease to be active in the production of internet regulation.

This early period of regulatory development in the US was characterised by a mood of technological optimism sometimes described as an era of 'internet exceptionalism'.[115]

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[110] *Bradford* (n1) p. 23.
[111] *Gstrein & Beaulieu* (n62) p. 2.
[112] *Kosseff* (n19).
[113] FOSTA (Allow States and Victims to Fight Online Sex Trafficking Act) and SESTA (Stop Enabling Sex Traffickers Act), (2018); A bill to amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.
[114] *Brookings Institution*, *Section 230 Reform* (accessed 01/08/2023).
[115] *Kosseff* (n19) p. 78.

This exceptionalist paradigm, which had a libertarian character, was best summarised by a manifesto published by the founder of the influential advocacy group, the Electronic Frontier Foundation, John Perry Barlow. This 1996 manifesto, entitled 'A Declaration of the Independence of Cyberspace',[116] espoused a vision of the internet as a 'separate place';[117] 'a realm that is not subject to traditional government laws and regulations'. [118] In 1999, Lawrence Lessig, in an influential book entitled 'Code and Other Laws of Cyberspace', would recommend a more circumspect view, holding that 'the invisible hand, through commerce, is constructing an architecture that perfects control'; that 'left to itself, cyberspace will become a perfect tool of control.[119] Despite Lessig's warning, in the US, it was Barlow's vision that prevailed, and the libertarian, *laissez faire* approach was codified into law; as Kosseff observes, 'internet exceptionalism is at the heart of Section 230'.[120]

The 'problem of liability for intermediaries on the Internet was one of the earliest problems in the cyberspace environment'.[121] Section 230, and the EU's E-Commerce Directive which would follow in 2000 at its core, aimed to address this fundamental problem of internet governance. Legislators asked whether, and under which circumstances, an intermediary might be held liable for illegality occurring upon its online platform. Determining the parameters of online intermediary liability is among the most important mechanisms through which the legislator can influence the speech environment that will emerge online. This is because exposure to liability significantly alters the incentive structures of the platform services which operate the networks through which the expressive activities of internet users are intermediated. These platforms also act as the custodians of the users' proprietary data and the frontline arbiters of permissible expression. Given the massive quantities of information that these platforms typically process, and given the conditions of anonymity which prevail in online fora, legislators in the US were concerned that the established structures of the US 1st Amendment law; through distributor and publisher's liability in defamation, would leave fledgling internet platforms exposed to a degree of legal risk which might

[116] *Barlow*, A Declaration of the Independence of Cyberspace (accessed 01/08/2023).
[117] *Savin,* p. 8.
[118] *Kosseff* (n19) p. 77.
[119] *Lessig*, p. 3 – 4.
[120] *Kosseff* (n19) 78.
[121] *Edwards* (n17).

hobble innovation in the emerging sector.[122] Furthermore, it was speculated that platforms would respond to this risk through over-correction, removing not only illegal but also merely controversial speech, resulting in collateral censorship which would harm the online speech environment from a 1st Amendment perspective.[123] Legislators were also concerned that the existing defamation standard for distributor's liability, laid down in a 1959 USSC case concerning a second hand bookseller's inadvertent distribution of an obscene novel,[124] which required proof that the distributor had 'actual knowledge' of the illegal material intermediated, would create an incentive to turn a blind eye to illegality, and forego any attempt at content moderation.[125]

This final issue would ultimately force the legislator's hand when a 1995 New York Supreme Court,[126] by applying the existing common law of defamation in tandem with the 1st Amendment to the problem of online intermediary liability, had created a 'perverse incentive for platforms to abandon any attempt to maintain civility on their sites'.[127] A bipartisan pairing of congressmen, Senators Chris Cox and Ron Wyden, drafted Section 230 to overturn that precedent by statute.[128]

Section 230, which was adopted in 1996 and remains applicable in the US today, provides intermediaries, in principle, with a blanket immunity from liability arising from illegal content posted by users on their platforms. The statute, which is explicitly framed as a 'Good Samaritan protection', is functionally dichotomous. Its protection militates through two separate provisions which have distinct but interrelated purposes. Section 230(c)(1) immunises intermediaries for their *failure to remove illegal content* whereas Section 230(c)(2) immunises intermediaries from liability for their decisions *to remove content* as moderators. Section 230 provides for a 'nearly impenetrable super-First Amendment' framework of protection for online intermediaries,[129] which affords internet intermediaries significantly more protection than their offline counterparts receive under the 1st Amendment. As such, it renders the US an outlier in its intermediary liability approach. The US is a libertarian stronghold of free speech

[122] *Kosseff* (n19) p. 70.
[123] *Cox*, The Origins and Original Intent of Section 230, § 30 (acc. 01/08/23).
[124] *Smith v. California*, 361 U.S. 147 (1959).
[125] *Kosseff* (n19) p. 28.
[126] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).
[127] *Cox* (n123).
[128] *Kosseff*, A User's Guide to Section 230, p. 771 (accessed 01/08/2023).
[129] *Kosseff* (n19) p. 95.

maximalism online, and it provides by far the strongest immunity for online intermediaries of any legal system in the world.

The first *bona fide* document of internet law to appear in the EU was a 1997 Commission initiative on electronic commerce which contained four principles to guide legislators in their approach to internet regulation.[130] The first of these principles was 'no regulation for regulation's sake'.[131] The spirit conveyed in the initiative is telling as to the mindset of the EU legislator in this early period of European online regulation. The ubiquitous narrative on either side of the Atlantic was one of potential, and there was very little conception of risk, and the approach forming in the EU was derived in large part from the American paradigm embodied in the 'Framework for Global Electronic Commerce' which was published earlier in the same year by the Bill Clinton Administration.[132] Already, the new technology was proving to be an unprecedented mechanism of ideological globalisation. However, in this nascent phase, it was primarily the US which was promulgating its normative paradigm toward Europe and this propagation was occurring primarily through influence and mimesis; the consenting EU legislator was mimicking US approaches through *de jure* transplantations, and the mechanics of unilateralism had not yet manifested. Giovanni De Gregorio explains this 'migration of constitutional ideas' from the 1st Amendment into the European legal order as occasioned by the unpredictability of the technology's development in the late 1990s.[133] The EU legislator, wary of stifling innovation and competition within the new digital economy, acquiesced to a US-derived vision of the internet as an essentially neutral, self-regulating network.[134]

The 'true beginning'[135] of European online regulation would come with the E-Commerce Directive (ECD) in 2000. The ECD provides a significantly more elaborated answer to the problem of intermediary liability than Section 230 and its liability immunity provisions are significantly more qualified and conditional than those provided in Section 230. The core of the ECD, the rules regarding intermediary liability, are codified in Articles 12 through 15. These rules have, today, been largely transposed, with only slight alterations, into the Digital Services Act of 2022, in Articles 4 through 8. De

[130] *Savin* (n117) p. 21
[131] EU COM, A European Initiative in Electronic Commerce, p. 14 (accessed 01/08/2023).
[132] White House, Global Framework (accessed 01/08/2023).
[133] *De Gregorio* (n46) p. 44.
[134] *Christou & Simpson*, p. 43.
[135] *Savin* (n117) p. 31.

Gregorio argues that the ECD, through conceiving the internet in exclusively economic terms, as an 'enabler of economic prosperity', should primarily be understood as an instrument characterised by the liberal influence of US norms.[136] Flowing from its restrained competence to maintain the single market in electronic commerce under Articles 49, 54 & 114 TFEU, the ECD scarcely even registered fundamental rights as a secondary concern; and generally assumed that only ancillary benefits, rather than risk, would flow toward rights protection by quickly securing market freedoms online.[137] It was understood that the free movement of information envisioned by the Directive would bring uncomplicated benefits which would militate to the furtherance of 'a more general principle, namely freedom of expression'.[138] This was the only fundamental right mentioned in the instrument and the consequences that the internet's development might have for dignitary rights and privacy protection were largely unforeseen. In this optimistic era, there was little appreciation of the challenges which might arise and no reason 'to fear the rise of new private powers challenging the protection of fundamental rights online and competing with public powers'.[139] The developments in European digital constitutionalism since can be seen as an effort from the Union to claw back control of the online environment and to 'emancipate itself from the US technological optimism' which remained embedded in its legislative architecture.[140]

Despite this fundamentally economic paradigmatic frame, the ECD's safe harbour provisions for intermediary liability differ very markedly from Section 230's maximalist immunity. Articles 12 through 14 ECD provide protection variegated upon the type of intermediary service concerned. Article 14 ECD is the fulcrum of the instrument's discipline as regards the platform economy and this provision was inspired not by Section 230 but by a 'comparable rule' in Section 512(c) of the 1998 US DMCA copyright instrument.[141] Article 14 regards 'hosting' services. Hosting is the type of service into which the typical online platform falls. The safe harbour for hosting services is limited in important respects. Article 14(1)(a)&(b) provide two conditions upon which the liability protection is dependent; pursuant to (a), the intermediary must not have

[136] *De Gregorio* (n46) p. 43.
[137] E-Commerce Directive, 2000, cf. Recital 9, 46.
[138] Ibid.
[139] *De Gregorio* (n46) p. 44.
[140] Id. p. 40.
[141] *Wilman*, E-Commerce Directive and the Digital Services Act, p. 318 (acc. 01/08/2023).

'actual knowledge' of the illegal content existing on its platform nor, as regards damages claims, the awareness of 'facts or circumstances' which would render the content's illegality apparent and; pursuant to (b), where the intermediary obtains such knowledge or awareness, the intermediary must 'act expeditiously' to remove or disable access to the content. The implications of Article 14 are delimited by the ban on general monitoring obligations in Article 15 which prohibits Member States from obliging intermediaries to monitor for illegality or to seek out facts indicating illegality.

The importance of Article 14's conditional clauses cannot be overstated; they transform the EU discipline over platform liability into a 'notice-and-take-down' regime which is fundamentally distinct from the US statutory immunity. The primary distinction is that the ECD regime places the intermediary at risk of incurring liability upon receipt of a notification alleging that illegal content is present and, given the subtle and contingent legal evaluations that are required to determine actual or apparent unlawfulness in regard to many forms of online expression, the intermediary, as a rational economic operator, is likely to behave in the manner that risk aversion recommends, by removing the content immediately without significant examination. This is the aforementioned concept of collateral censorship, or the so-called 'speech chilling effect'[142] of regulatory incentives which have created 'an environment (in Europe) in which the incentive to take down content from the Internet is higher than the potential costs of not taking it down'.[143]

Given the practical circumstances in which such content moderation decisions are made, both then and today, typically by an army of low-wage human content moderators, non-lawyers, often chiefly constituted of outsourced labour residing in countries which do not share, or intuitively understand, the normative balances of Western democratic rights discourses, and who under significant time pressure must conduct 'a careful, yet rapid, investigation, and a legal judgement, and an on-the-spot editorial decision, whether to risk liability', it is no surprise that there is a tendency to over-correct and produce 'collateral censorship' of lawful expression.[144]

Moving on from this era of 'digital liberalism' and this first generation of legislation, while the US has struggled to gain coherent or consistent progress, the EU has begun to 'pave the way towards a new regulatory phase of online content moderation' by

[142] *Youn*, The Chilling Effect and the Problem of PrivateAction (accessed 01/08/2023).
[143] *Edwards* (n17) p. 117.
[144] *Kosseff* (n19) p. 94.

'modernising the framework of the E-Commerce Directive'.[145] De Gregorio describes this development in three phases; firstly, the period of 'digital liberalism' already discussed; secondly, a 'bridge' period of judicial activism, which followed the Charter's entry into force at Lisbon, in which the ECJ took on an increasingly creative role re-inscribing fundamental rights as a quasi-constitutional 'shield' against the emergence of platform power and surveillance capitalism and; thirdly, the emergence of a coherent concept of European Digital Constitutionalism.[146] This constitutionalism is exemplified in the mature regulatory discipline over the EU's 'two emblematic areas' of 'content and data' as exemplified in the Digital Services Act and the GDPR, respectively.[147]

This fertile period has seen the consolidation of Europe's unilateral global hegemony over online regulation. When Bradford observed the phenomenon in 2012 and coined 'The Brussels Effect' to describe it; the EU's privacy norms were already 'spreading outside its boundaries'.[148] However, this spread was primarily due to the widespread adoption of EU-type data protection laws around the world. Thus, primarily, this was a consequence of traditional legal transplantation through mimesis rather than the kind of unilateral economic pressures that typify the Brussels Effect. That being said, even in 2012, many multinationals had begun to adopt European privacy policies internationally, and European institutions had already developed a number of unilateral approaches through global judicial enforcement measures.[149] However, with the GDPR, this privacy unilateralism exponentially expanded. Unlike its predecessor Directive which applied its geographic scope by reference to the 'use of certain equipment' upon the territory of the Union, the GDPR in Articles 2 & 3 provided scopes which contained a 'radical shift towards extraterritorial application' and were applicable to personal data irrespective of the legal status of the data-subject.[150] This expansion was demonstrated in the immediate responses of a number of the largest players within the highly concentrated platform economy. In the month of the GDPR's entry into force, in May 2018; Sheryl Sandberg announced that Facebook would extend European privacy protection to its 2.2 billion users worldwide; Google had done the same not long before announcing that, due to the immanent application of the GDPR, the

[145] *De Gregorio* (n46) p. 189.
[146] Id. p. 317.
[147] Id. p. 40.
[148] *Bradford* (n1) p. 23.
[149] *Greenberg*, The LICRA v. Yahoo! Case and the Regulation of Online Content (acc. 01/08/23).rf
[150] *Gstrein & Beaulieu* (n62) p. 9.

company was ‘taking the opportunity to make improvements for Google users around the world’; Airbnb did the same on the very day of the GDPR’s entry into force and Uber followed suit soon after.[151]

More recently, the EU has begun to unilaterally promulgate its standards beyond privacy concerns, toward the moderation of content and expression online. This development, in many respects, mirrors the evolutive genetic pattern of EU data legislation, with a delay of approximately five years. The DPD preceded the ECD by five years. The GDPR preceded the Digital Services Act by a similar time period. A comparable inter-generational genetic pattern can be traced in the relation between the data protection instruments, on the one hand, and the content-related instruments on the other. Just as the GDPR retained much of the fundamental normative architecture of its predecessor Directive while introducing some ‘novel elements’,[152] the Digital Services Act (DSA), though it contains some ‘remarkable new rules’,[153] as indicated previously, its core liability provisions ‘’remain a key feature of the DSA’s approach’ and are ‘almost literal copies’ of the E-Commerce Directive’s framework.[154] DSA Recital 16 underlines this element, explaining that the DSA aims to preserve and clarify the ECD framework, while harmonising its application, and incorporating the jurisprudence of the ECJ which has emerged since the ECD was drafted in the late 1990s.

Thus the innovations of these 2nd generation instruments appear to be primarily procedural. They retain, with certain innovative additions, the substantive frameworks of their antecedents while deepening and harmonising the architecture of monitoring and compliance, super-charging the sanctioning mechanisms and, crucially, expanding scopes toward internal market ‘externalisation’. Owing to these similarities, it is widely expected, the DSA will have a comparable global impact to the GDPR and ‘further instantiate the Brussels Effect’, impelling platforms to shape their global content moderation policies ‘to conform to the dictates of EU regulations’.[155] This process was already underway through a variety of other EU measures; most notably the voluntary approach of the 2016 Code of Conduct on Hate Speech and the recent 2022 update to the 2018 Code of Practice on Disinformation, in conjunction with the 2008 Council

[151] *Bradford* (n42) p. 143 ff.
[152] *Gstrein & Beaulieu* (n62) p. 2.
[153] *Wilman*, Verfassungsblog – Preservation (accessed 01/08/2023).
[154] Ibid.
[155] *Nunziato*, The Digital Services Act and the Brussels Effect, p. 1, 5 (accessed 01/08/2023).

Framework Decision 2008/913/JHA. The two Codes operate as voluntary agreements negotiated between the Commission and industry leaders. The flagship Code on Hate Speech was initially negotiated by four companies; Facebook, Twitter, Microsoft and YouTube; which each agreed to incorporate EU law, including the 2008 definitions from the criminal law framework decision on hate speech, into their terms of service globally. The companies agreed to this and other EU requirements because the negotiations were carried out 'in the shadow of binding law' and the Commission underlined that its voluntary approach would only continue insofar as the Commission's monitoring revealed sufficient compliance.[156] Facebook's involvement in the 2018 Cambridge Analytica scandal changed all this; and the Commission announced the prospect of a more coercive approach, which would eventually manifest in 2022 in the Digital Services Act.[157]

In January 2024, the DSA will become fully applicable and it is expected that it will have seismic effects on the global online ecosystem. In addition to an expected 'externalisation' of the European liability framework, the DSA imposes a range of mandatory obligations which fall particularly upon very large online platforms. These obligations include the crisis response mechanism in Article 36 which allows the Commission broad discretion to establish 'back room negotiations' with large platforms in order to disable access to information which constitutes a 'serious threat' and Article 33 requiring annual risk assessment reports to be made to the Commission by very large platforms, and for these platforms to work with the Commission in developing mitigation measures.[158] These provisions in particular have been flagged by civil society groups as insufficiently transparent and as 'bypassing democratic processes and forfeiting users fundamental rights'.[159] Daphne Keller cautions that 'whatever we think of the current set of regulators, we should be wary of granting too much discretion and power over fundamental rights to their successors'.[160]

The DSA's *de facto* promulgation, through the Brussels Effect, will render distinct constitutional speech norms increasingly obsolete within online contexts on a global scale.[161] Due to the size of the EU market, and the inelasticity of the internal consumer

[156] *Bradford* (n42) p. 158.
[157] Ibid.
[158] *Keller*, Verfassungsblog - The EU's new Digital Services Act (accessed 01/08/2023).
[159] Ibid.
[160] Ibid.
[161] *Nunziato* (n155).

market it regulates, the market cannot appreciably punish the EU by diverting investment to other jurisdictions, and the major powers are no exception. The DSA's procedural transparency obligations will 'create tensions and, in some cases, outright conflicts' with a range of recently enacted US State legislation.[162] For example, a recently adopted Texas law, House Bill 20, criminalises viewpoint discrimination in content moderation activities by large platforms. The law imposes such onerous neutrality requirements that platforms are likely to respond by declining to moderate any content at all, and thus eliminating legal risk. However, 'a platform's decision to decline to moderate any content would render it in violation of the DSA', and thus exposed to legal risk before European Courts.[163] Regardless of the fact that, under US law, the DSA's obligations would likely be deemed 'unduly burdensome' prior restraints on speech, and therefore violative of the First Amendment, there will be no possibility of constitutional judicial review because, though the effects of the obligations are practically employed, they are neither applicable nor binding within the US.[164] If these predictions manifest as expected, both Section 230 and the US's hundred of years of 1st Amendment jurisprudence will fade gradually into obsolescence online, converging toward European hegemony, and there is 'very little the United States can do to stop the EU' from displacing its norms and 'regulating its domestic market'.[165]

D. Judicial Application

1. The Changing Role of the Judicature: Amplification or Irrelevance?

In 2009, Jack Balkin predicted that constitutional jurisprudence on free expression will become 'increasingly irrelevant' as our economic and social existence becomes progressively embedded within the, primarily self regulatory, private ordering of online space.[166] Oreste Pollicino seems to contradict Balkin's 2009 prediction when, writing in 2021, he reviews a decade of 'amplification of judicial momentum' and an 'increase in the role of judges in the information society'.[167] This amplification, Pollicino argues, is coextensive with the speed of technological development. The exponential speed of

[162] Ibid.
[163] Id. p. 8.
[164] Id. p. 2.
[165] *Bradford* (n42) p. 50.
[166] *Balkin* (n48) p. 427.
[167] *Pollicino* (n47) p. 13.

innovation in the internet era serves to stretch the 'traditional gap between the law and technology' in which the law necessarily 'lags behind technological advances' and the responsibility for compensating for this 'legislative inertia' has fallen 'heavily upon the shoulders of the courts'.[168]

Regardless of the ostensible contradiction, Balkin's and Pollicino's observations are not mutually exclusive and each approaches analysis of the role of the courts from a distinct interpretative frame. Firstly, Balkin's prediction is relativistic rather than absolute; he considers that constitutional jurisprudence will become *less* relevant than it was in previous technological eras, and he concludes with the proviso that judicial protection of constitutional rights online 'will remain quite important'.[169] However, Balkin predicts that the 'key free speech battles' and the 'trajectory of future policy debates' in regard to free expression online will increasingly revolve around questions of institutional and technological design which 'are largely beyond judicial competence'.[170] Balkin in 2009 saw an emerging recourse to private adjudication of fundamental rights balancing online or, as it was described in a previous section of this paper, an incipient 'triangulation' in the geometry of constitutionalism. In 2020, Judge Spano of the Strasbourg Court alluded to this triangulation when he warned of the waning relevance of traditional judicial review mechanisms and remedies within the 'increasing tendency to privatise or outsource to the platforms the final determination of the scope and the content of free speech and privacy online'.[171]

This state cession, of speech regulatory authority to the private sector, is crucial to the manner in which Bradford's phenomenon militates online. While Bradford's term, the Brussels Effect, is used to describe a range of extraterritorial powers which the EU exercises, the core of Bradford's effect is characterised by its *de facto* effects. In its most essential and pervasive aspect, the Brussels Effect is a system of economic incentive. It propagates extralegally through the risk aversion and profit incentive of private entities. Thus, as Balkin predicted, this important global phenomenon is 'largely beyond judicial competence', at least as judicial competence traditionally subsumes retrospective review of harms and rendering of remedies *ex post facto* for injuries and rights infringements.

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[168] Ibid.
[169] *Balkin* (n48) p. 441.
[170] Id. p. 444.
[171] *Spano*, in CoE, p. 201 – 209.

At the same time, Pollicino's observation regarding an 'amplification' of judicial responsibility, and creativity, in the internet era, also holds true. The difference in emphasis between Balkin's and Pollicino's assessments may in part reflect the time of writing and the scholars' distinct jurisdictional derivation. Balkin, writing from Yale in 2009, had observed 'legislative inertia', which had metastasised since 1998 toward a judicial 'constitutional stagnation' by which US Courts, including the USSC, had limited 'any attempt to regulate online intermediaries'.[172] Pollicino, writing from Bocconi in 2021, on the other hand, was reflecting upon an a decade of 'incredible metamorphosis within the European system' since Lisbon,[173] with a new judicial role creatively reimagining 'classic models of protection for fundamental rights' including new definitions for old 'consolidated concepts of sovereignty and territory'.[174] This emboldened Court, however, would be responsible for the constitutionality of an emerging repertoire of legislative methods by which Brussels sought to reassert control within the triangulated geometry of online power. Brussels was in the process of re-imagining its role; from a liberal partnership with the intermediary toward a more paternalistic discipline. While Balkin saw congressional stasis and a divestment of enforcement power from the public to the private sector, Pollicino saw legislative fecundity in Brussels and a crucial role for the highest European Courts in transforming constitutional boundaries for a transformed landscape of rights protection.

In the following discussion of judicial application, it is important to note that the judicial competence of the CJEU is predominantly restricted to reviewing categories of unilateralism which militate through forms of territorial extension, rather than pure expressions of the *de facto* Brussels Effect which, as mentioned, largely operate in parallel to the legal system, through the leveraging of economic incentives. Territorial extension is a category of key legislative techniques employed by the EU which, as described by Joanne Scott, are 'triggered by the existence of a territorial connection' but require 'an assessment of foreign conduct' and thus tend to encourage or, depending on viewpoint, coerce compliance with EU standards in third countries.[175] A relevant and controversial example of territorial extension is the EU's practice, under GDPR Article 44, of 'rendering the transfer of personal data to third countries

[172] *Pollicino* (n47) p. 170 ff.
[173] Id. p. 45.
[174] Id. p. 189.
[175] *Scott* in: Cremona/Scott (eds) at p. 22.

contingent upon the country in question having adequate data protection policies in place'.[176] Scott underlines that, though 'there is no necessary relationship between territorial extension and the Brussels Effect', territorial extension can 'serve to promote the emergence of the Brussels Effect' and it is these applications which find themselves within the competence of courts to influence and, thus, which form the subject of the present discussion.[177]

Somewhat paradoxically, the advent of the internet has exacerbated divergences in transatlantic patterns of jurisprudence on the freedom of expression even while the Brussels Effect has resulted in significant real-world convergence toward a globalised European norm of online speech. It is often assumed that the foundational texts of internet platform regulation on either side of the Atlantic predetermined the emergence of dissonant transatlantic regimes intermediary liability online. The crucial role of the judiciary in regime formation, however, is increasingly overlooked or forgotten. US jurisprudence expanded the 'constitutional magnitude' of speech in the internet era while the 'position in Europe seems to be the opposite'.[178] Where the USSC has perceived the internet as a vehicle for the 1st Amendment, the highest European courts have perceived 'jeopardy' to other values,[179] and have tended to constrain the Freedom of Expression, viewing it as increasingly 'yielding';[180] a 'weapon' which, in the online context, should be considered to be 'more dangerous than it could be in the world of atoms'.[181]

2. The Responsibility and Role of the Intermediary

The position of the US Courts, which has largely remained static, but for accretive jurisprudential carve-outs, since the late 1990s, evolved as follows; in 1996, the very day President Clinton signed the Telecommunications Act, various civil liberties groups brought legal action challenging the constitutionality of large parts of the Communications Decency Act; the act within which Section 230 was housed. In 1997's *Reno v ACLU*, the USSC struck down the majority of the Act as an 'over-broad' and

[176] Id. p. 21.
[177] Id. p. 32.
[178] *Pollicino* (n47) p. 67.
[179] Id. p. 91.
[180] Ibid.
[181] Id. p. 92.

unconstitutional violation of the 1st Amendment,[182] but the Court left Section 230 intact and applicable. In this American *Handyside* for the internet era, the USSC lays out a comprehensive, early statement of its position regarding online expression. The Court staked a position against government intervention, holding that 'regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it' and, explicitly refashioning Justice Holmes' 1919 Dissent in *Abrams v USA*, the Court held that protecting the 'new marketplace of ideas' should outweigh 'any theoretical but unproven benefit of censorship'.[183]

The crucial question, however, regarding the meaning and scope of Section 230 would be decided later that year by the Fourth Circuit in the case *Zeran v AOL*[184] which was the first binding judgement interpreting Section 230 and, in terms of influence, is perhaps 'the most important court ruling in internet law'.[185] The statute's evolution into a 'nearly impenetrable Super First Amendment' was crucially facilitated by an extremely broad statutory interpretation in *Zeran* in 1997. Given that this judgement has not been overturned in the nearly 30 years since its promulgation, it is sometimes forgotten that the content of the US regime of blanket immunity was not necessarily clear, or predetermined in the text of Section 230. This is because the famous 26 words[186] of Section 230 allow for both a narrow and a broad interpretation. The statute precludes treating intermediaries as 'publisher or speaker' in regard to user generated content, but it is silent as regards whether intermediaries may be treated as 'distributors' of such user content. Thus, the argument for a narrow interpretation, which sticks close to the literal phrasing, is that the statute allows for a finding of liability where the intermediary distributed the illegal content and knew, or ought to have known, of its illegality. The *Zeran* court, however, opted for the broader interpretation in 1997, establishing a blanket immunity which has remained in place since given the Supreme Court's persistent reticence to review the statute until 2023, when it was seen to avoid ruling on the Section's scope.[187] The *Zeran* court's interpretation has been described as a 'fatal flaw' which turned a 'good-faith monitoring program whose goal is to preclude dissemination of illicit and improper materials' into a blanket exemption

[182] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
[183] *Pollicino* (n47) p. 72.
[184] *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).
[185] *Goldman,* The Ten Most Important Section 230 Rulings, p. 3 (accessed 01/08/2023).
[186] *Kosseff* (n19).
[187] *Liptak*, NYTIMES - Supreme Court (accessed 01/08/2023).

which allows the intermediary even where it is 'specifically made aware' and 'repeatedly and clearly notified' of the presence of, *inter alia*, terrorist propaganda, human trafficking conspiracy or 'child pornography on its service to do absolutely nothing, and reap the economic benefits flowing from the activity'.[188]

Just as US courts expanded the 1st Amendment in the internet age, European courts have contracted the freedom of expression. While Strasbourg continues in its historical role as the guarantor of human rights in the European region, the Luxembourg Court (CJEU or ECJ) has contributed significantly and particularly since 2009, pursuing an activist agenda to realise the 'community of values' envisioned at Lisbon and catalysing an 'emancipation of the EU from its original economic nature'.[189] However, the two high European courts have distinct functions, and their jurisprudence does not always synergise. The Strasbourg Court operates in the mould of a 'constitutional court of fundamental rights in the context of the Council of Europe'[190] and exercises a system of judicial review 'essentially similar'[191] to that of the US Supreme Court, for example. The CJEU, conversely, is constrained within a peculiar and formalised system of preliminary reference, which precludes the Luxembourg Court from more broad-ranging scrutiny of EU Member State law. The EU Court is 'bound by the terms' of the discrete and abstract legal questions referred.[192] In certain cases, institutional dissonance is apparent and one such case is the aforementioned landmark ECtHR Grand Chamber judgement in *Delfi AS v Estonia* which may be viewed as an analogous application to the *Zeran* claim in US jurisprudence; in the sense that both cases required a first binding 'federal' answer to the question of intermediary liability. The Grand Chamber in *Delfi*, however, would come to a conclusion which is not only antithetical to the US position, but which very likely creates dissonance with EU law.

To summarise the most pertinent points; the case concerned hate speech within the user comments section of a major Estonian online newspaper and the Grand Chamber ultimately found no violation of the Convention regarding an Estonian ruling which had found the news organisation liable for failing to eliminate hate speech on its platform despite that news organisation having acted expeditiously to remove the illegal content immediately upon receiving notification of its existence. The case essentially turned

[188] *Kosseff* (n19) p. 99.
[189] *Pollicino* (n47) p. 68.
[190] Id. p. 87.
[191] *Amponsah*, p. 67.
[192] *Pollicino* (n47) p. 88.

upon the question of whether the Estonian Supreme Court's dis-application of the Estonian transposition of the E-Commerce Directive, in favour of the more demanding standard under the Estonian obligations act, could be deemed to have been reasonably foreseeable to the applicant company. The company, which operated content moderation systems sufficient for compliance with EU law, complained that it could not have foreseen that the domestic court would find the ostensibly relevant EU Directive law to be inapplicable. It is interesting to observe the Court's explication in an official Q&A document published since that it has declined to 'resolve issues of interpretation and application of domestic law' and found, tellingly, that it had not examined EU law in the case, despite extensive tracts of EU legislation and case law being referenced and examined in the judgement.[193] In this author's view, the case reveals a problematic ambiguity in the interstices between the mandates of Strasbourg and Luxembourg respectively; the Grand Chamber claims to refrain from examining EU law while declaring the disapplication of EU law to have been foreseeable to the applicant, thus legitimating the interference under Article 10(2). The significant precedential ambiguity of this seminal ruling, which was observed from by US commentators as a 'test of how far the European Convention's free expression rights extended in the Internet age',[194] have since been somewhat clarified in the scholarly writing of Judge Spano who cautions against drawing 'grand and catastrophic conclusions as to Delfi's precedential value' and who considers the case as uniquely unsuitable among Grand Chamber judgements to derive 'broad interpretative conclusions'.[195] In addition, one can extrapolate a consistent theme from the case law on intermediary liability which has since been derived from *Delfi*,[196] though this was inadequately spelled out in the *Delfi* ruling itself. This consistent theme indicates an emergent principle of 'graduated content responsibility';[197] that the gravity of the content is dispositive. In concrete terms, where 'the pivotal elements of hate speech and incitement to violence' are absent, the Strasbourg Court is inclined to rule that

[193] CoE, Q & ADelfi AS v. Estonia, Grand Chamber judgment (accessed 01/08/2023).
[194] *Kosseff*, p. 150.
[195] *Spano*, 2017 (1), p. 676.
[196] See, *inter alia*; ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, App. No22947/13, 2 February 2016; *Pihl v. Sweden* (DEC), App. No. 74742/14, 7 February 2017; *Tamiz v. the United Kingdom*, App. No. 3877/14, 19 September 2017; *Høiness v. Norway*, App. No. 43624/14, 19 March 2019.
[197] *Spano*, 2017 (2), § 5.

intermediary liability is precluded by the Convention.[198] Had the case been referred to Luxembourg, as arguably it should have been under the restrictive *Acte Clair* doctrine of the *Cilfit* jurisprudence,[199] then it is 'apparent that the CJEU would have followed a different judicial path' by rendering Article 14 ECD applicable read alongside Article 11 of the Charter.[200] This outcome would have likely resulted in significantly less transatlantic controversy and uproar, and would have resulted in a more unified European approach to the question. At present, ambiguity reigns as regards the European constitutional position toward the question of intermediary liability, and it remains unclear how this Strasbourg precedent affirming laws imposing constructive knowledge on intermediaries for grave illegality should be reconciled with Article 14's requirement of actual knowledge under the E-Commerce Directive. This dissonance derives in large part from the distinct mandates of the Courts.

3. First Order Questions: Substance and the Global Takedown Order

Intermediary liability laws mould the overall macro-dynamic of content moderation. Thus they largely define the overall character of a speech environment online. However, such laws are meta-law, or procedural mechanisms, which dictate the conditions under which liability may attach to a third party which provides a service through which some unlawful behaviour is conducted. Such laws are silent as regards the question of which speech, content or conduct may be considered unlawful in the first place. This first order question, relating to substance, in the US, is within the domain of the USSC 1st Amendment jurisprudence. In the EU, however, this question is 'constitutionally divided' between the Union and the Member States, with the latter commanding the lion's share of the competence.[201] Beyond the Council Framework Decisions on serious crimes within the field of Justice and Home Affairs, and separate regimes for harmonising copyright and IP, the Union 'has no laws which directly regulate illegal and harmful content'.[202] Rather, the EU and the CoE impose constitutional principles on fundamental rights, and free movement in the EU, which provide guardrails for domestic legislation in fields relevant to content regulation.

[198] *Spano* (n195) p. 674.
[199] *Srl CILFIT v Ministry of Health* (1982) Case 283/81.
[200] *Pollicino* (n47) p. 87.
[201] *Savin* (n117) p. 83.
[202] Id. p. 84.

Among these fields, defamation plays 'a vital role in attempting to 'reconcile the competing interests of freedom of expression and the protection of individual reputation'.[203] In principle, the jurisprudence of the Strasbourg Court should penetrate to establish, for example, a high minimum standard of tolerance for political speech which theoretically should be afforded a narrow margin of appreciation.[204] However, EU Member States exhibit significant heterogeneity in regard to the substance of political content regulation. This heterogeneity, through the centralised mechanism of the DSA, will likely compound, through cumulative aggregation, to externalise a 'super-European' speech standard.[205]

For example, while sixteen EU member states prohibit holocaust denial, there is a more variegated approach to other elements that are associated with Nazi ideology; consider that only five states prohibit the display of Nazi symbols.[206] This issue, over which there is little international consensus, tends to divide opinion into camps between the common law and the civil law.[207] The 1st Amendment, for example, protects all the categories of speech which are criminalised in Germany under § 130 *Strafgesetzbuch*, and which have been carried over to the online sphere through the controversial *Netzwerkdurchsetzungsgesetz*.

Perhaps more controversially; a range of European states either criminalise offense, insult, satire and parody toward the King or Head of State, or render the Head of State under special civil protection from defamation, as in France since that country decriminalised the offence in 2013.[208] Austria and Finland criminalise blasphemy, while Hungary prohibits a 'wide swathe of pro-LGBTQ+ content' where it is ''accessible by minors'.[209] Global platforms, under the DSA, exposed to massive fines via criminal complaints deriving from these European content regulations, are likely to remove content that even resembles such locally prohibited speech, with the effect that criticism, *inter alia*, of certain European heads of state, or visibility of alternative LGBTQ+ lifestyles, may become increasingly invisible online.

The above phenomenons deriving from the DSA, it should be noted, are among the

[203] *Collins*, p. 4.
[204] *Lingens v Austria* (1986) 8 EHRR 407.
[205] *Nunziato* (n155).
[206] *EU-PARL*, Holocaust denial in criminal law (accessed 01/08/2023).
[207] *Guttenplan*.
[208] *Nunziato* (n155) p. 5.
[209] Ibid.

category of unilateral effects not subject to judicial review at the European level because of their *de facto* promulgation. The CJEU, however, has been integral in the formation of a related *de jure* phenomenon; the legality of take-down orders deriving both from local defamation laws and from the 'Right to be Forgotten' in Article 17 of the GDPR. Such take-down orders have, *inter alia*, concerned just such categories of speech as those listed in the previous paragraph, over which little international consensus exists. An important early example of such a dispute is the *Yahoo! LICRA* scandal which subsumed cases before the High Court of Paris and the US Ninth Circuit Appeals Court.[210] The anti-discrimination advocacy group LICRA successfully argued before the French Court for the blocking in France of a NAZI relic auction held online, via Yahoo!, though administered by auctioneers deriving from IP Addresses in the US, and in blocking the material the French Court *de facto* made the 'applicable at global level' due to the impossibility of partitioning, and the ineffectiveness of geoblocking which could be circumvented.[211]

The ECJ's 2014 holding in *Google Spain* which established the Right to be Forgotten, later codified in GDPR Article 17, is typically regarded as a data privacy issue. However, the case provides a good example of the inalienability of privacy from expression. To discuss *Google Spain* as either a case regarding privacy on the one hand, or expression on the other, is merely a matter of interpretative framing. The case concerns both values, which are 'two faces of the same coin'.[212] The ECJ in that case ruled against AG Jääskinen's concerns regarding free expression, and his recommendation that Google could not be required to remove links to dated personal data without first having recourse to consultation with the individual websites concerned. Furthermore, in an instance of privatisation, tthe ECJ asserted that Google itself had the responsibility to 'assess whether the conditions for the exercise of this right are met as well as its compatibility with freedom of information'.[213]

More recently, the cases of *Google v CNIL*[214] and *Eva Glawischnig-Piesczek v Facebook*[215] further clarify EU removal powers in the context of an inherently permeable jurisdictional frontier where only global enforcement of the injunction

[210] *Greenberg* (n149).
[211] *Pollicino* (n47) p. 38.
[212] *Buttarelli*, Privacy in an age of hyperconnectivity, p. 4 (accessed 01/08/2023).
[213] *Pollicino* (n47) p. 91.
[214] Case C-507/17 *Google v CNIL*, ECLI:EU:C:2019:772.
[215] 9Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, ECLI:EU:C:2019:821.

appears to render the removal practical and effective. At the same time, under black-letter doctrines, such global *de jure* enforcement also arguably conflicts with basic principles of international law; including the law of sovereignty and jurisdiction and the conditions for extraterritorial action.[216] In *Google v CNIL*, AG Szpunar observed the *acquis*'s silence on the issue of the territoriality of de-referencing[217] and, thus, opposed the 'expansion of the territorial scope of fundamental rights beyond EU borders'.[218] The AG observed the 'invasion' of sovereignty, and the danger of counter-responses resulting in a 'race to the bottom, to the detriment of freedom of expression, on a European and worldwide scale'.[219] The ECJ, in this case, with certain qualifications, accepted the AG's self-restraint though it is speculated that this represents a 'tactical retreat' pending further legislative guidance rather than a repudiation of 'legal colonisation'.[220]

Eva Glawischnig-Piesczek v Facebook primarily concerned the compatibility with Article 15 ECD, as well as the territorial reach, of a removal order against 'identical and equivalent' content to a post deemed unlawful under national law. The fact pattern is instructive for the present inquiry because it related to a piece of political expression which hovers on the border between defamatory, insulting and highly valued political speech. The case concerned a Facebook post which, *inter alia*, described the applicant, who was a former leader of the Austrian Green Party, as a 'lousy traitor' (*miese Volksverräterin*), a 'corrupt oaf' ('*korrupter Trampel*') and a member of a 'fascist party' ('*Faschistenpartei*')'.[221] While the content was multifaceted, and has been subject to various analyses as regards its degree of harmfulness, there is a reasonable chance that the speech concerned, which was deemed unlawful under Austrian defamation law, would have received maximum protection, as political speech, under the First Amendment. Like in *Google v CNIL*, the CJEU did not deny the possibility of Member State law being enforced globally, and the Court also found that orders could mandate removal both of 'identical and equivalent' content, under certain conditions, without violating the E-Commerce Directive.[222] It should be underlined that despite

[216] *Kamminga*, Extraterritoriality (accessed 02/08/2023).
[217] *Pollicino* (n47) p. 163.
[218] Ibid.
[219] Ibid.
[220] Id. p. 164.
[221] *Daskal & Klonick*, Politician Is Called a 'Lousy Traitor,' Should Facebook Censor It? (accessed 01/08/23).
[222] *Pollicino* (n47) p. 169.

elements of 'self-restraint' in these two latter decisions, both rulings only restrained take-down approaches 'at the EU level' and could also be read as 'a green light for national courts to impose a global reach to their decisions on the removal of online content'.[223] Pollicino describes the current position of 'self restraint', *qua* delegation to the Member States, as a 'sword of damocles' in which the ECJ eschews its responsibility to dictate clear guidelines and, thus, leaves a discretionary space for political actors at the national level to enforce global action.[224]

E. Concluding Remarks

To conclude, this section will return to address the research questions which were enumerated in the introduction. Rather than aiming to definitively resolve these questions, these concluding remarks aim to reflect upon the paper's insights and identify connections and thematic resonances which may be drawn between the paper's findings. As such, these concluding remarks function as a beginning, rather than an ending, and a sounding board for future investigations in what is a fast-developing field of law & technology.

Regarding the first research question; related to the factual conditions, minimum thresholds and maximum limits, for exercising unilateral power in regard to online content; this paper's findings reveal a particular complexity and nuance which may be peculiar to the operation of the Brussels Effect within online content regulation. The EU's recent expansion toward unilateral methods of norm propagation in regard to online content has underlined that unilateral power does not necessarily accrue, as was formerly believed, to a jurisdiction 'by the simple virtue' of its 'being the most stringent'.[225] The EU places significantly less stringent restrictions upon free expression than a variety of authoritarian countries but the EU prevails, nevertheless, in channelling its endogenous speech standards through the global terms of service of the most widespread and influential platforms. For example, China typically fails to elicit the compliance of exogenous platforms which, despite its huge consumer market, elect to forego the possibility of universal distribution, in favour of drawing an upper limit at the EU's exacting, but not superlative, stringency standard. This peculiarity

[223] Ibid.
[224] Ibid.
[225] *Bradford* (n1) p. 15.

likely arises in large part from the platform's concern that their privacy policies, community guidelines, algorithmic procedures and terms of service reflect the platforms' values and reinforce their brand identity. In other sectors, by contrast, the most stringent policy invariably prevails.

This insight may contain the seed of an answer to the second question enumerated in the introduction; the question regarding whether European unilateral power to shape online speech standards implies a coercive potential or depends upon the EU's continuing proclivity to promulgate standards which are 'normatively desirable and universally applicable'.[226] It would be a *non sequitur*, however, to determine that because EU standards typically prevail and promulgate internationally, while Chinese standards do not, then EU standards are somehow consensually disseminated or must be 'normatively desirable'. The abstract deduction which was provided in the introduction might be recalled here; that deduction, or rebuttable presumption, began from the premise that unilateralism implies a lack of consent. It is possible, however, to ask whether the EU's behaviour is truly unilateral. Though it does not achieve consent from the third country governments concerned and, thus, does not derive consent through any traditional democratic means, while affecting the experience of internet users in third countries. However, the EU may, theoretically, derive a form of consent from the intermediary and, via the intermediary, from the end user.

The evidence of the European standard's ability to promulgate, to the exclusion of more stringent competitors, does indicate that the standard achieves some degree of compliance or responsiveness from the platforms themselves. Whether such compliance indicates the platforms' consent, and precludes coercion, however, is a question which may neither be possible, nor illuminating, to definitively answer here. This is because the line between coercion and consent, especially in arm's length negotiations between parties with similar bargaining power which each represent a nexus of corporate and public interests, is extremely difficult to delineate. Nevertheless, in principle, it might be possible to establish some form of consensual linkage between the end user in the third country, whose experience is shaped by the hegemon's regulation, and the hegemon itself, but this linkage must be conveyed through the intermediary. Such a linkage would rely on determining; first, that the platform's agreement with the hegemon and; second, the platform's agreement with

[226] *Bradford* (n1) p. 37.

the end user; have each been founded in an adequate degree of consent. The relation, whether or not it is coercive or consensual, is a triangulated alternative to the traditional bilateral dynamic of the social contract.

A contractual agreement exists between the service provider and recipient. This is the terms of service between the third country user of the platform service and the intermediary itself. However, significant analysis would be required to establish whether the quality of the consent upon which such agreements are based should amount to a *consensus ad idem* and thus preclude coercion. Some relevant factors in such an analysis would include; first, whether the user is capable of influencing the terms of the contract which, by default and industry practice, are typically proffered as contracts of adhesion, which derive a poor quality of 'take it or leave it' consent. However, owing to the global diffusion of EU regulation, notably the GDPR which is 'sceptical of the legal tool of informed consent',[227] such adhesive contracting is increasingly giving way to models which afford the weaker party more discretion. If such discretion is absent, the consent between platform and user may be considered likely to be illusory or vitiated.

Secondly, owing to the extraordinary market concentration in the platform economy, it would be relevant to understand whether the user had any viable alternative to contracting with the platform in question. Such an investigation would require establishing whether a viable substitute service exists on the market. In order to establish viability as a substitute, however, it would be necessary to examine to what degree the platform market in question is characterised by network effects, and whether the substitute in question not only provides a similar service, but also provides the user access to a comparable network. In addition to these, a wide variety of other concerns which straddle discourses of competition law, contract law and legal philosophy would inevitably require examination in order to establish a verifiable relation of consent between the user and the platform. These, and other concerns, would require detailed consideration before determining whether some form of private and triangulated chain of contractually bargained consent could be derived to justify the absence of traditional democratic consent from the sovereign counterparty.

In regard to the third research question, concerning the nature of the values which

[227] *Hoofnagle, van der Sloot, Borgesius*, GDPR: What it is and what it means, p. 98 (accessed 01/08/2023).

underpin distinctions between the US and European normative frameworks, this paper has clarified that the two jurisdictions are primarily distinguished by the distinct values around which their constitutional orders are respectively organised. The US system is organised around a value of 'liberty' while the European system is organised around a value of 'dignity'. This paper emphasised that it is more accurate to describe the freedom of expression's counterpart within the European constitutional mindset as being a dignity value, rather than a privacy value. This is illuminating in respect to transatlantic normative distinctions because, while the value of dignity is somewhat alien to US law, the value of privacy is important and is protected as a penumbral right within the US Constitution. However, the notion of privacy which is protected in the US differs significantly from that which is protected in Europe. The European notion is concerned with public image and, thus, with dignity and honour, whereas the American notion is more closely aligned to the 18th century, Edward Coke-derived, conception of privacy as autonomy from state intervention and, thus, is considered an emanation of liberty protection. Both transatlantic notions, furthermore, have deep historical roots that long predate the 20th century, despite a prevailing narrative deriving European privacy norms to the post-WW2 era. It has been established, furthermore, throughout the latter sections of this paper that the freedom of expression in European law is inalienable from the values that oppose it such as dignity protection; dignity and free expression are, in this sense, mutually constitutive. These insights underscore the culturally and historically situated nature of free expression, and thus emphasise the problematic nature of a unilateral enforcement of one hegemonic speech standard to the displacement of distinct international approaches.

Finally, in respect to the last research question, which regarded whether unilateral coercion could be squared with the founding values of the Union enumerated in Article 2 TEU. Assuming that the EU's unilateralism implies at least some element of coercion, it would appear that the EU's increasing reliance upon unilateralism, as established in the introduction, contains some *prima facie* infringement of the Article 2 values requiring respect for democracy, pluralism and the rule of law because 'extraterritorial application of norms disrespects the sovereignty and rights' of the third country citizens 'that are subject to it'.[228] In this respect, due to the scarcity of precedent, relevant instruction may still be derived from the seminal 1927 judgement of the Permanent

[228] *Gstrein & Beaulieu* (n62) p. 6; Kamminga (n216).

Court (PCIJ) in *SS Lotus*, wherein, at § 18-19, the PCIJ held that 'the first and foremost restriction upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State'. Two questions are relevant in order to apply this principle to the present activity; first, does the EU's unilateralism amount to an 'exercise of power' in the sense proscribed by international law? Secondly, if so, does a 'permissive rule' exist to allow the EU to exercise that power in respect to online speech? It is beyond the scope of these concluding remarks to investigate such questions in detail. Such questions are provided here that they might provide material for future research, and provide an appropriate discussion to conclude the present paper's analysis. Such foundational principles of sovereignty and extraterritorial action as those laid down in the *SS Lotus* remain relevant today, and theoretically apply regardless of the state of technological development.

Nevertheless, the rise of the internet has arguably transformed the context of international relations to an extent which is unprecedented by any previous technological innovation. The *laissez faire* approach which characterised the early development of internet governance has enabled the emergence of a new category of superpower, in the platform intermediary, which has been vested with significant quasi-sovereign prerogatives in the structuring and policing of expressive activity. In addition, the nature of the technology has rendered cartographic jurisdictional boundaries incoherent and increasingly permeable, such that a private activity in one jurisdiction may, and often does, have instantaneous and appreciable effects around the world. This latter development has, in large part, shaped the CJEU's radically de-territorialised jurisdictional vision. This jurisprudence has, in effect, been organised around the so-called 'effects principle'; a widely recognised 'permissive rule',[229] permitting extraterritorial action where 'foreign conduct produces substantial effects' within the jurisdiction concerned.[230]

These considerations, however, only relate to the aspects of the Brussels Effect which are within the competence of courts. In regard to the pervasive *de facto* Brussels Effect, justificatory arguments broadly fall into two categories. The first type of argument emphasises that the EU merely regulates within its own territory, 'enforcing the norms of the single market equally on domestic and foreign players',[231] and ensuring the high

[229] *SS Lotus* § 18.
[230] *Kamminga* (n216) § 15.
[231] *Bradford* (n42) 249.

standards which its citizens demand. The external emanations and effects of any jurisdiction's regulatory action are likely to be extremely complex, but they are simply too diffuse to be legally cognisable. The second type of argument underlines that the EU is a 'benign global hegemon' which promotes standards which are universally desirable.[232] Such arguments frequently underline that the EU promulgates socially desirable regulatory standards toward states whose regulatory capacity and political will is flagging, corrupted or captured by special interests.[233] In addition, such arguments typically underline that third countries very often hail the EU 'as the benevolent provider of global public goods in situations where their own governments or multilateral cooperation mechanisms fail'.[234] The latter category of arguments appear almost patronisingly paternalistic at times, and may sound uncomfortably 'reminiscent of an earlier European colonial era'.[235] Nevertheless, their merits cannot be examined thoroughly here. The former category regarding the fact that the EU merely imposes regulation internally, on first glance, appear to have more merit. Such an argument might ask; if the external effects emanating even from traditional internal regulation are argued to be problematic, which alternative might the EU pursue? Should the EU be expected to deliver regulation to a standard less stringent than its citizens demand simply because serving the demands of its citizens results in diffuse international effects?

In conclusion, while European unilateralism appears to contain some contradiction with European values in respect to their tendency to replace conflicting value systems online and promulgate regardless of sovereign consent, it is not clear what alternative the EU might conscientiously pursue while serving its citizens' wishes and protecting its values and interests in crucial policy areas. The rise of the internet has transformed the landscape of human rights and international relations, requiring the development of new strategies and principles. The EU has sought creatively to experiment with new methods of governance in order to uphold its values and interests in this changed global landscape. The EU institutions should remain wary, however, and seek to ensure that this effort to uphold EU interests on the global stage does not compromise the founding values of the Union itself.

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[232] Ibid.
[233] Id. 251.
[234] Id. 252.
[235] *Kogan*, Exporting Europe's Protectionism p. 99 (acc. 01/08/2023).

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