

# Europe's Digital Constitution

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*This Article uncovers the fundamental values underlying the European Union's expansive set of digital regulations, which in aggregate can be viewed as Europe's "digital constitution." This constitution engrains Europe's human-centric, rights-preserving, democracy-enhancing, and redistributive vision for the digital economy into binding law. This vision stands in stark contrast to the United States, which has traditionally placed its faith in markets and tech companies' self-regulation. As a result, American tech companies today are regulated primarily by Brussels and not by Washington. By highlighting the distinctiveness and the global reach of the European digital constitution, this Article challenges the common narrative that portrays the European Union as a powerless bystander in a digital world dominated by the United States and China. By offering both a normative defense and a nuanced criticism of Europe's digital constitution, the Article contributes to ongoing scholarly debates on whether digital regulation compromises innovation and technological progress and whether governments or tech companies take precedence in governing digital societies. It also asks whether the United States should welcome EU regulation of U.S. tech companies as exerting a positive externality protecting the digital rights of American citizens or resent it as imposing a negative externality that compromises the U.S. government's democratic right to regulate—or refrain from regulating—its own tech companies. This Article also examines whether Europe's digital constitution is fit for the current era of tech wars and geopolitical conflict or if the pursuit of European "digital sovereignty" ought to be woven into its tenets—even if such an evolution would risk veering Europe towards digital protectionism and further ensprining techno-nationalism as a global norm.*

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## I. INTRODUCTION

Moments after completing his purchase of Twitter on October 27, 2022, Elon Musk tweeted that “the bird is freed”<sup>1</sup>—an apparent reference to his contested acquisition of the social media company and his newfound authority to reinstate his favored free speech norms on the platform. The European Union did not hesitate to respond. Within hours, European Commissioner Thierry Breton retorted to Musk on Twitter: “In Europe, the bird will fly by our rules.”<sup>2</sup> This exchange between an American tech entrepreneur and a European regulator captures the core dynamic in today’s digital economy: American tech companies seek to remake the world with their innovative products and services but face growing regulatory constraints that come predominantly from the European Union. These constraints reflect European values that call for restricting online content whenever such restrictions are needed to protect human dignity, data privacy, or democratic discourse. While the U.S. Constitution could be used to protect free speech online, in practice, European digital regulations often override those permissive norms, laying the legal foundation for today’s digital economy.

Since the commercialization of the internet in the 1990s, leading U.S. tech companies have been able to operate and expand across global markets with few regulatory constraints. However, their outsized influence over societies and individuals is now creating a backlash across jurisdictions. There is a growing sentiment that the largest tech companies have become too powerful and need to be reined in.<sup>3</sup> Despite the many benefits associated with technological innovations, digital transformation has ushered in an exceedingly concentrated economy where a few large tech companies control vast economic wealth and political power. Often these companies deploy their market power to restrict competition, to the detriment of their rivals and consumers.<sup>4</sup> They have also become platforms for disinformation, hate speech, and other repulsive content, undermining the safety and dignity of individuals while dividing societies and destabilizing democracies.<sup>5</sup> These platforms also extract vast data on their users’ private lives and commercialize that information through targeted advertising, which

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1. Elon Musk (@elonmusk), TWITTER (Oct. 27, 2022, 11:49 PM), <https://twitter.com/elonmusk/status/1585841080431321088>.

2. Thierry Breton (@ThierryBreton), TWITTER (Oct. 28, 2022, 3:52 AM), <https://twitter.com/ThierryBreton/status/1585902196864045056>.

3. Paul Mozur et al., *A Global Tipping Point for Reining in Tech Has Arrived*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/20/technology/global-tipping-point-tech.html>.

4. Alison Beard, *Can Big Tech Be Disrupted?*, HARV. BUS. REV. (Jan.-Feb. 2022).

5. See generally TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET (2018) (suggesting that content moderation is an essential process of social norm generation and policymaking).

threatens individuals' rights to data privacy and self-determination.<sup>6</sup> These are but a few reasons that digital citizens and governments are now turning against tech companies.

The European Union has been leading the fight against tech companies for the past decade, frequently leveraging its antitrust laws, data protection laws, and other regulatory instruments to reclaim control over the tech industry. This reflects the European Union's deep-seated belief that markets will not, left to their own devices, yield optimal outcomes, and that government intervention is needed to protect citizens' rights in the digital era. In contrast, the United States has traditionally embraced a techno-libertarian view that emphasizes the primacy of free markets, free speech, and the free internet. This pro-market ethos is deeply embedded in the U.S. regulatory regime, which consists of weakly enforced antitrust laws, the absence of a federal data privacy law, and permissive content moderation rules that shield tech companies from liability.<sup>7</sup> However, even in the United States, this techno-optimist outlook is now fading. The American public increasingly views the country's permissive laws as having vested tech companies with the kind of power that they are no longer able to responsibly handle.<sup>8</sup> At the same time, relentless lobbying by the tech industry and the continuing gridlock in Congress have prevented any meaningful tech legislation from emerging from Washington.<sup>9</sup> As a result, the United States has largely been watching from the sidelines as Brussels—not Washington—has been writing the rules for the digital economy.

Over the past decade, the European Union has emerged as the leading regulator of American tech companies, earning a reputation as the most

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6. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (depicting corporate digital practices as a form of “behavioral modification” aimed at remaking human society).

7. See, e.g., FED. TRADE COMM'N, *NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010–2019: AN FTC STUDY* (2021), <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>; 47 U.S.C. § 230; STAFF OF SUB. COMM. ON ANTITRUST, COM., & ADMIN. LAW OF THE H.R. COMM. ON THE JUDICIARY, 117TH CONG., *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS* (Comm. Print 2022), <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>; Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES WIRECUTTER (Sept. 6, 2021), <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us>. See generally VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021), <https://crsreports.congress.gov/product/pdf/R/R46751>.

8. See, e.g., Brooke Auxier et al., *Americans' Attitudes and Experiences with Privacy Policies and Laws*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws>.

9. See Emily Birnbaum, *Tech Spent Big on Lobbying Last Year*, POLITICO (Jan. 24, 2022), <https://www.politico.com/newsletters/morning-tech/2022/01/24/tech-spent-big-on-lobbying-last-year-00001144>; see also Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confronting Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46–48 (2020); Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 307–10 (2021).

aggressive antitrust enforcer in the world. Many of the European Union's antitrust enforcement actions today appear to target the tech industry—or, as many would point out, the *American* tech industry. The European Commission has fined Google almost \$10 billion over the past five years across three separate antitrust cases,<sup>10</sup> with another case against the company currently pending.<sup>11</sup> Last year, Amazon settled an antitrust case with the Commission,<sup>12</sup> while challenges against Apple and Meta are still in progress.<sup>13</sup> And antitrust is not the only domain where U.S. tech companies are constrained by European rules. As Part I demonstrates, stringent rules on data privacy, disinformation, hate speech, online copyright, and digital services taxes have all added to the regulatory burdens the U.S. tech industry faces in Europe. And there is more to come, with exacting rules regulating platform workers currently being debated before the European Parliament and the Council of Ministers and a comprehensive regulation on artificial intelligence (A.I.) being finalized.<sup>14</sup>

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10. See European Commission Press Release IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019), [http://europa.eu/rapid/press-release\\_IP-19-1770\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1770_en.htm); European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), [http://europa.eu/rapid/press-release\\_IP-18-4581\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4581_en.htm); European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1784](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784). Google appealed and lost the 2018 and 2017 Commission decisions but did succeed in getting the 2018 fine reduced to €4.13 billion. Case T-604/18, *Google & Alphabet v. Comm'n*, ECLI:EU:T:2022:541, ¶ 1113 (Sept. 14, 2022); T-612/17, *Google & Alphabet v. Comm'n*, ECLI:EU:T:2021:763, ¶ 703 (Nov. 10, 2021).

11. European Commission Press Release IP/21/3143, Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector (June 22, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3143](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143).

12. European Commission Press Release IP/20/2077, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practices (Nov. 10, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077).

13. See Margrethe Vestager, Exec. Vice-President for a Eur. Fit for the Digital Age, Eur. Comm'n, Statement of Objections Sent to Apple on App Store Rules for Music Streaming Providers (Apr. 30, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_21\\_2093](https://ec.europa.eu/commission/presscorner/detail/en/speech_21_2093); European Commission Press Release IP/22/7728, Antitrust: Commission Sends Statement of Objections to Meta over Abusive Practices Benefiting Facebook Marketplace (Dec. 19, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7728](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728).

14. *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, COM (2021) 762 final, 2021/0414 (COD) (Dec. 9, 2021); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Fostering a European Approach to Artificial Intelligence*, at 2, COM (2021) 205 final (Apr. 21, 2021); Draft European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, EUR. PARL. DOC. (COM 206) (2023) [hereinafter AI Resolution]; Council Press Release, *Artificial Intelligence Act: Council Calls for Promoting Safe AI That Respects Fundamental Rights* (Dec. 6, 2022) [hereinafter Council AI Release], <https://www.consilium.europa.eu/en/press/press->

European digital regulations are also significant for foreign companies in that they often generate a “Brussels Effect,” a regulatory phenomenon which explains why global companies frequently implement EU rules across their worldwide operations.<sup>15</sup> When the EU adopted its landmark data privacy regulation—the General Data Protection Regulation (GDPR)—in 2016,<sup>16</sup> it was soon embraced as a *global* data privacy standard by the leading American tech firms, including Meta, Google, Apple, and Microsoft.<sup>17</sup> While these tech companies could, of course, adopt one data privacy standard for the European Union and follow more lenient standards elsewhere, economies of scale and other benefits of uniform business practices often make such a customization strategy unappealing. Instead, these companies frequently choose the most stringent regulatory standard—typically the EU standard—as their global standard to ensure regulatory compliance worldwide. In this way, companies’ business incentives alone are often sufficient to convert the European Union’s data privacy regulation into a global regulation.

In addition to this type of de facto Brussels Effect—which explains how large tech companies adjust their global conduct to EU regulations—European regulations are also entrenched globally through the de jure Brussels Effect, which refers to the adoption of EU-style regulations by foreign governments. To date, nearly 150 countries have adopted domestic privacy laws, most of them resembling the GDPR.<sup>18</sup> According to Paul Schwartz and Karl-Nikolaus Peifer, “EU data protection law has been stunningly influential; most of the rest of the world follows it.”<sup>19</sup> While the United States lacks a federal privacy law, remaining an outlier, several U.S.

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releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights.

15. See generally ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020) [hereinafter THE BRUSSELS EFFECT]; Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2015).

16. Regulation 2016/679, of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 [hereinafter GDPR].

17. See, e.g., *Hard Questions: Q&A with Mark Zuckerberg on Protecting People’s Information*, META (Apr. 4, 2018), <https://newsroom.fb.com/news/2018/04/hard-questions-protecting-peoples-information>; E-mail from Google to Google User (May 14, 2018, 2:16), [https://groups.google.com/g/mtechcs09\\_nitkk/c/B5lWXsjv8aQ?pli=1](https://groups.google.com/g/mtechcs09_nitkk/c/B5lWXsjv8aQ?pli=1); Alex Hern, *Apple Launches iOS 11.3 with Raft of Privacy Features*, GUARDIAN (Mar. 29, 2018), <https://www.theguardian.com/technology/2018/mar/29/apple-launches-ios-113-privacy-features-gdpr-data-protection>; *Preparing for a New Era in Privacy Regulation with the Microsoft Cloud*, MICROSOFT (Apr. 16, 2018), <https://www.microsoft.com/en-us/microsoft-365/blog/2018/04/16/preparing-for-a-new-era-in-privacy-regulation-with-the-microsoft-cloud>.

18. See Graham Greenleaf, *Global Data Privacy Laws 2021: Despite COVID Delays, 145 Laws Show GDPR Dominance*, in 169 PRIV. L. & BUS. INT’L REP. (Feb. 23, 2021), <https://www.privacylaws.com/reports-gateway/articles/int169/int169dplaws2021>.

19. Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L.J. 115, 122 (2017).

states have followed California's lead in emulating the GDPR.<sup>20</sup> After a certain tipping point, there is such widespread convergence behind the EU standard that it is harder for any government enacting data privacy laws to justify a deviation from that global norm.

European digital regulations have had a significant impact on the daily operation of tech companies, constraining the way they collect, process, or share data, design their products, and interact with internet users or other businesses on the marketplace. However, while it is well understood that the European Union regulates, the motivations behind its regulatory agenda are subject to debate. The United States often views EU regulatory efforts as protectionist, unfairly targeting U.S. tech companies who outcompete their weaker European rivals.<sup>21</sup> In 2015, President Obama described EU antitrust investigations into Google and Facebook as reflecting European tech companies' inability to compete with their U.S. counterparts.<sup>22</sup> More recently, Charlene Barshefsky, the former U.S. Trade Representative, accused the European Union of digital protectionism and called for an end to Europe's "techno-nationalism."<sup>23</sup>

This common argument focusing on digital protectionism is plausible, yet overly simplistic. Of course, it is politically less costly for the European Union to leverage its regulations against leading tech companies when those companies are, in large part, foreign rather than European. The European Union has also not been spared from the recent nativist shift in trade and technology policy around the world. Like the United States and China, the European Union has become more conscious of its need to build its domestic technological capabilities and to reduce its foreign dependencies in a contested geopolitical environment.<sup>24</sup> Such policy goals often veer governments toward greater techno-nationalism. But singling out protectionism as the key driver of EU digital regulation either mischaracterizes the European Union's regulatory impulses or, at the very least, provides a highly incomplete account of the European Union's motivations.

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20. See Fredric D. Bellamy, *U.S. Data Privacy Laws to Enter New Era in 2023*, REUTERS (Jan. 12, 2023), <https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12>.

21. See Mark Scott, *E.U. Rules Look to Unify Digital Market, but U.S. Sees Protectionism*, N.Y. TIMES (Sept. 13, 2016), <https://www.nytimes.com/2016/09/14/technology/eu-us-tech-google-facebook-apple.html>.

22. See Kara Swisher, *White House. Red Chair. Obama Meets Swisher.*, VOX (Feb. 15, 2015), <https://www.vox.com/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher>.

23. See Charlene Barshefsky, *EU Digital Protectionism Risks Damaging Ties With the US*, FIN. TIMES (Aug. 2, 2020), <https://www.ft.com/content/9edea4f5-5f34-4e17-89cd-f9b9ba698103>.

24. See *Commission Communication on Shaping Europe's Digital Future*, at 3 (Feb. 2020), [https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf).

This Article argues that European digital regulation reflects a host of values consistent with the ethos of the broader European economic and political project. The European Union's digital agenda reflects its manifest commitment to fundamental rights, democracy, fairness, and redistribution, as well as its respect for the rule of law. These normative commitments, and the laws implementing those commitments, can be viewed in aggregate as Europe's "digital constitution." This Article uses the term "constitution" liberally to refer not to a formal constitution, but to a set of expansive digital regulations that form a normative and principled foundation for a digital economy and society as construed by European laws. This usage of the term constitution is consistent with what many American scholars today describe as the "small-c constitution," referring to rules that reflect fundamental values serving a "constitutional function" in society.<sup>25</sup>

The Article then demonstrates the way in which U.S. tech companies are predominantly regulated by Brussels and not by Washington. In today's digital economy, the division of labor is clear: U.S. tech companies generate digital technologies, while EU institutions generate the rules that govern those technologies. By highlighting the extraterritorial effect of the European Union's regulatory agenda, this Article draws a stark contrast to the U.S. Congress's inaction, leaving U.S. lawmakers questioning whether they ought to be setting the rules that affect American tech companies and digital citizens instead of leaving it to the Europeans. The European Union's regulatory influence over U.S. tech companies also raises intricate normative questions, including whether the European Union should be viewed as a benevolent regulatory hegemon that protects American digital citizens when their own government fails to do so, or as a regulatory imperialist imposing the European digital constitution on American companies.

By challenging the simplistic view that Europe's digital constitution stems from envy-driven protectionism, this Article offers a normative defense for the EU regulatory agenda. In comparison to the American regulatory approach to digital regulation—which may be viewed as too permissive—or the Chinese approach—which is often viewed as too oppressive—the EU regulatory approach can be praised for enhancing the public interest, checking corporate power, and preserving democratic structures of society. However, alongside this normative defense, the Article offers a normative critique of the European digital constitution. In particular, it questions whether the European digital agenda undermines technological innovation and whether the persistent enforcement deficit compromises the goals of that agenda in practice.

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25. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 33 (2014) (citing Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013)).



In advancing these arguments, this Article contributes to existing scholarship in several ways. First, by laying out an overarching theory of European digital regulation, this Article departs from the common practice of studying different policy areas in isolation. Scholarly works in the field of law and technology often analyze a single area of law, such as antitrust law, data privacy, digital taxation, content moderation, or artificial intelligence. By integrating numerous domains of digital regulations and examining their shared underlying regulatory philosophy, the Article reveals not only the expansiveness of the European Union's digital agenda but also the common constitutional foundation that underlies that agenda. This overarching theory of Europe's digital constitution helps explain the content and form that EU digital regulation has taken to date, in addition to predicting the evolution of that regulatory agenda in the near future.

By articulating the distinctiveness of the European digital constitution, this Article challenges the common narrative of a bipolar world order marked by U.S.-China conflict that treats the European Union as a powerless bystander. The European Union is often portrayed as a “casualty in the U.S.-China tech war,” having “less bargaining power to determine its own digital fate,” and thus being forced to “make a choice” between the United States and China.<sup>26</sup> This narrative is incomplete in that it focuses on a single aspect of the global digital contest—technological dominance—while casting aside an equally significant, ongoing contest over the regulations that govern the digital economy. By focusing on digital governance and tech regulation, this Article rejects the notion of the European Union's irrelevance as a digital power. Instead of choosing between the United States or China, the European Union advances its own digital agenda and shapes the global digital order towards its interests and values with the power that it undeniably has: the power of law.

In describing, defending, and criticizing Europe's digital constitution and its global reach, the theoretical contributions of this Article also have practical implications. As frequent targets of European digital rules, American tech companies benefit from an enhanced understanding of the regulations that have a direct impact on their core business models—as does the U.S. government in its efforts to manage frequent U.S.-EU regulatory

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26. See Tyson Barker, *Europe Can't Win the Tech War It Just Started*, FOREIGN POL'Y (Jan. 16, 2020), <https://foreignpolicy.com/2020/01/16/europe-technology-sovereignty-von-der-leyen> (describing why the global tech rivalry should instead be viewed as an EU-China battle of values, with the United States as an unpredictable but potential EU ally); Steven Erlanger & Adam Satariano, *Europe Feels Squeeze as Tech Competition Heats Up Between U.S. and China*, N.Y. TIMES (Sept. 13, 2020), <https://www.nytimes.com/2020/09/11/world/europe/eu-us-china-technology.html>; David Kirton, *U.S.-China Tech War Bigger Risk Than Coronavirus, EU Chamber Chief Says*, REUTERS (June 18, 2020), <https://www.reuters.com/article/us-china-business-europe/u-s-china-tech-war-bigger-risk-than-coronavirus-eu-chamber-chief-says-idUSKBN23P1PQ>.

conflicts or find avenues for regulatory cooperation.<sup>27</sup> The European Union's digital agenda is also of interest to several governments, including the U.S. government, that are looking to assert their regulatory powers over the tech industry and increasingly turning to Europe as a template.<sup>28</sup> For these governments, a more complete understanding of the European digital constitution's core commitments is essential to drawing lessons and evaluating their own reform proposals based on Europe's experience.

A close look at the expansiveness of the EU regulatory agenda also contributes to a broader conversation about whether tech companies can even be regulated in today's digital era. A number of commentators have portrayed tech firms as "new governors"<sup>29</sup> that "are "exercis[ing] a form of sovereignty," while arguing that states are increasingly powerless to govern these firms.<sup>30</sup> Europe's digital constitution presents the most concerted effort by any democratic government to prove that argument wrong. The European Union's effort to reassert democratic control over tech companies is therefore an important test case on whether tech companies, indeed, can be regulated or whether they are destined to rule the digital world.

This Article proceeds as follows. Part I lays down the pillars of Europe's digital constitution. Drawing on examples from multiple areas of law, it demonstrates how the European Union seeks to protect fundamental rights, preserve democracy, enhance fairness and distribution, and foster European integration through digital regulation. Part II engages in a critical assessment of Europe's digital constitution, offering both a normative defense and a criticism of that constitution. The conclusion asks whether Europe's digital constitution is fit for the new era of geopolitical conflict, or whether it needs to be re-written for the turbulent world in which the pursuit of technological sovereignty is increasingly guiding policymaking everywhere, and what such a shift would mean for Europe and the world.

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27. See ANU BRADFORD, *DIGITAL EMPIRES* (forthcoming Sept. 2023) (manuscript at 382) (on file with Virginia Journal of International Law Association) [hereinafter *DIGITAL EMPIRES*].

28. See Paul Mozur et al., *A Global Tipping Point for Reining in Tech Has Arrived*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/20/technology/global-tipping-point-tech.html> (describing how the "antitrust push has especially sharpened in the United States, with landmark suits filed against Google and Facebook" in 2020).

29. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1662–63 (2018) ("[P]latforms have a centralized body, an established set of laws or rules . . . and democratic values and culture[.]").

30. See Ian Bremmer, *The Technopolar Moment: How Digital Powers Will Reshape the Global Order*, FOREIGN AFFS. (Oct. 19, 2021), <https://www.foreignaffairs.com/articles/world/2021-10-19/ian-bremmer-big-tech-global-order>.

## II. THE PILLARS OF EUROPE'S DIGITAL CONSTITUTION

The below discussion articulates a theory of Europe's digital constitution by revealing the common foundation underlying its multifaceted regulatory agenda. The European Union has departed from the regulatory approach of the United States, which leaves tech companies in charge, and China, whose regulatory approach seeks to preserve the political power of the state. The EU digital agenda is primarily aimed at enhancing the individual and collective rights of European citizens in a digital society. It views governments as having a central role in upholding the fundamental rights of individuals, preserving the democratic structures of society, ensuring a fair distribution of benefits in the digital economy, and advancing European integration by creating a digital single market.

The European Union has promulgated these values in various high-level political statements that further illustrate the core principles underlying Europe's digital constitution. The European Declaration on Digital Rights and Principles for the Digital Decade, jointly adopted by the European Parliament, Council, and Commission in December 2022, proclaims that “[p]eople are at the centre of the digital transformation,”<sup>31</sup> and emphasizes the importance of “democratic functioning of the digital society and economy[.]”<sup>32</sup> It also asserts that the digital transformation should “benefit[] everyone and improve[] the lives of all people living in the EU[.]”<sup>33</sup> Technological solutions, according to the Declaration, should also “respect fundamental rights, enable their exercise and promote solidarity and inclusion[.]”<sup>34</sup> These political statements identify democracy, fairness, and fundamental rights as key values guiding the European Union's policymaking. These values are directly engrained in the European Union's regulatory instruments with the goal of ushering in a human-centric, democracy-enhancing, rights-preserving, and redistributive digital economy where technology is harnessed for human empowerment.

Of course, the values underlying Europe's digital constitution are not all uniquely European. The United States shares the European Union's commitment to safeguarding fundamental rights and protecting democracy. However, in the United States, the rights discourse often centers on protecting free speech as *the* fundamental right implicated by the digital transformation, whereas the European Union is looking to balance the right to free speech with a host of other fundamental rights, including human dignity, non-discrimination, and the right to data privacy. The United States

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31. European Declaration on Digital Rights and Principles for the Digital Decade, 2023 O.J. (C 23), § 1.

32. *Id.* p.mbl. para. 9.

33. *Id.* § 1(a).

34. *Id.* § 2(a).

and the European Union also differ in how they seek to advance democracy through digital regulation. American regulators, who often evince techno-libertarian instincts, fear overdoing content moderation rather than underdoing it. Thus, while the European Union at times restricts online speech in the name of democratic discourse, the United States frequently invokes this very same principle to allow such speech to remain online.<sup>35</sup> European regulators' concerns over fairness and redistribution often sets the European Union even more apart from their American counterparts. These concerns reflect the European Union's commitment to the social market economy and the pursuit of more equal wealth distribution in general. Conversely, the United States has traditionally been more comfortable with income inequality, seeking to preserve equality of opportunities as opposed to equality of outcomes.

By insisting that its vision for the digital economy must be embedded in laws—which are written and enforced by democratic institutions—the European Union rejects the techno-libertarian idea of a “lawless” or self-governing internet, advancing instead a view that the digital transformation needs to be firmly anchored in the rule of law and subjected to democratic oversight.<sup>36</sup> While the American regulatory approach frequently emphasizes that the government does not understand technology and should hence refrain from regulating it, the European approach is more concerned that tech companies do not understand how technology implicates constitutional democracy and fundamental rights, which their products and services often undermine.<sup>37</sup>

The European Union's pro-regulation stance is not limited to the technology sector, but reflects a broader view of how markets operate and the optimal role of government. Compared to the United States, the state enjoys greater public trust in the European Union and can therefore assume a more prominent role in regulating markets.<sup>38</sup> In contrast, Americans tend

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35. Press Release, President William J. Clinton, A Framework for Global Electronic Commerce, <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html>; *Reno v. Am. C.L. Union*, 521 U.S. 844, 885 (1997) (“The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”).

36. See Paul Nemitz, *Constitutional Democracy and Technology in the Age of Artificial Intelligence*, 376 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y A 1, 2–4 (2018) [hereinafter Nemitz, *Constitutional Democracy*]; Paul Nemitz, *Democracy Through Law: The Transatlantic Reflection Group and Its Manifesto in Defence of Democracy and the Rule of Law in the Age of “Artificial Intelligence,”* EUR. L.J. 1, 1 (2021); European Parliament Press Release, Digital Markets Act: Parliament Ready to Start Negotiations with Council (Dec. 15, 2021), <https://www.europarl.europa.eu/news/en/press-room/20211210IPR19211/digital-markets-act-parliament-ready-to-start-negotiations-with-council> (“Our message is clear: the EU will enforce the rules of the social market economy also in the digital sphere, and this means that lawmakers dictate the rules of competition, not digital giants[.]”).

37. See Nemitz, *Constitutional Democracy*, *supra* note 36, at 5.

38. The functioning of the social market economy is explicitly mentioned in foundational treaties as a common objective for the European Union. See Consolidated Version of the Treaty on European Union art. 3, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

to embrace a pro-business, free market-oriented version of capitalism. Under this view, government intervention should be limited to avoid curtailing the innovative zeal of tech companies. In terms of the influential literature on “varieties of capitalism,” most European countries exhibit features of a “coordinated market economy” as opposed to a “liberal market economy,” meaning that they reserve a greater role for government regulation and non-market institutions.<sup>39</sup>

The discussion below shows how Europe’s digital constitution has emerged and evolved over the past decade. It identifies the core values shaping the European Union’s regulatory philosophy and shows how the European Union has ingrained these core values in its ambitious regulatory instruments. This Article focuses on EU-level regulation, though there have also been significant legislative developments in individual European Union member states that shape the broader European approach towards the digital economy. First, the discussion illustrates how the European Union’s commitment to *fundamental rights* manifests, in particular, in its regulatory approach to data protection, artificial intelligence, and online content regulation. Second, it shows how the European Union has developed regulatory instruments to preserve and strengthen *democracy* in the digital age, including by curtailing online disinformation and promoting a free and pluralistic media. Third, the European Union has woven a commitment to *fairness and redistribution* into its digital regulations, as exemplified by its regulation of market competition, digital taxation, and attempts to extend social protections to platform workers. Finally, the European Union’s digital regulation has also been a tool to advance European market integration. This effort to create a *digital single market* has provided a strong political impetus for the European Union’s ambitious regulatory agenda.

#### A. *Safeguarding Fundamental Rights*

Fundamental rights are deeply entrenched in the ethos of the European Union, forming a values-based constitutional foundation for European integration and guiding EU legislative activity as well as its engagement with the world in all policy areas. According to Article 2 of the Treaty of the European Union: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”<sup>40</sup> The 2000 Charter of Fundamental Rights of the European Union (the EU Charter), which became legally binding in 2009, further enshrines

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39. See PETER A. HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 71–78 (2001).

40. TEU, *supra* note 38, art. 2.

fundamental rights embedded in the Treaties.<sup>41</sup> This European “Bill of Rights”<sup>42</sup> protects key rights implicated by the recent digital transformation of economies and societies, including the protection of privacy and personal data, the freedom of expression, and non-discrimination principles.<sup>43</sup>

European political leaders frequently embrace fundamental rights as the cornerstone of the European Union’s digital policy in their public statements. The Commission’s Executive Vice President, Margrethe Vestager, and the European Union’s High Representative, Josep Borrell, recently wrote that “[t]he 1948 Universal Declaration of Human Rights established the dignity of the individual, the right to privacy and to non-discrimination, and the freedoms of speech and belief. It is our common duty to make sure that the digital revolution lives up to that promise.”<sup>44</sup> This sentiment has been echoed by the President of the European Court of Justice (CJEU), Koen Lenaerts, who has described the EU Charter as turning the EU legal order into “a globally-renowned beacon of fundamental rights protection.”<sup>45</sup> In discussing the CJEU’s recent decision to invalidate data transfers from the European Union to the United States based on fundamental rights concerns, President Lenaerts noted that “[t]he rule of law is not up for sale. It is a matter of upholding the requirements in the European Union, of the rule of law, of fundamental rights. If this is also affecting some dealings internationally, why would Europe not be proud to contribute its requiring standards of respect of fundamental rights to the world in general?”<sup>46</sup>

Digital transformation has altered the ways in which businesses operate and societies function, implicating a number of fundamental rights in the process. As the demand for data multiplies, so does the potential for its misuse—by public and private actors alike. As a result, the European Union has sought to limit both government surveillance and the exploitation of internet users’ personal data by tech companies. The European Union also looks to protect internet users from discrimination by regulating the ways

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41. Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) [hereinafter Charter of Fundamental Rights].

42. See Koen Lenaerts, President, Eur. Ct. of Just., Speech to the European Court of Human Rights: Creating Synergies in the Field of Fundamental Rights Protection (Jan. 26, 2018), [https://www.echr.coe.int/Documents/Speech\\_20180126\\_Lenaerts\\_JY\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf).

43. See Charter of Fundamental Rights, *supra* note 41, art. 7, 8, 11, 21 at 391, 397–400.

44. See Margrethe Vestager & Josep Borrell, *Why Europe’s Digital Decade Matters*, EUR. EXTERNAL ACTION SERV. (Mar. 10, 2021), [https://www.eeas.europa.eu/eeas/why-europe’s-digital-decade-matters-margrethe-vestager\\_en](https://www.eeas.europa.eu/eeas/why-europe’s-digital-decade-matters-margrethe-vestager_en).

45. See Koen Lenaerts, President, Eur. Ct. of Just., Keynote Speech at Conference on the 10th Anniversary of the Charter Becoming Legally Binding: Making the EU Charter of Fundamental Rights a Reality for All (Nov. 12, 2019), [https://commission.europa.eu/system/files/2019-11/charter\\_lenaerts12.11.19.pdf](https://commission.europa.eu/system/files/2019-11/charter_lenaerts12.11.19.pdf).

46. See Valentina Pop, *ECJ President on EU Integration, Public Opinion, Safe Harbor, Antitrust*, WALL ST. J. (Oct. 14, 2015), <https://www.wsj.com/articles/BL-RTBB-5170>.

A.I. systems are developed and deployed. EU regulators are further committed to safeguarding freedom of expression, which they see as under threat when internet platforms moderate content online. At the same time, they recognize the need to balance that freedom against other fundamental rights such as human dignity, which can be undermined by illegal and harmful content online. Together, these specific issues—outlined below—drive the EU digital agenda, placing the protection of fundamental rights at the heart of Europe's digital constitution.

### 1. *The Right to Data Privacy*

The right to privacy, and the related right to the protection of personal data, are considered fundamental rights in the European Union.<sup>47</sup> The philosophy behind the EU conception of fundamental rights in data privacy is to foster individual self-determination by granting citizens enhanced control over their personal data.<sup>48</sup> In European rights discourse, the right to data privacy is closely related to human dignity, which the EU Charter considers inviolable.<sup>49</sup> Europeans' concerns about data privacy can be traced back to World War II and the atrocities committed by the Nazis, who systematically abused personal data to identify Jews and other minority groups the Nazi regime oppressed.<sup>50</sup> The infringement of privacy rights continued under the post-war socialist dictatorship in East Germany, where the Ministry for State Security, known as the Stasi, continued the surveillance of its citizens.<sup>51</sup> These experiences have left Europeans suspicious of governments' data collection practices. These suspicions, combined with a mistrust that corporations would not act in the public interest when handling user data, paved the way for a robust privacy rights regime in Germany, and later across Europe.

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47. Charter of Fundamental Rights, *supra* note 41, art. 7, 8; Consolidated Version of the Treaty on the Functioning of the European Union art. 16, Oct. 26, 2012, 2012 O.J. (C 326) 55 [hereinafter TFEU].

48. See ORLA LYNSEY, *THE FOUNDATIONS OF EU DATA PROTECTION LAW* 11 (2015).

49. See Charter of Fundamental Rights, *supra* note 41, art. 1; see also Wojciech Wiewiórowski, Eur. Data Prot. Supervisor, Speech at the Presentation of the European Data Protection Supervisor Strategy 2020-2024: Protecting Privacy and Data Protection in a Responsible, Sustainable Future (June 30, 2020), [https://edps.europa.eu/sites/default/files/publication/20-06-30\\_strategy\\_speech\\_en.pdf](https://edps.europa.eu/sites/default/files/publication/20-06-30_strategy_speech_en.pdf) (“We should embrace those technologies that respect the principle of human dignity, which is the cornerstone of our Charter of Fundamental Rights.”).

50. See Thomas Shaw, *Privacy Law and History: WWII-Forward*, INT'L ASS'N OF PRIV. PROS. (Mar. 1, 2013), <https://iapp.org/news/a/2013-03-01-privacy-law-and-history-wwii-forward> (describing the strongly negative citizen reactions to a 1982 German government effort to collect citizen data, as well as the origins of German data protection laws in the 1970s).

51. See Alvar C.H. Freude & Trixy Freude, *Echoes of History: Understanding German Data Protection*, NEWPOLITIK 85, 86 (Oct. 1, 2016), [https://www.astrid-online.it/static/upload/freu/freude\\_newpolitik\\_german\\_policy\\_translated\\_10\\_2016-9.pdf](https://www.astrid-online.it/static/upload/freu/freude_newpolitik_german_policy_translated_10_2016-9.pdf) (“The Stasi searched private premises, installed hidden tapping devices, questioned neighbors and combed the personal mail of ‘suspicious persons,’ usually opponents of the regime.”).

The rights to privacy and data protection have since been codified into European legal instruments. The 1950 European Convention of Human Rights—to which all EU Member States are party—recognizes the right to privacy as a fundamental right.<sup>52</sup> The EU Charter further guarantees individuals the right to privacy, including the right to the protection of their personal data.<sup>53</sup> In addition to these constitutional protections, the European Union set out detailed privacy protections in the GDPR, which entered into force in 2018.<sup>54</sup> The GDPR seeks to protect individuals' personal data from exploitation by governments and private companies alike. It calls for lawfulness, fairness, and transparency in processing personal data,<sup>55</sup> in addition to limiting the quantity and purpose of any data collection.<sup>56</sup> The Regulation also creates new obligations, such as the “right to be forgotten,” which gives the data subject the right to ask for erasure of certain data,<sup>57</sup> and “privacy by design,” which requires manufacturers to design their products and services at the outset with GDPR obligations in mind.<sup>58</sup> The GDPR also provides for heavy sanctions: Noncompliance may result in fines of up to €20 million or up to 4% of a company's total worldwide annual turnover in the preceding financial year.<sup>59</sup>

The EU judiciary has played a key role in shaping Europe's digital constitution, expanding the scope of European citizens' data privacy rights in multiple landmark pro-privacy rulings, including in *Google Spain*—better known as the “right to be forgotten” case.<sup>60</sup> The “right to be forgotten” refers to internet users' right to demand that data pertaining to them be permanently deleted. In this case, Mario Costeja González, a Spanish citizen, requested Google to remove from its search engine results that linked him to old newspaper articles detailing his financial troubles.<sup>61</sup> According to Mr. Costeja González, the information, while accurate, was no longer relevant since all his debts were resolved.<sup>62</sup> Google initially refused to delink the information.<sup>63</sup> However, the CJEU ruled that Google was obliged to honor requests to make certain content, which is not adequate,

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52. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Nov. 4, 1950, E.T.S. No. 5 [hereinafter ECHR]. The European Court of Human Rights, which is vested with the task of enforcing the ECHR, has extended the right to privacy to data protection. *See* *Copland v. United Kingdom*, 253 Eur. Ct. H.R., ¶¶ 41–44 (2007).

53. *See* Charter of Fundamental Rights, *supra* note 41, art. 7, 8; TFEU art. 16.

54. *See* GDPR, *supra* note 16, art. 1, 99(2).

55. *Id.* art. 5(1)(a).

56. *Id.* art. 5(1)(b)–1(c).

57. *Id.* art. 17.

58. *Id.* art. 25.

59. *Id.* art. 83.

60. *See* Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317 (May 13, 2014).

61. *Id.* ¶¶ 14–15.

62. *Id.* ¶ 15.

63. *Id.* ¶ 18.



relevant, or current, no longer searchable.<sup>64</sup> The ruling has led to significant delisting of content, in part because of the asymmetrical incentives it imposes on search engines. While these companies retain the authority to decide whether to erase the requested information, any borderline case is likely to result in removal because a failure to do so can lead to heavy fines, whereas excessive delinking carries no penalty, incentivizing erasure.<sup>65</sup> As evidence of its responsiveness to delinking requests, Google reported that, as of August 2022, it had removed about 49% of the 5.1 million URLs that it had been asked to delist since the May 2014 ruling.<sup>66</sup>

While offering steadfast privacy protections, the GDPR acknowledges that “[t]he right to the protection of personal data is not an absolute right; it must . . . be balanced against other fundamental rights, in accordance with the principle of proportionality.”<sup>67</sup> The CJEU has frequently been called on to weigh the right to data privacy against other pressing societal imperatives, such as national security and law enforcement. In carrying out its proportionality analysis, the CJEU has shown itself to be a staunch defender of data protection, actively shaping the European Union’s digital governance in ways that elevate the right to data privacy, even when that right conflicts with other important societal imperatives.<sup>68</sup> This balancing has also affected the United States, as the CJEU has repeatedly invalidated U.S.-EU agreements concerning transatlantic data transfers. The court has done so on the grounds that the United States offers inadequate data privacy protections, potentially exposing European data to U.S. government surveillance once transferred to the United States.<sup>69</sup> These and other cases reveal the court’s expansive approach to data protection rights and leave no doubt that data privacy is a pivotal right that goes to the heart of Europe’s digital constitution.

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64. *Id.* ¶ 99.

65. See Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179, 214 (2018) (noting also that while individual journalists have protested the deletion of this information, such protests are “rare,” “after the fact,” and rarely impact the companies’ decisions).

66. See *Requests to Delist Content Under European Privacy Law*, GOOGLE, <https://transparencyreport.google.com/eu-privacy/overview> (last visited Aug. 15, 2022).

67. See GDPR, *supra* note 16, at 2.

68. See, e.g., *Joined Cases C-293 & C-594/12, Digital Rights Ireland Ltd. v. Minister for Commc’ns, Marine & Nat. Res.*, ECLI:EU:C:2014:238, ¶¶ 69, 71 (Apr. 8, 2014); *Case C-623/17, Privacy Int’l v. Sec’y of State for Foreign and Commonwealth Affairs*, ECLI:EU:C:2020:790, ¶ 82 (Oct. 6, 2020); *Joined Cases C-511, C-512 & C-520/18, La Quadrature du Net v. Premier ministre*, ECLI:EU:C:2020:791, ¶¶ 132, 139, 151, 168 (Oct. 6 2020).

69. See *Case C-362/14, Schrems v. Data Prot. Comm’r*, ECLI:EU:C:2015:650, ¶ 107 (Oct. 6, 2015); see *Case C-311/18, Data Prot. Comm’r v. Facebook Ireland Ltd.*, ECLI:EU:C:2020:559, ¶ 203 (July 16, 2020).

## 2. *Protections Against Harmful Applications of Artificial Intelligence*

A.I. is another area where fundamental rights concerns have shaped Europe's digital constitution. Governments and companies increasingly rely on A.I.-driven algorithms to make critical decisions, including screening candidates for education or employment and determining individuals' eligibility for credit or public benefits. Despite its growing prevalence and touted promise as a tool for better decision-making, the use of A.I. has been controversial. For example, Amazon abandoned its A.I.-based recruiting tool after it was shown to discriminate against women.<sup>70</sup> The gender bias was caused by an algorithm that was trained with past resumes submitted to the company, most of which came from men.<sup>71</sup> Racial bias is also a common problem underlying A.I.-driven decision-making. Google was "appalled" by a mistake in its image-labeling algorithm that led to the mislabeling of black people.<sup>72</sup> These are but a few examples that reveal how A.I. can lead to discrimination and violate fundamental rights.

Conscious of both the opportunities and risks that A.I. entails, the European Union has moved to regulate this space by promoting the development and deployment of A.I. while seeking to mitigate the potential downsides associated with it. In 2021, the Commission unveiled a new proposal for a comprehensive A.I. regulation.<sup>73</sup> The legislation is close to being finalized after its approval by the Council of Ministers in 2022 and the European Parliament in 2023.<sup>74</sup> The A.I. Act seeks to promote ethical, trustworthy, and human-centric A.I. development that ensures a high level of protection of fundamental rights.<sup>75</sup> The A.I. Act acknowledges that algorithmic decision-making may reproduce existing biases, which can lead to large-scale discrimination.<sup>76</sup> Moreover, the collection of personal data for training A.I. threatens citizens' fundamental right to data privacy—a concern that is magnified when A.I. technologies, such as facial recognition, are deployed for mass surveillance of citizens.<sup>77</sup> To guard against these risks, the A.I. must be free of harmful bias, respectful of citizens' right to privacy,

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70. See Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

71. *Id.*

72. See James Vincent, *Google 'Fixed' its Racist Algorithm by Removing Gorillas from Its Image-Labeling Tech*, VERGE (Jan. 12, 2018), <https://www.theverge.com/2018/1/12/16882408/google-racist-gorillas-photo-recognition-algorithm-ai>.

73. See *Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM (2021) 206 final (Apr. 21, 2021) [hereinafter *Artificial Intelligence Act*].

74. Council AI Release, *supra* note 14; AI Resolution, *supra* note 14.

75. *Artificial Intelligence Act*, *supra* note 73, pmbl. para. 1, 5.

76. *Artificial Intelligence Act*, *supra* note 73, pmbl. paras. 43–45.

77. *Artificial Intelligence Act*, *supra* note 73, at 21.

and otherwise consistent with fundamental rights embedded in the EU Charter and treaties.<sup>78</sup>

The proposed A.I. Act takes a risk-based approach to regulation. It divides A.I. applications into four categories, depending on the level of risk they pose—unacceptable risk, high risk, limited risk, and minimal risk—and adjusts the regulatory obligations accordingly.<sup>79</sup> The category of “unacceptable risk” includes A.I. systems that manipulate human behavior and undermine free will by using subliminal techniques.<sup>80</sup> A.I. systems that deploy social scoring by governments—a practice that is believed to be common in China<sup>81</sup>—are also prohibited, as is governments’ deployment of real-time facial recognition for law enforcement purposes.<sup>82</sup> The deployment of facial recognition by law enforcement authorities is considered particularly invasive of fundamental rights, as it places large parts of the population under constant surveillance.<sup>83</sup> A category of “high-risk” A.I. applications is not prohibited but tightly regulated with a set of risk management obligations applying to all developers, providers, and users of A.I. systems.<sup>84</sup> These obligations apply, for instance, when A.I. is deployed to determine individuals’ access to education, employment, loans, public assistance, or other essential public services, as there is a high risk that harmful bias and discrimination may occur.<sup>85</sup>

The European Union maintains that A.I. technologies exist for the benefit of humans and must also be overseen by humans. The European Union’s 2019 *Ethics Guidelines for Trustworthy AI*,<sup>86</sup> which paved the way for the proposed A.I. Act, emphasize “human-centric design principles” for A.I. and stress that “AI systems should not unjustifiably subordinate, coerce,

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78. *Artificial Intelligence Act*, *supra* note 73, pmb. paras. 13–15.

79. *Artificial Intelligence Act*, *supra* note 73, arts. 5–6; see *Commission Communication on Shaping Europe’s Digital Future*, at 3 (Feb. 2020), [https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf).

80. See *Artificial Intelligence Act*, *supra* note 73, § 5.2.2; *id.* art. 5(1)(a).

81. See Guowuyuan Guanyu Yinfa Shehui Xinyong Tixi Jianshe Guihua Gangyao (2014–2020 Nian) de Tongzhi (国务院关于印发社会信用体系建设规划纲要 (2014—2020年) 的通知 [State Council Notice Concerning Issuance of the Planning Outline for the Establishment of a Social Credit System (2014–2020)] (promulgated by the St. Council, June 14, 2014) St. Council Gaz., June 27, 2014, [http://www.gov.cn/zhengce/content/2014-06/27/content\\_8913.htm](http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm) (China), translated in CHINA L. TRANSLATE, <https://www.chinalawtranslate.com/en/socialcreditsystem>; Rene Chun, *China’s New Frontiers in Dystopian Tech*, ATLANTIC (Apr. 2018), <https://www.theatlantic.com/magazine/archive/2018/04/big-in-china-machines-that-scan-your-face/554075>.

82. *Artificial Intelligence Act*, *supra* note 73, pmb. paras. 17–19.

83. *Id.*

84. *Id.* art. 9(2).

85. *Id.* pmb. para. 32; *id.* pmb. paras. 35–37.

86. See *Report of the High-Level Expert Group on Artificial Intelligence on Ethics Guidelines for Trustworthy AI* (Apr. 8, 2019), <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>.

deceive, manipulate, condition or herd humans.”<sup>87</sup> The Commission’s 2020 White Paper on A.I. similarly underscores the importance of a human-centric A.I. that improves the lives of individuals while respecting their rights and preserving their human dignity.<sup>88</sup> This policy imperative, according to the European Union, also necessitates that A.I. is overseen by natural persons who can override algorithms when needed and help ensure that risks to fundamental rights are mitigated.<sup>89</sup>

The European Union’s proposed A.I. Act is the first of its kind globally. It embeds European values around ethics, trust, fundamental rights, and dignity, while reflecting the European Union’s approach in grounding these values in the rule of law and subjecting them to oversight by democratic institutions. While many tech companies have adopted various ethics codes to mitigate risks associated with A.I.,<sup>90</sup> the European Union views these tools of self-regulation as ultimately insufficient. While such ethics codes can lead to better corporate practices, they cannot substitute legally binding obligations that are generated through a democratic process to ensure that those obligations reflect the public interest more broadly.<sup>91</sup> Thus, by pursuing binding rules on A.I., the European Union also affirms the primacy of the rule of law and democracy as the foundation of its digital constitution.<sup>92</sup>

### 3. *Moderating Online Content while Preserving Freedom of Expression*

The European Union’s effort to protect fundamental rights online extends to content moderation. Digital technologies have revolutionized opportunities for communication, expanding individuals’ freedom of expression. However, this vast opportunity for online engagement has also increased the dissemination of hate speech and other harmful content online. While platforms frequently host content that is harmful, dangerous, and often illegal, excessive removal of objectionable material can also pose its own problems. For example, the posting of a video of George Floyd’s brutal killing at the hands of a police officer in Minnesota in 2020 led to an

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87. *Id.* at 12.

88. See *Commission White Paper on Artificial Intelligence—A European Approach to Excellence and Trust*, at paras. 3, 8–9, COM (2020) 65 final (Feb. 19, 2020).

89. See *Artificial Intelligence Act*, *supra* note 73, art. 14.

90. See *Our Principles*, GOOGLE, <https://ai.google/principles>; *Microsoft Responsible AI Standard, v2*, MICROSOFT (June 2022), <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE4ZPmV>; *Facebook’s Five Pillars of Responsible AI*, META AI (June 22, 2021), <https://ai.meta.com/blog/facebook-s-five-pillars-of-responsible-ai>.

91. See Nemitz, *Constitutional Democracy*, *supra* note 36, at 7–8.

92. This approach is called for in Paul Nemitz, *Democracy Through Law: The Transatlantic Reflection Group and Its Manifesto in Defence of Democracy and the Rule of Law in the Age of “Artificial Intelligence,”* EUR. L.J. 1, 1–2 (2021).

unprecedented public outrage.<sup>93</sup> This public reckoning—and the broad movement towards racial reconciliation in the United States and beyond—might not have taken place had the platforms censored the video due to its violent and repulsive nature. This illustrates how the line-drawing between permissible and impermissible speech is complicated, and the key question thus becomes who gets to draw that line.

According to Article 11 of the EU Charter, “[e]veryone has the right to freedom of expression.”<sup>94</sup> This staunch commitment to free speech forms the foundation of the European Union’s regulation of online content. Notwithstanding this commitment, the European Union is prepared to curtail harmful content, including online hate speech. Compared to the United States, the European Union takes a harder line on hate speech, which is not considered a valuable part of public discourse and hence unworthy of protection in Europe—whether such speech takes place online or offline.<sup>95</sup> Like its approach to data privacy, the European Union’s firm stance against hate speech is best understood in light of Europe’s history of racist and xenophobic violence, including most prominently the incitement of hatred by the Nazis against the Jews. The burden of this history continues to define the European regulatory approach today, heightening its sense of a “duty of remembrance, vigilance and combat” against racist and xenophobic speech.<sup>96</sup> Today, the rise of populist parties with anti-migrant views is contributing to an increase of incidents of hate speech within the European Union, particularly on social media, strengthening the European Union’s resolve to tackle this challenge with regulation.<sup>97</sup>

Until recently, the European Union has relied on voluntary rules targeting online hate speech. In 2016, the European Commission signed a non-binding Code of Conduct on Countering Illegal Hate Speech Online (Hate Speech Code) with four U.S. tech companies: Facebook, Twitter,

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93. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html>.

94. Charter of Fundamental Rights of the European Union, *supra* note 41, art. 11.

95. See Noah Feldman, *Free Speech in Europe Isn't What Americans Think*, BLOOMBERG (Mar. 19, 2017), <https://www.bloomberg.com/view/articles/2017-03-19/free-speech-in-europe-isn-t-what-americans-think> (“Europeans don’t consider hate speech to be valuable public discourse, and reserve the right to ban it. They consider hate speech to degrade from equal citizenship and participation.”); see also Jeffrey Rosen, *The Delete Squad: Google, Twitter, Facebook and the New Global Battle Over the Future of Free Speech*, NEW REPUBLIC (Apr. 29, 2013), <https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-%EF%BF%BCmaking-rules>.

96. See *European Commission Against Racism and Intolerance General Policy Recommendation No. 15 on Combating Hate Speech*, at 3 (Dec. 8, 2015), <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

97. See Piotr Bakowski, *Combating Hate Speech and Hate Crime in the EU*, EUR. PARL. RSCH. SERV. (June 6, 2022), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733520/EPRS\\_ATA\(2022\)733520\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733520/EPRS_ATA(2022)733520_EN.pdf).

YouTube, and Microsoft.<sup>98</sup> Additional companies have since joined, including Instagram and Snapchat in 2018 and TikTok in 2020.<sup>99</sup> These signatories agree to “prohibit the promotion of incitement to violence and hateful conduct” on their platforms and commit to reviewing any request to remove such content from their platform within twenty-four hours.<sup>100</sup> Despite its voluntary nature, the Hate Speech Code has had a notable impact. Data from 2021 show that the signatories remove, on average, 63% of all illegal hate speech that is notified to them.<sup>101</sup>

Another category of problematic content available online is terrorist propaganda. Terrorist organizations frequently use internet platforms to spread propaganda, contributing to the radicalization of individuals and facilitating their recruitment to those organizations. This presents a direct security challenge to the European Union—a concern which has been magnified through recent terrorist attacks on European soil. The European Union acknowledges that acts of terrorism amount to some of the most serious violations of individuals’ right to life, liberty, and security.<sup>102</sup> However, efforts to combat the dissemination of terrorist content online touches many other fundamental rights, including the freedom of expression or non-discrimination.<sup>103</sup> Consequently, there is a fear that platforms may deploy discriminatory proxies to screen terrorist content without respecting the individual rights of internet users. In 2021, the European Union adopted a binding Regulation on Preventing the Dissemination of Terrorist Content Online, which seeks to strike a balance between the fundamental rights of all affected parties.<sup>104</sup> The Regulation

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98. See *The EU Code of Conduct on Countering Illegal Hate Speech Online*, EUR. COMM’N, at 1 (June 30, 2016), [https://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=42985](https://ec.europa.eu/newsroom/just/document.cfm?doc_id=42985).

99. See *Snapchat Joins the EU Code of Conduct to Fight Illegal Hate Speech Online*, EU DAILY NEWS (May 7, 2018), [http://europa.eu/rapid/press-release\\_MEX-18-3723\\_en.htm](http://europa.eu/rapid/press-release_MEX-18-3723_en.htm); Cormac Keenan, *TikTok Joins the Code of Conduct on Countering Illegal Hate Speech Online*, TIKTOK (Sept. 8, 2020), <https://newsroom.tiktok.com/en-gb/tiktok-joins-the-code-of-conduct-on-countering-illegal-hate-speech-online>; European Commission Press Release IP/22/7109, EU Code of Conduct Against Online Hate Speech: Latest Evaluation Shows Slowdown in Progress (Nov. 24, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7109](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7109).

100. *The EU Code of Conduct on Countering Illegal Hate Speech Online*, EUR. COMM’N, at 2 (June 30, 2016), [https://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=42985](https://ec.europa.eu/newsroom/just/document.cfm?doc_id=42985).

101. See Didier Reynders, *Countering Illegal Hate Speech Online: 6th Evaluation of the Code of Conduct*, EUR. COMM’N (Oct. 7, 2021), [https://ec.europa.eu/info/sites/default/files/factsheet-6th-monitoring-round-of-the-code-of-conduct\\_october2021\\_en\\_1.pdf](https://ec.europa.eu/info/sites/default/files/factsheet-6th-monitoring-round-of-the-code-of-conduct_october2021_en_1.pdf). The exact time period was the six weeks between March 1, 2021, and April 14, 2021. *Id.*

102. See Regulation 2021/784, of the European Parliament and of the Council of 29 April 2021 on Addressing the Dissemination of Terrorist Content Online, 2021 O.J. (L 172) 79, 80 (EU [hereinafter Regulation on Dissemination of Terrorist Content Online]).

103. See Joris van Hoboken, *The Proposed EU Terrorism Content Regulation: Analysis and Recommendations with Respect to Freedom of Expression Implications*, TRANSATLANTIC WORKING GRP. 1, 3, 8–9 (May 3, 2019), [https://www.ivir.nl/publicaties/download/TERREG\\_FoE-ANALYSIS.pdf](https://www.ivir.nl/publicaties/download/TERREG_FoE-ANALYSIS.pdf).

104. See Regulation on Dissemination of Terrorist Content Online, *supra* note 102, pmb. paras. 27, 41–42.

mandates that platforms must remove terrorist content within one hour following a removal order issued by an EU Member State authority.<sup>105</sup> To safeguard due process and alleviate concerns of restricting free speech, platforms and content providers retain the right to challenge any removal order.<sup>106</sup>

To complement these codes and regulations, the European Union adopted the Digital Services Act (DSA) in 2022.<sup>107</sup> The DSA adds legal force and considerable political momentum to the European Union's rights-driven regulatory agenda by establishing a comprehensive and legally binding transparency and accountability regime for online platforms regarding the content they host. The DSA lays out various due diligence obligations as well as procedural safeguards that platforms must abide by when moderating online content. Very large online platforms, including U.S. tech giants that have a disproportionate impact on internet users in the European Union, face additional obligations under the DSA.<sup>108</sup> For example, the DSA mandates that these platforms carry out annual assessments identifying and mitigating systemic risks and subjects them to an independent auditing regime.<sup>109</sup> To promote algorithmic transparency, these designated platforms must also share data with researchers and authorities on their content moderation decisions.<sup>110</sup>

The DSA reflects the European Union's commitment to freedom of expression. It refrains from introducing a general monitoring obligation on platforms, preserving their immunity as currently provided for under the 2000 e-Commerce Directive.<sup>111</sup> Fundamental rights considerations explain the DSA's regulatory restraint across a number of provisions. For example, in the preamble laying out the objectives of the DSA, the Commission notes that "[r]esponsible and diligent behaviour by providers of intermediary services is essential . . . for allowing Union citizens and other persons to exercise their fundamental rights[.]"<sup>112</sup> The DSA also underscores the importance of non-discrimination as a core fundamental right. In particular, the DSA acknowledges how user notices or content removal algorithms may reflect unconscious or conscious biases that disproportionately affect certain

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105. *See id.* art. 3(3).

106. *See id.* art. 9.

107. Regulation 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1 (EU) [hereinafter Digital Services Act].

108. *See id.* pmb. paras. 41, 47–48, 57, 65, 75–96.

109. *Id.* art. 55(1).

110. *Id.* art. 40(4).

111. *Id.* pmb. para. 34; Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), pmb. para. 47, art. 15, 2000 O.J. (L 178) 1.

112. *See* Digital Services Act, *supra* note 107, pmb. para. 3.

user groups, and prohibits such discriminatory practices.<sup>113</sup> Very large online platforms must additionally evaluate and report systemic risks that may compromise fundamental rights.<sup>114</sup> These provisions illustrate how the DSA, while seen as imposing considerable regulatory burdens on online platforms, is concerned with establishing a strong rights foundation for content moderation decisions and processes, and thus upholding fundamental rights as a key pillar of Europe's digital constitution.

### B. *Using Digital Regulation to Preserve and Strengthen Democracy*

The Treaty of the European Union emphasizes “freedom” and “democracy” as the European Union's founding principles.<sup>115</sup> Democracy is also a precondition for EU membership.<sup>116</sup> However, in recent years, democracy has come under threat in Europe and elsewhere. Freedom House, an American NGO that conducts research and advocacy on democracy and political freedom, documented a fifteenth consecutive year of decline in global freedom in 2021.<sup>117</sup> According to its “Freedom in the World 2021” report, less than 20% of the world's population now lives in what is categorized to be a “free” country.<sup>118</sup> Such democratic decay has not spared Europe. Voter turnout in many European countries has also declined, as has membership in political parties.<sup>119</sup> At the same time, populist parties have gained ground, ascending into power in several EU Member States. Poland and Hungary, in particular, have experienced severe democratic backsliding as a result of these power shifts from the ideological center toward more authoritarian leaders, shaking faith in democracy as an inalienable foundation of the European Union.<sup>120</sup>

Against these broader economic, cultural, and political trends, there is a growing concern that technology may adversely affect democracy. For

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113. *See id.* pmbl. para. 94 (noting that very large online platforms should, “where necessary, adjust the design of their recommender systems, for example by taking measures to prevent or minimise biases that lead to the discrimination of persons in vulnerable situations”).

114. *See id.* pmbl. para. 34.

115. *See* TEU, *supra* note 38, art. 2.

116. *See* Presidency Conclusions, Copenhagen European Council (June 21–22, 1993).

117. *See* SARAH REPUCCI & AMY SLIPOWITZ, DEMOCRACY UNDER SIEGE 1, 3 (Freedom House, 2021), <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege>.

118. *Id.* at 3.

119. *See* HANS KUNDNANI, THE FUTURE OF DEMOCRACY IN EUROPE: TECHNOLOGY AND THE EVOLUTION OF REPRESENTATION 5, 9 (Chatham House, Mar. 2020), <https://www.chathamhouse.org/sites/default/files/CHHJ7131-Democracy-Technology-RP-INTS-200228.pdf>.

120. Case C-156/21, Hungary v. European Parliament and Council of the European Union, ECLI:EU:C:2022:97 (Feb. 16, 2022); Case C-157/21, Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:98 (Feb. 16, 2022); *see also* Yasmeen Serhan, *The Other Threat to Democracy in Europe*, ATLANTIC (Apr. 11, 2022), <https://www.theatlantic.com/international/archive/2022/04/democracy-eu-hungary-viktor-orban-russia/629504>.



techno-optimists, technology can amplify individual freedoms and revitalize democracies.<sup>121</sup> At its best, the internet can preserve and strengthen democracy by providing an inclusive platform for diverse voices to participate in society. Yet, critical voices point to a myriad of ways for technology to undermine democracy. Online communication channels have not only cultivated civic engagement; they have also facilitated the spread of disinformation, undermining public debate and the legitimacy of democratic elections.<sup>122</sup> Apart from producing freedom and enhancing democracy, online platforms have also sowed discord and deepened societal divisions.<sup>123</sup> In light of this, the internet's potential to amplify freedom and usher in a revitalized democracy has been, at best, only partially realized, and, at worst, proven to be a false promise.

Aware of these dangers, the European Union has sought to harness the democracy-enhancing potential of technology while guarding itself against the dangers that digital technologies present. It has adopted a number of regulatory instruments, including measures aimed at countering disinformation and strengthening free and pluralistic media—both of which the European Union sees as crucial for sustaining democratic discourse. Through these efforts, the European Union is elevating the preservation and strengthening of democracy as a central tenet of its digital constitution.

### 1. *Fighting Disinformation and Other Harmful Content Online*

The European regulatory agenda is anchored in the conviction that protecting citizens' ability to express themselves freely online is essential for a democratic society. In the 2020 European Democracy Action Plan, the Commission emphasized how democracy cannot thrive without “engaged, informed, and empowered citizens.”<sup>124</sup> To meaningfully participate in democracy, citizens must be able to form their own opinions, including making electoral choices in a public space that exposes them to a plurality of viewpoints.<sup>125</sup> According to the Commission, this requires both protecting the freedom of speech online and eliminating online

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121. See, e.g., ELISA LIRONI, HARNESING DIGITAL TOOLS TO REVITALIZE EUROPEAN DEMOCRACY 2 (Carnegie Endowment for Int'l Peace, Nov. 28, 2018), <https://carnegieeurope.eu/2018/11/28/harnessing-digital-tools-to-revitalize-european-democracy-pub-77806>.

122. See DAVID KAYE, SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET 13 (Colum. Glob. Rep. 2019).

123. See Christopher K. Tokita, Andrew M. Guess & Corina E. Tarnita, *Polarized Information Ecosystems Can Reorganize Social Networks Via Information Cascades*, 118 PROC. NAT'L ACAD. SCI. 1 (2021).

124. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan*, at 3, COM (2020) 790 final (Mar. 12, 2020).

125. See *id.*

disinformation that can potentially undermine political processes.<sup>126</sup> Without the freedom of expression, individuals' political rights are compromised. At the same time, disinformation polarizes the public discourse and undermines citizens' trust in democracy.<sup>127</sup>

Given the prevalence and severity of disinformation, as well as its manifested adverse effect on democracy, the European Union seeks to limit the dissemination of such information online. However, any efforts to limit disinformation are complicated as they risk undermining the freedom of expression foundational to a democratic society. Europe's digital constitution thus reflects the belief that excessive content removal can lead to harmful censorship that is inconsistent with the European Union's commitment to democracy and individual freedom.<sup>128</sup> Unlike hate speech or terrorist content, disinformation is not illegal, which makes it even harder to target through regulation. EU regulation is therefore not mandating the removal of disinformation, but predominantly alerting internet users of alternative information sources and educating them to more critically evaluate the information they encounter online.

The Commission developed a non-binding Disinformation Code, which, in its updated 2022 version, has been signed by leading platforms including Google, Meta, Microsoft, TikTok, and Twitter,<sup>129</sup> though Twitter later abandoned the Disinformation Code in its controversial 2023 decision.<sup>130</sup> These companies voluntarily commit to measures including increasing transparency in political advertising, closing fake accounts, facilitating fact-checking, demonetizing the dissemination of disinformation, and granting researchers access to their data to facilitate

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126. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Online Disinformation: A European Approach*, at 1, COM (2018) 236 final (Apr. 26, 2018) [hereinafter *Tackling Online Disinformation*]; see also Resolution on Foreign Electoral Interference and Disinformation in National and European Democratic Processes, EUR. PARL. DOC. P9\_TA (2019) 0031 para. 4 (2019) (emphasizing the importance of “free and fair elections”).

127. See *Commission Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan Against Disinformation*, at 11, JOIN (2018) 36 final (Dec. 5, 2018).

128. See *Tackling Online Disinformation*, *supra* note 126, at 1125.

129. See *Signatories of the 2022 Strengthened Code of Practice on Disinformation*, EUR. COMM'N (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation>; *Shaping Europe's Digital Future: Code of Practice on Disinformation*, EUR. COMM'N (Jan. 31, 2023), <https://digital-strategy.ec.europa.eu/en/news/code-practice-disinformation>; *Shaping Europe's Digital Future: Roadmaps to Implement the Code of Practice on Disinformation*, EUR. COMM'N (Mar. 8, 2021), <https://digital-strategy.ec.europa.eu/en/news/roadmaps-implement-code-practice-disinformation>.

130. Ewa Krukowska, *Twitter Withdraws from EU Disinformation Code, Commissioner Says*, TIME (May 27, 2023, 3:16 PM), <https://time.com/6283183/twitter-withdraws-from-eu-disinformation-code-commissioner-says>.

research on disinformation.<sup>131</sup> While the voluntary Code has led to progress, disinformation remains prevalent online.<sup>132</sup> Acknowledging this, the Commission announced in 2020 that it was time to complement self-regulation with binding regulation.<sup>133</sup> This paved the way for the adoption of the DSA. As discussed earlier, the DSA regulates illegal content such as hate speech, but also acknowledges how online disinformation can impose “systemic risks on society and democracy.”<sup>134</sup>

Under the DSA, “very large online platforms,” such as Google and Meta, are obliged to assess such systemic risks, and adopt “reasonable, proportionate and effective” measures to mitigate them.<sup>135</sup> These platforms must also subject themselves to an independent auditing regime.<sup>136</sup> To promote algorithmic transparency, these large platforms are expected to share data with researchers and authorities on their content moderation decisions.<sup>137</sup> The DSA is backed by notable sanctions. Very large platforms infringing the DSA can be fined up to 6% of their global turnover.<sup>138</sup> For example, if Meta were to be fined the maximum 6% under the DSA, it could cost the social network \$7.1 billion, based on its 2021 revenue.<sup>139</sup> By resorting to binding rules and heavy fines, the DSA underscores the European Union’s view that government intervention is needed in order to preserve democracy in a digital society—an approach that stands in stark contrast to the U.S. government, which has been reluctant to intervene for the fear that any limits on free speech present an ultimately greater threat to democracy.

The European Union’s efforts to fight online disinformation through digital regulation are particularly relevant in its quest to protect the integrity of political elections. Politically motivated disinformation campaigns present a serious threat to democracy. These campaigns are being waged with the aim of delegitimizing elections, including by spreading

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131. See EUR. COMM’N, THE STRENGTHENED CODE OF PRACTICE ON DISINFORMATION 2022 (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

132. See European Commission Statement /19/6166, Code of Practice on Disinformation One Year On: Online Platforms Submit Self-Assessment Reports (Oct. 29, 2019).

133. See European Commission Press Release IP/20/1568, Disinformation: EU Assesses the Code of Practice and Publishes Platform Reports on Coronavirus Related Disinformation (Sept. 10, 2020).

134. See Digital Services Act, *supra* note 107, pmbl. para. 104.

135. See *id.* arts. 33–35.

136. See *id.* art. 37.

137. See *id.* art. 40 (“Upon a reasoned request from the Digital Services Coordinator . . . very large online platforms . . . shall, within a reasonable period, as specified in the request, provide access to data to vetted researchers[.]”).

138. See *id.* art. 74.

139. See *Meta Reports Fourth Quarter and Full Year 2021 Results*, META PLATFORMS, INC. (Feb. 2, 2022), [https://s21.q4cdn.com/399680738/files/doc\\_financials/2021/q4/FB-12.31.2021-Exhibit-99.1-Final.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/FB-12.31.2021-Exhibit-99.1-Final.pdf).

disinformation about democratic institutions, manipulating voter preferences, and suppressing voter turnout.<sup>140</sup> One particularly disturbing example of such election meddling is Russia's 2016 disinformation campaign orchestrated to influence the outcome of the Brexit referendum,<sup>141</sup> which further contributed to the European Union's resolve to address this problem with more robust regulation. A related concern is the manipulation of voter behavior, which can compromise citizens' privacy, personal autonomy, and freedom to exercise free will in a political process.<sup>142</sup> As a result, citizens' ability to partake in free and fair elections by exercising their full and autonomous political choice has become a central concern for the European Union.

In an attempt to curtail malicious actors' ability to manipulate the electorate and undermine their political freedom, the Commission proposed a new regulation geared at enhancing transparency in political advertising and communication in 2021.<sup>143</sup> The proposed rules mandate the labeling of political advertisements, revealing the identities of individuals or entities paying for various ads.<sup>144</sup> The proposed regulation also restricts various targeting and amplification techniques in the context of political advertising.<sup>145</sup> These measures illustrate the common belief among EU leaders—supported by the European public at large—that democracy cannot be sustained by relying on free speech and platforms' self-regulation alone. Instead, the government must step in and help uphold citizens' political rights in a democratic society.

## 2. *Strengthening Free and Pluralistic Media*

Europe's digital constitution also protects the news media, a regulatory effort that the European Union sees as necessary for defending democracy. Large online platforms increasingly threaten the viability of traditional media, which play an essential role in democracy. In its 2020 European Democracy Action Plan, the Commission highlights that “[b]y providing the

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140. See DUNCAN B. HOLLIS & JENS DAVID OHLIN, *DEFENDING DEMOCRACIES: COMBATING FOREIGN ELECTION INTERFERENCE IN A DIGITAL AGE* 1–16 (Duncan B. Hollis & Jens David Ohlin eds., 2021); see Motion for a European Parliament Resolution on Foreign Interference in All Democratic Processes in the European Union, Including Disinformation, EUR. PARL. DOC. (2020/2268(INI)) (Aug. 8, 2022).

141. See, e.g., Mark Lander & Stephen Castle, *'No One' Protected British Democracy from Russia*, U.K. Report Concludes, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/world/europe/uk-russia-report-brexit-interference.html>.

142. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan*, at 4, COM (2020) 790 final (Dec. 3, 2020).

143. See *Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising*, COM (2021) 731 final (Nov. 25, 2021).

144. *Id.* art. 7(1).

145. *Id.* art. 12.

public with reliable information, independent media play an important role in the fight against disinformation and the manipulation of democratic debate.”<sup>146</sup> This view provides a policy rationale for the European Union to leverage regulation with the goal of enhancing the role of traditional media companies—including strengthening their ability to compete with large digital platforms—in the new digital landscape.

As part of its effort to promote a free and pluralistic media, the European Union adopted a landmark Copyright Directive in 2019.<sup>147</sup> The Directive takes a direct aim at the sustainability of the press sector by seeking to ensure that journalists receive a fair share of the revenue generated by viewers who access the news stories through online intermediaries.<sup>148</sup> Under the Directive, search engines, social networks, and news aggregators are required to obtain a license from publishers before displaying content that these publishers create.<sup>149</sup> This bargaining process is expected to lead to revenue sharing between the platforms and the publishers. However, it is unclear whether the Copyright Directive will, in fact, support the news industry that remains dependent on traffic that these platforms offer.<sup>150</sup> A refusal by Google to link to a publisher's content, for example, could be a death sentence for that publisher.<sup>151</sup> This was illustrated in 2014 when Spain passed a law that obliged news aggregators to compensate publishers of news content.<sup>152</sup> Google responded by withdrawing Google News from the Spanish market, impairing the news publishers who were no longer able to benefit from the traffic Google generated for them.<sup>153</sup>

Media outlets are acutely aware that, if they were to exercise their right to demand revenue sharing under the Copyright Directive, Google could replicate what it did in Spain. This has led several publishers to waive their right to collect fees and to allow Google to link their content free of charge.

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146. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan*, at 11, COM (2020) 790 final (Dec. 3, 2020).

147. See Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

148. See *id.* pmb1. paras. 1–3.

149. *Id.* art. 17(1).

150. See *Academics Against Press Publishers' Right*, INST. FOR INFO. L., UNIVERSITEIT VAN AMSTERDAM, <https://www.ivir.nl/academics-against-press-publishers-right>.

151. See Duncan Robinson, *European Copyright Rules: What Happens Now?*, FIN. TIMES (Aug. 26, 2016), <https://www.ft.com/content/0fb1b2de-6b5a-11e6-a0b1-d87a9fea034f> (explaining how, due to the fact that “Google’s market share [is] close to 90 per cent in some European countries,” publishers would suffer a major “traffic hit” from Google “simply opt[ing] not to . . . link to any more of that publisher’s content”).

152. See Intellectual Property Law (B.O.E. 2014, 268) (Spain).

153. See Ashifa Kassam, *Google News Says ‘Adiós’ to Spain in Row Over Publishing Fees*, GUARDIAN (Dec. 16, 2014, 10:46 AM), <https://www.theguardian.com/world/2014/dec/16/google-news-spain-publishing-fees-internet>.

For example, some German publishers acknowledged that they were forced to do so given the “overwhelming market power of Google.”<sup>154</sup> However, a recent licensing agreement Google reached with APIG, an organization representing the French news media, suggests that Google intends to comply with the Copyright Directive.<sup>155</sup> Interestingly, Google agreed to negotiate individual licenses with the French publishers only after the French competition authority ruled that Google’s initial refusal to negotiate with them amounted to an abuse of its dominant position and thus a violation of French competition law.<sup>156</sup> This, again, shows how Europe’s digital constitution places its faith in government intervention to ensure that tech companies do not abuse their market power in ways that undermine news production and democratic institutions.

In addition to seeking to reduce the supply of disinformation, the European Union has sought to reduce demand for it. The European Union has repeatedly emphasized the importance of promoting citizens’ digital literacy as a way to counter disinformation and to empower citizens to critically consume and evaluate the media content they encounter.<sup>157</sup> In this effort, the European Union has adopted several soft law initiatives to advance digital literacy in Europe.<sup>158</sup> But the European Union has issued binding obligations as well. The revised Audiovisual Media Services Directive from 2018 obliges video-sharing platforms to provide effective media literacy measures and tools.<sup>159</sup> A failure to comply with these obligations may lead to fines.<sup>160</sup> This further illustrates how the European

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154. See Nate Hoffelder, *German Publishers Cave, Grant Google Free Permission to Use Snippets in Search Results*, DIGIT. READER (Oct. 22, 2014), <https://the-digital-reader.com/2014/10/22/german-publishers-cave-grant-google-free-permission-use-snippets-search-results>.

155. See Hanna Ziady, *Google Agrees to Pay French Publishers for News*, CNN (Jan. 21, 2021, 12:43 PM), <https://edition.cnn.com/2021/01/21/tech/google-pays-french-publishers/index.html>.

156. See Thibault Larger & Laura Kayali, *French Publishers Win Decisive Battle Against Google*, POLITICO (Apr. 9, 2020, 4:46 PM), <https://www.politico.eu/article/french-publishers-win-decisive-battle-against-google>.

157. See Council Conclusions on the Strengthening of European Content in the Digital Economy, 2018 O.J. (C 457) 2, 5–6.

158. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Digital Education Action Plan 2021-2027*, COM (2020) 624 final (Sept. 30, 2020).

159. See Directive 2018/1808, of the European Parliament and of the Council of 14 November 2018 Amending Directive 2010/13/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) in View of Changing Market Realities, art. 28b(3)(j), 2018 O.J. (L 303) 69.

160. *Id.* art. 4(a)(1); AVMS-RADAR, *Update on Recent Changes and Developments in Member States and Candidate Countries that are Relevant for the Analysis of Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies*, ¶ 16, SMART 201/0083 (2015) (EC); *The Independence of Media Regulatory Authorities in Europe*, EUR. AUDIOVISUAL OBSERVATORY, at 120 (2019), <https://rm.coe.int/the-independence-of-media-regulatory-authorities-in-europe/168097e504>; see *Self- and Co-regulation in the New AVMSD*, EUR. AUDIOVISUAL OBSERVATORY (2019), <https://rm.coe.int/iris-special-2019-2-self-and-co-regulation-in-the-new-avmsd/1680992dc2>.

Union's efforts to protect democracy have evolved into a multifaceted regulatory agenda geared toward ensuring that tech companies' actions enhance, and do not undermine, democracy as a foundation of a digital society.

### C. *Promoting Fairness and Redistribution*

Values relating to social fairness and solidarity are defining features of European economic policy. The European Union's commitment to fairness and redistribution is consistent with the European social market economy model, which seeks to combine a free-market capitalist economy with social progress and a welfare state. In its 2020 Report, the European Commission notes how “[e]conomic growth can be deemed fair when it is inclusive, benefiting all income groups, particularly the poorest.”<sup>161</sup> Consistent with this statement, the European Union seeks to integrate specific ideas about solidarity and fairness into its policymaking. This reflects the view that societies perceived as fairer and more equal are associated with higher levels of life satisfaction and better social outcomes, whereas rising inequalities cultivate a sense of discontentment within the public.<sup>162</sup> Various surveys among European citizens further demonstrate that inequality at the bottom of the distribution elicits a particularly strong sense of injustice among Europeans—even more than inequality at the top of the distribution.<sup>163</sup> This concept of societal fairness, embraced by political leaders and the public alike, has been integral in shaping Europe's digital constitution.

The European Union's regulatory agenda is geared at mitigating existing power asymmetries and cultivating a fairer digital economy. Despite its many benefits, digital transformation has led to an exceedingly concentrated economy where a few powerful companies control economic wealth and political power, accentuating inequalities and widening the gap between winners and losers. Consequently, EU regulations are aimed at reducing this power imbalance and distributing the gains from the digital economy more equally. The European Union integrates fairness into its digital policy both as *ex ante* fairness—such as by creating contestable markets where all players, big and small, are given the opportunity to compete on a level playing field—and as *ex post* fairness, where gains from the digital transformation are distributed more evenly.

These commitments around greater fairness have led the European Union to adopt policies that shift power away from platforms to workers,

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161. 2020 *Annual Commission Review of Employment and Social Developments in Europe*, at 17 (Sept. 15, 2020), <https://ec.europa.eu/social/BlobServlet?docId=22965&langId=en>.

162. See *Beyond Averages: Fairness in an Economy that Works for People*, at 28 (June 11, 2020).

163. See *Justice and Fairness in Europe: Topline Results from Round 9 of the European Social Survey*, ESS TOPLINE RESULT SERIES 2, 4–10 (2020).

internet users, smaller businesses and other economic actors, and to the public at large. In recent years, the European Union's focus to fairness and redistribution has manifested itself in three different areas of digital regulation, each discussed in detail below. First, the European Union has deployed its antitrust laws to rein in the power of large tech companies, with the goal of empowering smaller firms and consumers. Second, EU Member States have led the quest toward a fairer digital tax regime in an effort to share gains from the digital economy with the general public. Third, the European Union has sought to enhance the social protections of platform workers. Each of these three policy areas illustrates how the European Union views government regulation as an essential tool for redistributing economic wealth and opportunities in a digital society.

### 1. *Antitrust Law*

Antitrust law offers an important policy tool for the European Union in its efforts to promote a digital marketplace where all companies can compete fairly. Antitrust law, in Europe and elsewhere, is traditionally deployed to promote efficiency rather than fairness. The primary goal of EU antitrust law—or, using the European terminology, EU competition law—is the maximization of consumer welfare.<sup>164</sup> Consequently, conventional thinking suggests that it cannot directly be leveraged to advance broader fairness considerations. However, Commissioner Margrethe Vestager, who is responsible for competition policy, has described how “competition policy contributes to shaping a *fairer society*, where all economic players—large and small—abide by the same rules.”<sup>165</sup> In the competition law context, this entails creating a more equal playing field where even small rivals can contest powerful incumbents. In his 2016 State of the Union speech, the former Commission President Jean-Claude Juncker emphasized how EU competition policy contributes towards “a fair playing field,” adding how “[t]he Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for.”<sup>166</sup>

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164. *Commission Guidelines on the Application of Article 81(3) of the Treaty*, 2004 O.J. (C 101) 97, ¶ 33, at 102; *Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7, ¶ 19, at 9; see also Case C-94/00, *Roquette Frères SA v. Comm'n*, 2002 E.C.R. I-09011, ¶ 42; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 E.C.R. I-527, ¶ 22. See generally Ariel Ezrachi, *The Goals of EU Competition Law and the Digital Economy*, EUR. CONSUMER ORG. (Aug. 2018), [https://www.beuc.eu/publications/beuc-x-2018-071\\_goals\\_of\\_eu\\_competition\\_law\\_and\\_digital\\_economy.pdf](https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf) (identifying consumer well-being and consumer welfare as a primary goal of EU competition law).

165. Margrethe Vestager, *Foreword to the Annual Competition Report 2016*, EUR. COMM'N, [https://ec.europa.eu/competition/publications/annual\\_report/2016/fw\\_en.pdf](https://ec.europa.eu/competition/publications/annual_report/2016/fw_en.pdf) (emphasis added).

166. Jean-Claude Juncker, President of the Eur. Comm'n, State of the Union 2016 (Sept. 14, 2016), in STATE OF THE UNION 2016 5, 10–11.



Some of the recent Commission decisions illustrate how this concept of fairness informs EU antitrust enforcement action in practice, both reflecting and furthering the European Union's attempts to advance fairness as a central tenet of its digital constitution. In 2017, the Commission issued a decision against Google in the case commonly referred to as *Google Shopping*, finding that Google had given an unfair advantage to its own comparison-shopping service and hence engaged in self-preferencing in breach of EU competition rules.<sup>167</sup> In this case, Google was accused of displaying its rivals' comparison-shopping services lower down in search results. This reduced traffic to these other sites and, according to the Commission, denied these other companies the chance to compete and innovate.<sup>168</sup> Google was ordered to grant equal treatment to its rivals.<sup>169</sup> Niamh Dunne has argued that the "ethos" of fairness is "intrinsic to the theory of harm" in the *Google Shopping* case.<sup>170</sup> The European Union's General Court upheld the Commission's decision in 2021,<sup>171</sup> thus endorsing these fairness-driven non-discrimination obligations for large online platforms as a cornerstone of EU competition law.

The European Union's adoption of the Digital Markets Act (DMA) in 2022 illustrates how antitrust regulation can be harnessed to advance the notion of fairness. There is a growing consensus that the European Union's existing enforcement toolkit that relies on *ex post* enforcement of antitrust law is insufficient. These investigations are time-consuming and often fail to unlock competition.<sup>172</sup> Smaller rivals cannot survive in the marketplace for the decade that it can take for the Commission to collect evidence and to build a case against a dominant company. Partly in response to these concerns, the European Union adopted a new *ex ante* regulation on competition—the DMA—in 2022.<sup>173</sup> The DMA targets so-called "digital gatekeepers," which are the largest online platforms that have the greatest ability to shape competitive conditions on the marketplace, thus bringing the large U.S. tech giants under its fold. The DMA invokes fairness multiple times. In describing the goals of the legislation, the Commission emphasizes the need to counter "[t]he adverse impact of unfair practices on the internal

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167. Case AT.39740, *Google Search (Shopping)*, C (2017) 4444 final, ¶ 2 (June 27, 2017).

168. *Id.* ¶ 63, at 16.

169. *Id.* ¶ 697, at 204.

170. See Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84(2) MOD. L. REV. 230, 252 (2020).

171. Case T-612/17, *Google & Alphabet v. Comm'n*, ECLI:EU:T:2021:763, ¶ 703 (Nov. 10, 2021).

172. *European Court of Auditors Special Report on the Commission's EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight*, paras. 7, 46, 47 (2020), <https://op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/index.html>.

173. Regulation 2022/1925, of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1 (EU) [hereinafter Digital Markets Act].

market and the particularly weak contestability of core platform services, including the negative societal and economic implications of such unfair practices[.]”<sup>174</sup> By seeking to “lay[] down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union,”<sup>175</sup> the DMA directly contributes to the European Union’s fairness-driven digital policy.

## 2. *Digital Taxation*

The European Union acknowledges that there is a limit to how much fairness and wealth redistribution can be accomplished through the enforcement of antitrust law alone. Taxation is commonly viewed as a more effective policy instrument than antitrust policy to transfer wealth in the economy, making it an essential policy tool for the European governments to promote fairness in the digital economy.<sup>176</sup> Acknowledging this, several EU Member States have either announced, proposed, or enacted a domestic Digital Services Tax (DST).<sup>177</sup> These DSTs reflect a belief that the country where digital companies create economic value—for instance, by offering digital services to users located in that country—should have taxing rights over that digital company.

France was the first EU jurisdiction to enact a DST in 2019, imposing a 3% tax on digital services provided to French users.<sup>178</sup> Digital services such as online advertising, online platforms, or online marketplaces fall under the law’s definition of digital services.<sup>179</sup> The French DST applies to approximately thirty companies, including the large U.S. tech companies, such as Amazon, Apple, Google, and Meta.<sup>180</sup> In announcing the new law, the French Minister for the Economy and Finance Bruno Le Maire emphasized that with the DST, France is “merely re-establishing fiscal justice” by “creat[ing] taxation for the 21st century that is fair and efficient.”<sup>181</sup> European countries that have already implemented a DST

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174. *Id.* pmb1., ¶ 6.

175. *Id.* art. 1(1).

176. See Louis Kaplow, *On the Choice of Welfare Standards in Competition Law*, in HARVARD JOHN M. OLIN DISCUSSION PAPER SERIES 1, 3, 19 (2011).

177. See *BEPS 2.0: Pillar One and Pillar Two*, KPMG, <https://home.kpmg/xx/en/home/insights/2020/10/beps-2-0-pillar-one-and-pillar-two.html> (last visited Aug. 16, 2022).

178. See Loi 2019-759 du 24 juillet 2019 portant création d’une taxe sur les services numériques et modification de la trajectoire de baisse de l’impôt sur les sociétés [Law 2019-759 of July 24, 2019 on Creating a Digital Services Tax and Modifying the Trajectory of Corporate Tax Cuts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE] 1, July 25, 2019; CODE GÉNÉRAL DES IMPÔTS [TAX CODE] art. 299c(II) (Fr.).

179. CODE GÉNÉRAL DES IMPÔTS [TAX CODE] art. 299(II)-(III) (Fr.).

180. See U.S. TRADE REPRESENTATIVE, SECTION 301 INVESTIGATION: REPORT ON FRANCE’S DIGITAL SERVICES TAX (2019), at 26–27.

181. Angélique Chrisafis, *France Hits Back at US Over Tax on Digital Giants*, GUARDIAN (July 11, 2019), <https://www.theguardian.com/world/2019/jul/11/france-us-tax-big-digital-companies-donald-trump-amazon-facebook>.

include Austria, France, Hungary, Italy, Poland, Portugal, and Spain, in addition to the UK outside of the European Union.<sup>182</sup> The wide adoption of the DSTs at the EU Member State level reflects an emerging European consensus that tax legislation offers an important policy instrument to promote a fair digital economy.

To prevent the emergence of multiple DSTs at the Member State level, the Commission sought to implement a European-wide solution on digital taxation in 2018.<sup>183</sup> The Commission's proposal subsequently evolved into a reshaped 2020 proposal for a digital levy.<sup>184</sup> With this levy, the Commission seeks "to ensure that digital companies contribute their fair share to society, since a prolonged unequal distribution of rights and responsibilities undermines the social contract."<sup>185</sup> The national DSTs and the Commission's digital levy soon became a source of major controversy in U.S.-EU relations, bringing the parties to the brink of a trade war over the issue and ultimately paving the way for a multilateral agreement within the Organization for Economic Co-operation and Development (OECD).<sup>186</sup>

While the developments discussed above are significant, to date the European Union has had limited ability to shape the digital economy through taxation, as tax policy remains to a large extent a competence of individual Member States. But there are other related policies that intersect with taxation and that fall squarely within the European Union's competences, thus providing the European Union an avenue to advance its fairness-driven digital agenda. For example, the European Union has often resorted to another policy tool—state aid control—in challenging what it considers unfair corporate tax planning.<sup>187</sup> State aid refers to a selective advantage, such as a tax benefit, which a Member State government grants to a company and which may provide the recipient with an unfair competitive advantage over its rivals. Such aid can be considered a violation of EU competition law as it can distort fair competition in the marketplace.

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182. See BEPS 2.0: *Pillar One and Pillar Two*, *supra* note 177; KPMG, TAXATION OF THE DIGITALIZED ECONOMY: DEVELOPMENTS SUMMARY (July 14, 2023), <https://tax.kpmg.us/content/dam/tax/en/pdfs/2023/digitalized-economy-taxation-developments-summary.pdf>.

183. See *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, at 2, COM (2018) 147 final, 2018/0072 (Mar. 21, 2018); *Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, at 3, COM (2018) 148 final, 2018/0073 (Mar. 21, 2018).

184. See Ursula von der Leyen, President of the Eur. Comm'n, State of the Union Address 2020 (Sept. 16, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655).

185. See Eur. Comm'n, Inception Impact Assessment, Ref. Ares (2021) 312667 (Jan. 14, 2021).

186. See KPMG BEPS 2.0, *supra* note 177; SECTION 301 INVESTIGATION: REPORT ON FRANCE'S DIGITAL SERVICES TAX, *supra* note 180, at 26–27.

187. TFEU arts. 107–09.

The EU state aid rules formed the basis for the recent, controversial ruling involving the Irish government and Apple.<sup>188</sup> In 2016, the Commission ordered Ireland to reclaim €13 billion in unpaid tax revenue from Apple.<sup>189</sup> According to the Commission, Apple had benefited from an unfair advantage over its competitors by paying a conspicuously low tax rate of 4% on nearly \$200 billion in profits it earned outside the United States over the past decade.<sup>190</sup> To justify its low tax rate, Apple relied on a 1991 tax ruling by Irish tax authorities, which the Commission found to violate EU state aid rules.<sup>191</sup> As a result, the Commission ordered Ireland to claw back the unpaid taxes from Apple.<sup>192</sup> In 2020, the European Union's General Court overturned the Commission decision.<sup>193</sup> The Commission is now appealing that decision to the CJEU, signaling the Commission's continuing resolve to assert its view of fairness over the tax treatment of large tech companies.<sup>194</sup>

### 3. *Employment Protections for Platform Workers*

The European Union's attention to fairness in the context of the digital economy is also reflected in its increasing concern about the working conditions of platform workers or "gig workers."<sup>195</sup> Platform work encompasses services such as food-delivery or ride-hailing services where workers perform services on-demand while being connected to their customers via a platform.<sup>196</sup> This type of work can enhance fairness by offering new opportunities for individuals to engage in the labor market under flexible conditions, thus benefiting workers, businesses, and

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188. See Commission Decision (EU) 2017/1283, 2017 O.J. (L187) 1, 109 [hereinafter Apple Decision].

189. *Id.* at 109–10; Apple, Inc., Annual Report (Form 10-K) (Nov. 3, 2017), <https://www.sec.gov/Archives/edgar/data/320193/000032019317000070/a10-k20179302017.htm>; European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion (Aug. 30, 2016), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2923](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923).

190. Apple Decision, *supra* note 188, at 5, 22, 39, 68, n.198, 78; Matthew Gardner, *Apple: A Case Study in Why a Tax Holiday for Offshore Cash is Indefensible*, INST. ON TAX'N & ECON. POL'Y (May 4, 2017), <https://itep.org/apple-a-case-study-in-why-a-tax-holiday-for-offshore-cash-is-indefensible>.

191. Apple Decision, *supra* note 188, at 5, 38–39, 109.

192. *Id.* at 109.

193. See Cases T-778/16 and T-892/16, *Ireland v. Commission*, ECLI:EU:T:2020:338.

194. See *Statement by Executive Vice-President Margrethe Vestager on the Commission's Decision to Appeal the General Court's Judgment on the Apple Tax State Aid Case in Ireland*, EUR. COMM'N (Sept. 25, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_20\\_1746](https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1746).

195. See *First Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work*, C (2021) 1127 final (Feb. 24, 2021) [hereinafter *Consultation of Social Partners*], <https://ec.europa.eu/social/BlobServlet?docId=23655&langId=en>.

196. *Id.* at 5.

customers alike.<sup>197</sup> However, it can also undermine fairness, giving impetus for regulatory action. The EU institutions have expressed concern about the precarious nature of platform work, including insufficient social protections for these workers.<sup>198</sup> For example, Nicolas Schmit, Commissioner for Jobs and Social Rights, has stressed that online platforms must offer platform workers social protections to ensure that “the digital transition is fair and sustainable.”<sup>199</sup> The European Parliament has also called for legislative action. In its 2020 report, the Parliament called for the benefits of digitalization to be shared broadly and equitably while stressing how “workers in the digital sector must enjoy the same rights and working conditions as those in other sectors[.]”<sup>200</sup>

In December 2021, the Commission proposed a Directive aimed at improving working conditions for platform work.<sup>201</sup> The proposed Directive, which is now pending before the Council of Ministers and the European Parliament, seeks to ensure that platform workers are classified as employees when the nature of their work calls for such a designation. By setting out the criteria that determine when the platform is considered an “employer,” the Directive is expected to lead to a significant re-classification of platform workers—such as Uber drivers—as employees.<sup>202</sup> This would extend various labor and social rights to these workers that traditional employees are entitled to under the national laws of each EU Member State. In practice, platform companies would be required to respect laws on minimum wage, collective bargaining, working time, unemployment, sickness benefits, and more.<sup>203</sup> The Directive also calls for greater transparency in algorithmic management of platform workers, vesting these workers with the right to contest automated decisions and mandating platforms to complement algorithms with human monitoring.<sup>204</sup>

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197. See *Questions and Answers: First Stage Social Partners Consultation on Improving the Working Conditions in Platform Work*, EUR. COMM'N 1–2 (Feb. 24, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_656](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_656).

198. See *id.* at 1.

199. European Commission Press Release IP/21/2944, *Protecting People Working Through Platforms: Commission Launches Second-Stage Consultation of Social Partners* (June 15, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_2944](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2944).

200. See Report on a Strong Social Europe for Just Transitions, PARL. EUR. DOC., A9-0233/2020 (Nov. 24, 2020), at 19.

201. See *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, COM (2021) 762 final (Dec. 9, 2021) [hereinafter *Improving Working Conditions*].

202. See *id.*, art. 4; *Impact Assessment Report Accompanying the Document Proposal for a Directive of the European Parliament and of the Council to Improve the Working Conditions in Platform Work in the European Union*, at 82–98, COM (2021) 762 final (Dec. 9, 2021).

203. See *Improving Working Conditions*, *supra* note 201, art. 5; *EU Rules on Platform Work*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/platform-work-eu/> (last visited June 30, 2023).

204. See *id.*, arts. 6–10.

This EU-level measure was, in part, motivated by the European Union's growing awareness of the inadequate employment protections available to platform workers.<sup>205</sup> But the Commission was also spurred to action because of the growing legislative activity on platform work within individual Member States—a development that often prompts Commission action, as it fears fragmentation of the single market with conflicting laws across Member States. Some Member States have already taken (or proposed) legislative action, whether by introducing a rebuttable presumption of employment for platform workers (e.g., the Netherlands, Spain) or by placing the burden on the platform to show that an employment relationship does not exist (e.g., Germany).<sup>206</sup> Some no longer draw a binary distinction between workers and self-employed individuals in their legislation but have proposed a third status for platform workers (e.g., Germany, France, Italy, Spain, and Portugal).<sup>207</sup> Many of the highest national courts across Europe—including in France, Spain, and the former EU Member State the United Kingdom—have also recognized platform workers as employees,<sup>208</sup> with significant consequences for ride-hailing companies, such as Uber, and food delivery services, such as Deliveroo. In Italy, Uber was put into “judiciary administration” in 2020 after the company's executives were accused of “exploitation and modern slavery[.]”<sup>209</sup> The following year, the Tribunal of Milan lifted the restriction following commitments made by Uber.<sup>210</sup> This spate of legislative activity and court rulings at the Member State level further illustrates the European governments' commitment to a redistributive, fairness-driven, and inclusive digital policy that is designed to “benefit[t] all income groups, particularly the poorest.”<sup>211</sup>

These efforts by the European Union to pursue greater fairness through its proposed regulation of platform work—along with those efforts discussed above in the context of antitrust law and digital taxation—reflect the European Union's view that government intervention is needed to ensure that the digital economy benefits large segments of society. This

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205. *Improving Working Conditions*, *supra* note 201, at 3.

206. *See Consultation of Social Partners*, *supra* note 195, at 8.

207. *See id.*

208. *See id.* at 25; Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.); S.T.S, Sept. 25, 2020 (T.S., No. 2924) (Spain); *Uber BV v. Aslam* [2021] UKSC 5 [paras. 1–2] (appeal taken from EWCA) (U.K.).

209. *See Consultation of Social Partners*, *supra* note 195, at 25; *see also* Trib., 28 maggio 2020, n. 74, Giur. Pen., Mi. 2020, 20 (It.), <https://www.giurisprudenzapenale.com/wp-content/uploads/2020/06/tribunale-mi-uber-34-anonim.pdf>.

210. *See* Emilio Parodi et al., *Court Lifts Restrictions on Uber Eats Italy After Working Conditions Investigation*, REUTERS (Mar. 4, 2021), <https://www.reuters.com/article/us-uber-italy-verdict/court-lifts-restrictions-on-uber-eats-italy-after-working-conditions-investigation-idUSKBN2AW24Y>.

211. *2020 Annual Commission Review of Employment and Social Developments in Europe*, at 17 (Sept. 15, 2020), <https://ec.europa.eu/social/BlobServlet?docId=22965&langId=en>.

policy objective requires the European Union to deploy multiple and diverse regulatory instruments. Their goals are manifold: ensure powerful platforms cannot harness their economic, political, and informational power for simply their own benefit; give smaller businesses a fair chance to compete with industry behemoths in the marketplace; grow public revenues through contributions from the digital giants; and protect platform workers' core social rights.

#### *D. Creating a Digital Single Market*

Since the early days of the European Union, regulation has served the fundamental goal of European integration. A well-functioning digital single market calls for harmonized EU regulations as inconsistent regulatory standards hinder cross-border trade. For example, if each of the twenty-seven individual EU Member States adopted different rules to safeguard personal data, the single market could not function efficiently, as companies would face a different regulatory environment in each Member State. As a result, this overarching policy objective—advancing European integration by creating a *digital single market*—is directly woven into Europe's digital constitution.

Most EU regulations advance dual objectives: in addition to advancing certain policy objective—such as fundamental rights, democracy, or fairness—they simultaneously seek to contribute to the better functioning of the single market. For example, the GDPR seeks not only to enhance the fundamental right to data protection but also to facilitate data flows across Member States.<sup>212</sup> Similarly, the Copyright Directive seeks to promote democracy through fostering a more sustainable press sector while also removing barriers from within the European Union by creating a digital single market for copyrighted works online.<sup>213</sup> The DSA was likewise motivated by the need to enhance transparency and accountability over tech companies' content moderation decisions and to prevent fragmentation that was emerging as individual Member States began adopting conflicting hate speech laws and enforcing them extraterritorially, thus undermining the functioning of the single European market.<sup>214</sup> This dual-objective approach underlying EU digital regulation has often allowed the European Union to harness broad political support for its regulatory acts, offering both pro-

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212. Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/26/EC, art. 98, 2016 O.J. (L 119) 87.

213. See *Shaping Europe's Digital Future: The EU Copyright Legislation*, EUR. COMM'N, <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation> (Feb. 7, 2023); see TFEU arts. 113–14.

214. See *Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, at 10–11, SWD (2020) 348 final (Dec. 15, 2020).

regulation and pro-trade coalitions a reason to advocate for common European rules.

The creation of a digital single market as a central policy goal also provides a sound legal basis for the European Union's regulatory action, allowing the European Union to regulate in domains over which it otherwise has no powers to act. For example, the European Union does not have the legal authority to regulate copyright matters, which remain within the scope of Member State powers. However, in adopting the Copyright Directive, the European Union relied on its existing powers to pursue harmonization measures that are necessary for the establishment and functioning of the internal market.<sup>215</sup> The single market imperative provides a legal basis for many other EU tech regulations as well, including the A.I. Act, the DSA, and the DMA.<sup>216</sup> Many of the European Union's far-reaching regulatory initiatives—however controversial—have thus benefited from being supported by a less controversial policy goal that rests on an uncontested legal basis: the completion of the digital single market and, thereby, the advancement of European integration.

### III. THE ASSESSMENT OF EUROPE'S DIGITAL CONSTITUTION

This Part discusses the perceived strengths and alleged weaknesses of Europe's digital constitution. It argues that the European digital regulations provide an important corrective to what is increasingly seen as a digital society marked by the excessive influence of a few tech companies. There is a growing understanding that the freewheeling pro-market ethos underlying America's lax tech regulation has been too narrowly focused on innovation and has been too optimistic about tech platforms' ability to nurture a vibrant democratic society. Europe's digital constitution is therefore seen as both beneficial and necessary, mitigating some of the harmful effects created and sustained by the United States' techno-libertarian regulatory regime. However, Europe's digital constitution has potential weaknesses as well. Common concerns include the adverse effects the European Union's stringent digital rules may have on innovation; the persistent enforcement deficits that often compromise the goals of European regulations in practice; the internal divisions within the European Union that undermine

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215. See Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

216. *Artificial Intelligence Act*, *supra* note 73, at 18; *The Digital Services Act: Ensuring a Safe and Accountable Online Environment*, EUR. COMM'N, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en) (last visited June 13, 2023); *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, at 4, COM (2020) 842 final (Dec. 15, 2020).



the coherence and legitimacy of Europe's digital constitution; and the alleged regulatory protectionism—or, perhaps even, regulatory imperialism—as either a driver or an outcome of the European Union's digital agenda.

*A. Restoring a Democratic, Fair, and Rights-Driven Digital Society*

Deepening discontent with the vast and unchecked power of U.S. tech companies is now creating a backlash in the European Union and elsewhere, leading to calls for governments to leverage their regulatory powers to rein in those companies.<sup>217</sup> The United States' hands-off approach towards antitrust regulation has allowed a highly concentrated economy to emerge, leaving a few tech companies in charge of providing most digital services.<sup>218</sup> These companies are protected by network effects that make it difficult for any entrant to challenge their entrenched market position. As a result, competition is limited, allowing existing tech giants to exploit their market power to the detriment of consumers. The concentration of economic power is also seen as contributing to existing economic inequalities, further widening the gap between the winners and losers in the digital economy.

In light of these concerns, Europe's digital constitution is seen as appealing because it is associated with greater economic fairness and distributional justice. Its central goal is to foster a fairer digital economy that divides the gains from the digital economy more equally. As Part I showed, this has entailed leveraging European antitrust, employment, and tax laws to redistribute power away from platforms to empower internet users and consumers, platform workers, and smaller businesses and to benefit the public at large. This regulatory philosophy is more in line with today's political environment, where the ideological underpinnings of neoliberalism, including any manifestations of capitalist excess, are increasingly criticized.<sup>219</sup> As a result, there is an increasingly compelling argument that Europe's digital constitution facilitates greater economic success not because of its ability to maximize wealth, but because of its commitment to distribute that wealth more evenly across society.

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217. See Jack Goldsmith, *The Failure of Internet Freedom*, 18-03 KNIGHT FIRST AMEND. INST. 11, 12, 17 (2018); see Josh Sisco, *Apple, Amazon, Google and Facebook Face at Least 70 Antitrust Probes, Cases*, THE INFO. (July 15, 2021, 9:03 AM).

218. STAFF OF H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 133 (Comm. Print 2020); Sara Morrison & Jason Del Rey, *FTC Chair Lina Khan's Plan to Take on Big Tech, in 9 Questions*, VOX (June 9, 2022, 12:00 AM), <https://www.vox.com/recode/2022/6/9/23160578/lina-khan-ftc-interview>.

219. For an overview of the history of neoliberalism, see generally GARY GERSTLE, *THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA* (Oxford Univ. Press 2022).

Another normative argument in favor of Europe's digital constitution stems from the growing discontent towards the United States' unwavering commitment to free speech, even when that speech undermines democracy, harms individuals, or destabilizes societies. Detrimental content online has too often trumped the decency, dignity, and safety of individuals, with Section 230 of the U.S. Communications Decency Act (CDA) coming to the rescue of tech companies no matter how repulsive the content they host on their platforms.<sup>220</sup> One can be a staunch proponent of free speech yet still argue that the U.S. government has gotten more than it bargained for with Section 230 of the CDA. That provision created an online world in which techno-libertarianism has gone rogue, turning the American regulatory model against the country's own democratic institutions, as evidenced most vividly by the disinformation-fueled U.S. Capitol insurrection in January 2021.<sup>221</sup>

The U.S. tech platforms have also too often caused irreparable harm abroad, adding to the concerns about their unchecked power.<sup>222</sup> For example, Meta admitted in 2018 that it failed to intervene and remove content posted by military and radical Buddhist groups in Myanmar.<sup>223</sup> These groups utilized the Facebook platform to spread hate and racially-motivated discrimination against the Rohingya minority, including messages calling for the destruction of the Rohingya as a people.<sup>224</sup> Instead of removing posts that were fueling hatred towards the country's Muslim minority, Meta provided a platform for advocating racist attacks and ethnic cleansing. This incident underscores the limits of the free speech ideology as a foundation of today's digital economy and lends further legitimacy to Europe's digital constitution. Even though the European Union is

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220. See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 17–24 (1st Cir. 2016); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x. 586 (2d Cir. 2019); Carrie Goldberg, *Herrick v. Grindr: Why Section 230 of the Communications Decency Act Must be Fixed*, LAWFARE (Aug. 14, 2019, 8:00 AM), <https://www.lawfareblog.com/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed>.

221. See Alan Feuer, *Two Years Later, Prosecutions of Jan. 6 Rioters Continue to Grow*, N.Y. TIMES (Jan. 6, 2023), [https://www.nytimes.com/2023/01/06/us/politics/jan-6-capitol-riots-prosecutions.html?name=styln-capitol-mob&region=TOP\\_BANNER&block=storyline\\_menu\\_recirc&action=click&pgtype=LegacyCollection&variant=show&is\\_new=false](https://www.nytimes.com/2023/01/06/us/politics/jan-6-capitol-riots-prosecutions.html?name=styln-capitol-mob&region=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=LegacyCollection&variant=show&is_new=false); Craig Silverman et al., *Facebook Hosted Surge of Misinformation and Insurrection Threats in Months Leading Up to Jan. 6 Attack, Records Show*, PROPUBLICA (Jan. 4, 2022, 8:00 AM), <https://www.propublica.org/article/facebook-hosted-surge-of-misinformation-and-insurrection-threats-in-months-leading-up-to-jan-6-attack-records-show>; Samantha Lai, *Data Misuse and Disinformation: Technology and the 2022 Elections*, BROOKINGS (June 21, 2022), <https://www.brookings.edu/articles/data-misuse-and-disinformation-technology-and-the-2022-elections>.

222. See KAYE, *supra* note 122, at 28–31; Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html>.

223. See KAYE, *supra* note 122, at 28–31; see Stevenson, *supra* note 222.

224. See Steve Stecklow, *Why Facebook is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018, 3:00 PM), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate>.

committed to protecting free speech, it is prepared to restrict that fundamental right in the name of other fundamental rights and important public policies, be it human dignity, personal privacy, public safety, or democracy—an approach that is increasingly seen as necessary.

Europe's digital constitution also protects internet users' data privacy, seeking to curtail prevalent “surveillance capitalism,” where tech companies track internet users' every move online and acquire a trove of personal data that they then monetize through targeted advertising.<sup>225</sup> Users' data has become the main currency fueling today's digital economy, giving tech companies the incentive to extract excessive amounts of data on users even when such data gathering infringes user privacy or exploits their vulnerabilities. As one of many examples, disturbing revelations by a former Facebook employee, Frances Haugen, provide evidence of how Instagram's algorithms intentionally target the vulnerabilities of teenage users by displaying weight loss ads to a teen with an emerging eating disorder.<sup>226</sup> More broadly, privacy-infringing data extraction by tech companies is increasingly seen as compromising internet users' “decisional privacy” by subverting individual choice, liberty, and self-governance.<sup>227</sup>

Voter behavior can also be manipulated whenever someone gains access to internet users' personal data and deploys that data for targeted political advertising. This practice was revealed in the Cambridge Analytica scandal, where British political consulting firm Cambridge Analytica harvested data from eighty-seven million Facebook profiles.<sup>228</sup> This data was used to build psychological profiles of users and then leveraged in political campaigns, including Donald Trump's 2016 presidential campaign.<sup>229</sup> Meta admitted to

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225. ZUBOFF, *supra* note 6, at 8–12.

226. See Sheera Frenkel, *Whistleblower Discusses How Instagram May Lead Teenagers to Eating Disorders*, N.Y. TIMES (Oct. 5, 2021, 1:25 PM), [https://www.nytimes.com/live/2021/10/05/technology/facebook-whistleblower-frances-haugen?action=click&pgtype=Article&module=&state=default&region=footer&context=breakout\\_link\\_back\\_to\\_briefing#in-hearing-haugen-discusses-how-instagram-may-lead-teenagers-to-eating-disorders](https://www.nytimes.com/live/2021/10/05/technology/facebook-whistleblower-frances-haugen?action=click&pgtype=Article&module=&state=default&region=footer&context=breakout_link_back_to_briefing#in-hearing-haugen-discusses-how-instagram-may-lead-teenagers-to-eating-disorders); Georgia Wells et al., *The Facebook Files: Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739>.

227. Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 129–30 (2019).

228. See Tim Mak, *Cambridge Analytica Scandal Raises New Ethical Questions About Microtargeting*, NPR (Mar. 22, 2018, 5:31 PM), <https://www.npr.org/2018/03/22/596180048/cambridge-analytica-scandal-raises-new-ethical-questions-about-microtargeting>; see Rob Price, *Why Facebook's Stock Jumped Despite Facing a Record-Breaking \$5 Billion FTC Penalty: 'A Slap on the Wrist'*, BUS. INSIDER (July 12, 2019), <https://www.businessinsider.com/facebook-stock-rose-news-5-billion-ftc-settlement-why-critics-2019-7>.

229. Mak, *supra* note 228; Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>; Carole Cadwalladr, *'I Made Steve Bannon's Psychological Warfare Tool': Meet the Data War Whistleblower*, GUARDIAN (Mar. 18, 2018, 5:44 AM),

mishandling user privacy and pledged to make significant changes in securing user data going forward.<sup>230</sup> Regardless of this pledge, the scandal has been ingrained in the memory of internet users and regulators alike, elevating the importance of data protection in their minds. These scandals further lend normative support for Europe's digital constitution, which views safeguarding data privacy as a paramount concern and a fundamental right that is vigorously defended by European courts.

Each additional privacy scandal and online disinformation campaign reveals the limits of the American regulatory approach—which has left tech companies in charge—and vindicates the principles underlying Europe's digital constitution. This explains why a growing number of governments in the democratic world are coalescing around a view that the European regulatory approach best enhances public interest, checks corporate power, and preserves democratic structures of society, and are now emulating those regulations as a result.<sup>231</sup> Even the United States is now becoming aware of the limits of its permissive regulatory approach, with some members of Congress now seeking to rewrite U.S. antitrust laws, adopt a federal privacy law, or revisit the Section 230 liability shield given to tech companies.<sup>232</sup> Any such reform would end American exceptionalism as one of the last frontiers of a largely unregulated digital economy and move the United States closer to a digital regime exemplified by Europe's digital constitution.

### B. *Raising Costs and Impeding Innovation*

Despite the many benefits associated with Europe's digital constitution, there are several potential downsides as well. Perhaps most glaringly, critics fear that the European approach towards digital regulation is not conducive to innovation and technological progress. There are few leading tech companies originating from Europe today, a fact that some

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<https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-facebook-nix-bannon-trump>; Sean Illing, *Cambridge Analytica, the Shady Data Firm that Might be a Key Trump-Russia Link, Explained*, VOX (Apr. 4, 2018, 3:41 PM), <https://www.vox.com/policy-and-politics/2017/10/16/15657512/cambridge-analytica-facebook-alexander-nix-christopher-wylie>.

230. See Josh Constine, *Zuckerberg's Response to Cambridge Scandal Omits Why It Delayed Investigating*, TECHCRUNCH (Mar. 21, 2018), <https://techcrunch.com/2018/03/21/zuckerberg-cambridge-analytica/>; Julia Wong, *Mark Zuckerberg Apologises for Facebook's 'Mistakes' Over Cambridge Analytica*, GUARDIAN (Mar. 22, 2018), <https://www.theguardian.com/technology/2018/mar/21/mark-zuckerberg-response-facebook-cambridge-analytica>.

231. See DIGITAL EMPIRES, *supra* note 27, at 366–69.

232. Press Release, Rep. Ro Khanna, Release: Rep. Khanna Releases 'Internet Bill Of Rights' Principles, Endorsed By Sir Tim Berners-Lee (Oct. 4, 2018), <https://khanna.house.gov/media/press-releases/release-rep-khanna-releases-internet-bill-rights-principles-endorsed-sir-tim>; H.R. 5815, 115th Cong. (2018); STAFF OF H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 376 (Comm. Print 2020); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021); SAFE TECH Act, S. 560, 118th Cong. (2023).

view as a product of the European Union's excessive regulation.<sup>233</sup> On the *Forbes* 2022 list of "The World's Largest Technology Companies," for example, only three EU-based companies, ASML, SAP and Accenture, made it to the top twenty.<sup>234</sup> At the same time, there were eleven U.S. companies among those leading twenty companies.<sup>235</sup> Other statistics portray an equally sobering picture. When focusing on the world's top 100 unicorns, only twelve European companies made the list in September 2021, with seven of those hailing from the United Kingdom as opposed to the European Union.<sup>236</sup> European companies contribute less than 4% to the market capitalization of the world's seventy largest platforms.<sup>237</sup> These statistics paint a clear picture of the European Union's relative weakness in this space and raise the question of whether Europe's relative lack of competitiveness can, indeed, be attributed to alleged overregulation.

Several academics, tech entrepreneurs, and industry analysts trace EU tech companies' relative lack of success to the level of tech regulation they face. Some scholars describe the European Union's regulatory approach toward platforms as "too blunt, with the risk of constraining value creation" while "producing unintended consequences[.]"<sup>238</sup> Andrew McAfee, co-founder of the MIT Initiative on the Digital Economy, suggests that "more upstream governance translates to less downstream innovation" in the European Union and predicts that the "expensive and time-consuming requirements" in the European Union's proposed A.I. rules "will generate less tech innovation[.]"<sup>239</sup> Jack Ma, the co-founder of Alibaba Group, has also suggested that the European Union's "tighter regulation could hamper its ability to innovate," noting that China's "lack of regulation around the internet in the early days allowed China's mobile internet to flourish and for Alibaba to thrive."<sup>240</sup> One tech industry association representative points

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233. Frances G. Burwell & Kenneth Propp, *The European Union and the Search for Digital Sovereignty: Building "Fortress Europe" or Preparing for a New World?*, ATL. COUNCIL 5 (June 2020).

234. Jonathan Ponciano, *The World's Largest Technology Companies in 2023: A New Leader*, FORBES (June 8, 2023, 6:15 AM), <https://www.forbes.com/sites/jonathanponciano/2023/06/08/the-worlds-largest-technology-companies-in-2023-a-new-leader-emerges/?sh=5fe835e35d1d>.

235. *Id.*

236. *The Complete List of Unicorn Companies*, CBINSIGHTS, <https://www.cbinsights.com/research-unicorn-companies> (last visited Aug. 17, 2022).

237. *The EU Wants to Set the Rules for the World of Technology*, ECONOMIST (Feb. 20, 2020), <https://www.economist.com/business/2020/02/20/the-eu-wants-to-set-the-rules-for-the-world-of-technology>.

238. Carmelo Cennamo & D. Daniel Sokol, *Can the EU Regulate Platforms Without Stifling Innovation?*, HARV. BUS. REV. (Mar. 1, 2021), <https://hbr.org/2021/03/can-the-eu-regulate-platforms-without-stifling-innovation>.

239. Andrew McAfee, *EU Proposals to Regulate AI are Only Going to Hinder Innovation*, FIN. TIMES (July 25, 2021), <https://www.ft.com/content/a5970b6c-e731-45a7-b75b-721e90e32e1c>.

240. Zen Soo, *Alibaba's Jack Ma Says He is "Worried" Europe Will Stifle Innovation with Too Much Tech Regulation*, S. CHINA MORNING POST (May 17, 2019, 11:09 AM), <https://www.scmp.com/tech/big-tech/article/3010606/alibabas-jack-ma-says-he-worried-europe-will-stifle-innovation-too>.

out that Spotify is one of the few successful European tech companies and, to change that, the European Union ought to “rethink its approach to regulation.”<sup>241</sup> These statements capture a common sentiment that assumes a direct link between the European Union’s stringent tech regulations and its lackluster technological progress.

However, it is not clear that more regulation always means less innovation. Looking back, the digital economy was not heavily regulated in Europe before 2010 (when the Commission opened its first antitrust investigation into Google) or even before 2018 (when the GDPR entered into force). The European Union’s 2000 e-Commerce Directive—the predecessor to the DSA—closely resembles Section 230 of the CDA, shielding platforms from any general monitoring obligation.<sup>242</sup> Thus, even though there was no substantial tech regulation in the European Union during the years when companies such as Google and Facebook were founded—1998 and 2004 respectively—comparable companies did not emerge in Europe.<sup>243</sup> The main target of the European Union’s digital regulation to date has also been large U.S. tech companies, as noted earlier,<sup>244</sup> and few would suggest that EU regulations have discouraged those companies from innovating. It is therefore possible that the reasons for the European Union’s inability to compete with the United States’ technological leadership can be found elsewhere, including in the European Union’s fragmented single market that hinders scaling by tech companies or in its under-developed capital markets that limit tech companies’ ability to fund their innovations in the European Union.<sup>245</sup>

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241. Gary Shapiro, Commentary, *How the EU’s War on U.S. Innovation Stifles European Creativity*, INV.’S BUS. DAILY (Sept. 12, 2016, 5:04 PM), <https://www.investors.com/politics/commentary/how-the-eus-war-on-u-s-innovation-stifles-european-creativity>.

242. Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), 2000 O.J. (L 178) 1, 6, 13; 47 U.S.C. § 230 (2018).

243. The only other notable digital regulation in force before 2010 was the 1995 Data Protection Directive, which was considerably less protective of fundamental rights than the EU’s 2016 GDPR. *See generally* Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

244. Case T-604/18, *Google & Alphabet v. Comm’n*, 2018 O.J. (C 445) 21 (EC); Case T-612/17, *Google & Alphabet v. Comm’n*, 2017 O.J. (C 369) 37 (EC); European Commission Press Release IP/21/3143, *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector* (June 22, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3143](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143); European Commission Press Release IP/21/2061, *Antitrust: Commission Sends Statement of Objections to Apple on App Store Rules for Music Streaming Providers* (Apr. 30, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_2061](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061); European Commission Press Release IP/21/2848, *Antitrust: Commission Opens Investigation Into Possible Anticompetitive Conduct of Facebook* (June 4, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2848](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848).

245. Anu Bradford, *The False Choice Between Tech Regulation and Innovation* 33–42 (Apr. 25, 2023) (unpublished manuscript) (on file with the Virginia Journal of International Law Association).

The European Union's digital regulations can also generate economic benefits for companies. Common EU rules harmonize discordant regulations across Member States. From this perspective, they often reduce companies' operating costs by streamlining the regulatory environment while contributing to greater predictability and legal certainty. Regulation can also enhance consumers' and organizational customers' confidence in tech firms' conduct and products. For example, Microsoft's president, Brad Smith, recently called for regulation of facial recognition technology in the United States.<sup>246</sup> He stressed the importance of clear rules in this area of technology precisely because, if left unregulated, the technology "can be used for ill or good" and unsettle consumers.<sup>247</sup> Seen this way, stringent EU regulation can help firms obtain reputational gains and win over consumers. For example, in the global A.I. race, the European Union competes by setting a higher standard for A.I.'s trustworthiness and ethics.<sup>248</sup> According to the Commission, this not only allows the European Union to defend its normative vision and guard against risks associated with A.I., but also makes it possible for the European Union to capture a commercial advantage if consumers prefer A.I. applications that adhere to high regulatory standards they find easier to trust.<sup>249</sup>

While one can debate how large of a net cost EU regulations impose on companies, and whether and how those costs also dampen innovation, it seems less disputed that those costs have a distributional effect. The cost of compliance with EU regulations, such as the GDPR, is relatively high for small- and-medium-sized enterprises, while the large tech giants have the resources to meet almost any standard that the European Union sets. Thus, if anything, the concern ought to be how high regulatory barriers in the European Union have the potential to further entrench the relative power of the largest tech companies.<sup>250</sup> This concern directly undermines another pillar of Europe's digital constitution—the one emphasizing fairness and redistribution—and undercuts the European Union's attempts to curtail the power of large tech companies through antitrust laws. The European Union is increasingly aware of this contradiction. This explains why the recently adopted DMA only targets the largest tech giants and the DSA imposes additional regulatory demands on platforms that have both the greatest

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246. See Brad Smith, *Facial Recognition Technology: The Need for Public Regulation and Corporate Responsibility*, MICROSOFT (July 13, 2018), <https://blogs.microsoft.com/on-the-issues/2018/07/13/facial-recognition-technology-the-need-for-public-regulation-and-corporate-responsibility>.

247. *Id.*

248. See *Artificial Intelligence Act*, *supra* note 73.

249. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Fostering a European Approach to Artificial Intelligence*, *supra* note 14, at 4–6.

250. See THE BRUSSELS EFFECT, *supra* note 15, at 238.

potential to cause harm and the most resources to preempt any harm from occurring.<sup>251</sup> These new regulations can be seen as attempts to alleviate the distributional concern associated with past EU regulations and restore Europe's constitutional commitment towards fairness and redistribution.

### C. *Inadequate Enforcement*

Europe's digital constitution has not only been criticized for its excessive stringency, but paradoxically also for its leniency—at least with respect to its implementation. The European Union's ambitious regulations often fail to translate into effective enforcement, thus compromising the goals of the European regulatory agenda in practice. Of course, European digital regulations have still had impact. There is likely more competition, more data privacy, and less harmful speech online thanks to existing EU regulations. Yet, those regulations were likely designed to do much more.

For example, lackluster enforcement of the GDPR has often left individuals' data vulnerable to exploitation. Particular criticism has been leveled against the Irish Data Protection Commission (DPC), which is in charge of enforcing the GDPR against large U.S. tech companies that have their European headquarters in Dublin, including Apple, Google, Meta, and Microsoft.<sup>252</sup> The DPC has been overwhelmed by this task, bringing only a small number of cases under the GDPR, which have resulted in relatively modest fines.<sup>253</sup> In September 2021, reports surfaced that 98% of the 164 significant complaints submitted to the Irish DPC were still unresolved at that time.<sup>254</sup> The European Parliament has expressed concern over the Irish DPC's ability to discharge its obligations under the GDPR, even though the European Data Protection Board is now pushing the DPC towards a more decisive enforcement stance.<sup>255</sup> Even then, the U.S. government, which has not adopted a federal privacy law, seems to be outdoing Europeans on the enforcement front. In 2019, the U.S. Federal Trade Commission (FTC) imposed a historically high \$5 billion fine on Facebook, after the company

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251. Digital Markets Act, *supra* note 173, pmb. para. 3, 8, 12, 15, 16; Digital Services Act, *supra* note 107, pmb. para. 40, 48–50.

252. Madhumita Murgia & Javier Espinoza, *Ireland Fails to Enforce EU Law Against Big Tech*, FIN. TIMES (Sept. 13, 2021), <https://www.ft.com/content/5b986586-0f85-47d5-8edb-3b49398e2b08>.

253. See Vincent Manancourt & Mark Scott, *Whatsapp Hit with €225M Privacy Fine*, POLITICO (Sept. 2, 2021), <https://www.politico.eu/article/whatsapp-facebook-privacy-fine-european-commission-data-protection>; see Murgia & Espinoza, *supra* note 252.

254. See Murgia & Espinoza, *supra* note 252.

255. See Commission Evaluation Report on the Implementation of the General Data Protection Regulation Two Years After Its Application, EUR. PARL. DOC. P9\_TA (2021) 0111, at para. 20; *1.2 Billion Euro Fine for Facebook as a Result of EDPB Binding Decision*, EUR. DATA PROT. BD. (May 22, 2023), [https://edpb.europa.eu/news/news/2023/12-billion-euro-fine-facebook-result-edpb-binding-decision\\_en](https://edpb.europa.eu/news/news/2023/12-billion-euro-fine-facebook-result-edpb-binding-decision_en).



was found to have deceived users about their ability to control the privacy of their personal information.<sup>256</sup>

There is notable evidence that companies around the world have changed their privacy practices in light of the GDPR.<sup>257</sup> However, unless these companies are subjected to effective enforcement, the GDPR's deterrent effect may wane over the years. At the same time, it is not clear that even high fines will be sufficient to change tech companies' data privacy practices, raising the question of what "effective enforcement" would entail in practice. Even the FTC's \$5 billion fine on Meta appears modest next to the revenues and valuations of these companies. Ironically, the day this landmark fine was imposed, Meta's stock rose by nearly 2%, adding \$10 billion to its market value.<sup>258</sup> This suggests that the largest tech companies may treat fines merely as the price of doing business and as something they can easily offset by other gains—so long as they are not forced to fundamentally overhaul their business models that rely on the exploitation of user data.

Similarly, the European Union's antitrust enforcement record suggests that high fines alone may not be sufficient to effectively discipline the tech giants. Even though the EU has fined Google over €8 billion across three antitrust cases in the past decade, these fines have hardly made a dent in Google's market dominance.<sup>259</sup> Despite high-profile cases resulting in high-profile fines, markets remain dominated by a few large tech behemoths, with limited opportunities for rivals to effectively compete against them. In its 2020 report, the European Court of Auditors criticized EU antitrust investigations as being too slow and delayed, intervening only after

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256. See Press Release, Federal Trade Commission, *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook>.

257. See Christian Peukert et al., *European Privacy Law and Global Markets for Data*, CEPR DISCUSSION PAPERS 14475 2, 16 (2020); Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662, 695, 697–98, 700 (2019); René Mahieu et al., *Measuring the Brussels Effect Through Access Requests: Has the European General Data Protection Regulation Influenced the Data Protection Rights of Canadian Citizens?*, 11 J. INFO. POL'Y 301, 327–28 (2021).

258. See Rob Price, *Why Facebook's Stock Jumped Despite Facing a Record-Breaking \$5 Billion FTC Penalty: 'A Slap on the Wrist,'* BUS. INSIDER (July 12, 2019), <https://www.businessinsider.com/facebook-stock-rose-news-5-billion-ftc-settlement-why-critics-2019-7>; Charlotte Jee, *Facebook is Actually Worth More Thanks to News of the FTC's \$5 Billion Fine*, MIT TECH. REV. (July 15, 2019), <https://www.technologyreview.com/2019/07/15/134196/facebook-is-actually-richer-thanks-to-news-of-the-ftcs-5-billion-fine>.

259. See Conor Dougherty, *Inside Yelp's Six-Year Grudge Against Google*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/technology/yelp-google-european-union-antitrust.html>; Nitasha Tiku, *Don't Expect Big Changes from Europe's Record Google Fine*, WIRED (July 18, 2018), <https://www.wired.com/story/dont-expect-big-changes-from-europes-record-google-fine>; Foo Yun Chee, *Google Loses Challenge Against EU Antitrust Decision, Other Probes Loom*, REUTERS (Sept. 14, 2022), <https://www.reuters.com/technology/eu-courts-wed-ruling-record-44-bln-google-fine-may-set-precedent-2022-09-14>.

competition has already been eliminated.<sup>260</sup> The report acknowledged that the Commission has no legal tools to intervene before competition problems occur and is forced to rely on the slow process of gathering evidence of consumer harm.<sup>261</sup> The Commission itself has seized on this argument, arguing that it needs new enforcement tools.<sup>262</sup> This very concern motivated the European Union to create the DMA, which was adopted in 2022 and endows the Commission with new powers to regulate the marketplace with strong *ex ante* competition rules.<sup>263</sup> This regulation, together with the DSA, allows the European Union to show that it is not only capable of adopting laws, but also of transforming the digital marketplace toward the policy goals embedded in those laws.

The European Union's enforcement of its online content regulations can also be seen as suffering from critical weaknesses. Some critics maintain that the European Union errs too far on the side of protecting civility and dignity, leading to overly aggressive content removal.<sup>264</sup> However, one can also assert that the European Union has been too lenient in tolerating harmful content online. While European regulations have led tech companies to take down considerable amounts of hate speech, disinformation, and other objectionable content in the name of dignity, safety, and democracy, such content remains rampant online. These platforms remain go-to destinations for the spread of disinformation and the manipulation of public opinion on critical issues ranging from vaccines to migration, and from military conflicts to democratic elections—precisely because there has been too little, and not too much, content removal.<sup>265</sup> The European Union also relies on platforms themselves to implement most of the EU rules, with limited oversight by European regulators. It is the tech companies that retain the ultimate power to decide which content to disseminate, amplify, demote, label, and censor—replacing democratic governments as “custodians of the internet.”<sup>266</sup> This increases, rather than curtails, the power of these platforms.<sup>267</sup>

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260. See *European Court of Auditors Special Report on the Commission's EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight*, paras. 54, 59–60, 98 (2020), <https://op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/index.html>.

261. *Id.* paras. 54, 59, 98.

262. Digital Markets Act, *supra* note 173, at 3–4.

263. *Id.* at 3–4, 12–13.

264. See Adam Satariano, *Europe is Reining in Tech Giants. But Some Say It's Going Too Far.*, N.Y. TIMES (May 6, 2019), <https://www.nytimes.com/2019/05/06/technology/europe-tech-censorship.html>.

265. Steven Lee Myers, *How Social Media Amplifies Misinformation More Than Information*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/technology/misinformation-integrity-institute-report.html>.

266. For a discussion of how social media platforms police the content posted online, see generally TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2021).

267. See KAYE, *supra* note 122, at 13, 29–31.

Of course, there is no regulatory model under which EU institutions could be left to screen the trove of content posted online every second of every day. Every minute in 2020, Facebook users uploaded about 147,000 photos and shared 150,000 messages, Twitter gained 319 users, Instagram users posted 347,222 stories, and YouTube users uploaded 500 hours of video.<sup>268</sup> There is no regulatory regime under which any government could proactively screen such content. In the absence of direct democratic oversight over the platforms' content removal policies and practices, transparency and accountability become key to enhancing the platforms' public accountability.<sup>269</sup> With the newly adopted DSA, the Commission requires platforms to disclose to users their detailed content moderation policies while also providing various safeguards, such as avenues for users to contest any content removal decisions.<sup>270</sup> Such transparency is designed to help ensure that platforms are not engaging in over-removal of permissible content, while remaining responsive to legitimate removal requests. Whether the DSA will ultimately succeed in pushing platforms toward a more democratic, transparent, and accountable governance model will therefore be one of the biggest tests of Europe's regulatory regime, revealing whether the European Union is capable of translating the stated values underlying its digital constitution into actual market outcomes.

#### *D. Internal Divisions*

Some critics may question whether it is even possible to speak about Europe's digital constitution given the wide differences across the EU Member States, which may undermine the coherence, effectiveness, and even legitimacy of the European regulatory approach. The sources of such internal differences within the European Unions are manifold. At times, they stem from notable disparities in the robustness of national technology ecosystems. Some Member States are more digitally advanced, while others have limited innovation capabilities on their own. The more advanced Member States typically endorse a liberal approach on digital issues, such as the promotion of free flow of data or measures designed to enhance economic growth and competitiveness.<sup>271</sup> For example, a group of such digitally advanced Member States recently signed a position paper on the forthcoming A.I. regulation, calling for a "well-calibrated," "proportionate" and "innovation-friendly" A.I. regulation geared at fostering economic

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268. See *Data Never Sleeps 8.0*, DOMO, <https://www.domo.com/learn/data-never-sleeps-8> (last visited Mar. 21, 2021).

269. See Digital Services Act, *supra* note 107, pmbl. paras. 40, 45, 48–49, 54.

270. *Id.* pmbl. paras. 50, 54.

271. See Clément Perarnaud, *A Step Back to Look Ahead: Mapping Coalitions on Data Flows and Platform Regulation in the Council of the EU (2016-2019)*, 10(2) INTERNET POL'Y REV. 1, 7, 12–13, 15 (2021).

growth and European competitiveness.<sup>272</sup> The EU Member States are also split in their support for state intervention, with France leading the more dirigiste, industrial policy-oriented camp and the Northern European countries, in particular, emphasizing the need to retain Europe's commitment to economic openness.<sup>273</sup>

Another dividing line stems from differences in national tax regimes, which explains why a consensus on DSTs was difficult to forge across the European Union. Only a few Member States, such as Ireland, Luxembourg, and the Netherlands, host large global tech companies. The local tax regime is, no doubt, an important reason why the European headquarters of Apple, Google, Microsoft, and Twitter are in Dublin; the headquarters of Cisco, Netflix, and Tesla in Amsterdam; and the headquarters of Amazon and PayPal in Luxembourg.<sup>274</sup> These three countries, in addition to other low-tax jurisdictions, such as Cyprus, Hungary, and Malta, have traditionally opposed any attempt to curtail their authority to set their own tax rates, due to concerns that their ability to attract international companies would be undermined.<sup>275</sup> These differences, in part, gave the Commission the impetus to craft a European-wide response to digital taxation.

Perhaps the most complex intra-EU conflicts are those that reflect a clash of fundamental values, as opposed to economic interests. For example, while all EU Member States are committed to the fundamental right to data privacy, privacy cultures differ among them. Germany, in large part for historical reasons, tends to be more absolutist in its commitment to data

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272. See Denmark et al., *Innovative and Trustworthy AI: Two Sides of the Same Coin*, at 1–2 (Oct. 8, 2020), <https://em.dk/media/13914/non-paper-innovative-and-trustworthy-ai-two-side-of-the-same-coin.pdf>.

273. See Thibault Larger et al., *Inside the EU's Divisions on How to Go After Big Tech*, POLITICO (Dec. 14, 2020), <https://www.politico.eu/article/margrethe-vestager-thierry-breton-europe-big-tech-regulation-digital-services-markets-act>.

274. *Apple Cork*, APPLE CAREERS, <https://www.apple.com/careers/us/work-at-apple/cork.html> (last visited June 14, 2023); *Dublin (EU HQ)*, GOOGLE CAREERS, <https://careers.google.com/locations/dublin/> (last visited June 14, 2023); *Microsoft Dublin*, MICROSOFT CAREERS, <https://careers.microsoft.com/v2/global/en/locations/dublin.html> (last visited June 14, 2023); Kate Conger, Ryan Mac & Mike Isaac, *Confusion and Frustration Reign as Elon Musk Cuts Half of Twitter's Staff*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/elon-musk-twitter-layoffs.html>; *Cisco in Europe*, CISCO (2004), [https://www.cisco.com/c/dam/global/fi\\_fi/assets/docs/solutions\\_europe.pdf](https://www.cisco.com/c/dam/global/fi_fi/assets/docs/solutions_europe.pdf); *Amsterdam, Netherlands*, NETFLIX JOBS, <https://jobs.netflix.com/locations/amsterdam-netherlands> (last visited June 14, 2023); Riham Alkousaa & Toby Sterling, *Dutch Watchdog Looking into Alleged Tesla Data Breach*, YAHOO FIN. (May 25, 2023), <https://finance.yahoo.com/news/german-authorities-looking-possible-data-183937915.html>; *Amazon Luxembourg*, AMAZON JOBS, <https://www.amazon.jobs/en/locations/luxembourg-city-luxembourg> (last visited June 14, 2023); *About Us*, PAYPAL EUR., <https://www.paypal.com/eu/webapps/mpp/about> (last visited June 14, 2023).

275. See Mehreen Khan & Laura Noonan, *Europe's Low-Tax Nations Braced for Struggle Over US Corporate Tax Plan*, FIN. TIMES (Apr. 14 2021), <https://www.ft.com/content/1a8e5bf7-49e0-4987-98c8-893f08d9c77c>; Mehreen Khan et al., *Legal Wrangle Raises Hurdles to EU Implementation of Global Tax Deal*, FIN. TIMES (July 6, 2021), <https://www.ft.com/content/e51c4a7b-a64d-40e5-b45c-e53ebdf284fe>.

privacy, whereas France, for example, has been more willing to make compromises on data privacy for reasons of public security.<sup>276</sup> This is, in part, explained by repeated terrorist attacks, foreign election interference, industrial spying, and other threats that France has endured in recent years.<sup>277</sup> According to the French government, the CJEU's pro-privacy rulings threaten Member States' exercise of their key "sovereign" functions to protect national security and public order.<sup>278</sup> In 2020, the CJEU ruled that France's surveillance laws violated fundamental rights and freedoms and were hence contrary to EU law.<sup>279</sup> Rather defiantly, the French high administrative court issued a decision in 2021 that creatively interpreted the CJEU ruling in ways that allowed the French government to continue to "indiscriminately and indefinitely retain data," effectively undermining the CJEU and the European Union's fundamental rights regime.<sup>280</sup>

Recent revelations about extensive use of spyware by the governments of Greece, Hungary, Poland, and Spain in contravention of EU data privacy rules also cast a shadow over the European Union's constitutional commitment to the fundamental right to data privacy.<sup>281</sup> These governments have allegedly carried out espionage operations to hack the phones of activists, journalists, and politicians, prompting an investigation by the European Parliament into surveillance practices that likely contravene EU law.<sup>282</sup> Such digital surveillance not only compromises Europe's constitutional norms but also severely undermines the European Union's frequent critiques of American and Chinese digital surveillance practices. These recent scandals further expose Europe's digital constitution to criticism about double standards when it comes to the European Union's demands for the U.S. government to curtail its surveillance practices in order

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276. See Shaw, *supra* note 50.

277. See Arthur Messaud & Noémie Levain, *CJEU Rulings v. French Intelligence Legislation*, ABOUT:INTEL (May 14, 2021), <https://aboutintel.eu/cjeu-french-intelligence-legislation>.

278. See Theodore Christakis & Kenneth Propp, *How Europe's Intelligence Services Aim to Avoid the EU's Highest Court—and What It Means for the United States*, LAWFARE (Mar. 8, 2021), <https://www.lawfareblog.com/how-europes-intelligence-services-aim-avoid-eus-highest-court-and-what-it-means-united-states>.

279. See Case C-511/18, *La Quadrature du Net and Others v. Premier Ministre*, ECLI:EU:C:2020:79, 1 (Oct. 6, 2020).

280. See Messaud & Levain, *supra* note 277.

281. See Antoaneta Roussi, *EU and Greece Veer Toward Standoff Over Wiretapping Scandal*, POLITICO (Aug. 29, 2022), <https://www.politico.eu/article/eu-and-greece-near-standoff-over-phone-tapping-scandal>.

282. See European Parliament Press Release, *Pegasus: MEPs Grilled NSO Group Representatives About Spyware Abuse Allegations* (June 20, 2022), <https://www.europarl.europa.eu/news/en/press-room/20220620IPR33414/pegasus-meps-grilled-nso-group-representatives-about-spyware-abuse-allegations>; Jennifer Rankin, *Dutch MEP Says Illegal Spyware "A Grave Threat to Democracy"*, GUARDIAN (Nov. 8, 2022), <https://www.theguardian.com/world/2022/nov/08/dutch-mep-says-spyware-a-grave-threat-to-democracy>.

to protect European citizens' data that gets transferred to the United States.

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Perhaps the most troubling divisions within the European Union relate to its commitment to democracy and the rule of law, including press freedoms and pluralistic media. Poland and Hungary have taken extensive measures to curtail those freedoms, while the rule of law also remains a challenge in other Member States, such as Bulgaria and Romania.<sup>284</sup> In the digital realm, these divisions have recently become palpable when the illiberal, conservative, and nationalist governments of Poland and Hungary sought to curtail tech companies' ability to "limit the visibility of Christian, conservative, rightwing opinions."<sup>285</sup> Resembling the views of many Republicans in the U.S. Congress, the Polish and Hungarian governments accused tech companies of liberal bias and censorship.<sup>286</sup> The Polish government even proposed a law banning social media companies from deleting content that was not contrary to Polish law.<sup>287</sup> This proposed law has raised concerns, especially as hate speech—in particular content that targets LGBTQ+ communities or Muslims and refugees—is prevalent in Poland.<sup>288</sup> These Polish and Hungarian measures are a direct challenge to Europe's digital constitution. While Hungary and Poland lack the power to veto most EU digital regulation, they can still undermine the European digital agenda, at home and around the world. Their overt illiberalism invites criticism of the European Union's hypocrisy and questions its moral

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283. See Charles Martinet & Romain Bosc, *Europe Uses Spyware on its Own Citizens*, CTR. FOR EUR. POL'Y ANALYSIS (Oct. 27, 2022), <https://cepa.org/article/europe-uses-spyware-on-its-own-citizens>.

284. Case C-156/21, *Hungary v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:97 (Feb. 16, 2022); Case C-157/21, *Republic of Poland v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:98 (Apr. 26, 2022); see also Yasmeen Serhan, *The Other Threat to Democracy in Europe*, ATLANTIC (Apr. 11, 2022), <https://www.theatlantic.com/international/archive/2022/04/democracy-eu-hungary-viktor-orban-russia/629504>; *Brussels Ends 15 Years of Special Rule-of-Law Surveillance on Romania*, EURONEWS (Nov. 23, 2022), <https://www.euronews.com/my-europe/2022/11/23/brussels-ends-15-years-of-special-rule-of-law-surveillance-on-romania>.

285. See Valerie Hopkins et al., *Hungary Follows Poland in Taking on Big Tech 'Censors'*, FIN. TIMES (Feb. 3, 2021), <https://www.ft.com/content/6a315d26-c6fe-4906-886d-04cec27a6788> (internal quotations omitted).

286. Peter Murphy, *Hungary Launches Offensive Against US Tech Giants*, JAKARTA POST (Jan. 27, 2021), <https://www.thejakartapost.com/news/2021/01/27/hungary-launches-offensive-against-us-tech-giants.html>.

287. See Tim Hume, *Poland Wants to Ban Social Media Companies from Banning Hate Speech*, VICE (Jan. 15, 2021), <https://www.vice.com/en/article/v7mpkj/poland-wants-to-ban-social-media-companies-from-banning-hate-speech>. The discussion resurfaced in 2022. See Aleksandra Krzysztoszek, *Polish Justice Ministry Proposes Online Free Speech Law After Facebook Debacle*, EURACTIV (Jan. 18, 2022), [https://www.euractiv.com/section/politics/short\\_news/polish-justice-ministry-proposes-online-free-speech-law-after-facebook-debacle](https://www.euractiv.com/section/politics/short_news/polish-justice-ministry-proposes-online-free-speech-law-after-facebook-debacle).

288. See Hume, *supra* note 287.

legitimacy when it seeks to defend and export its vision of a digital society grounded in fundamental rights and democracy.<sup>289</sup>

In some instances, these differences within the European Union indeed undermine the coherence, effectiveness, and legitimacy of Europe's digital constitution. This is particularly true when EU Member States act in ways that challenge European constitutional commitments to fundamental rights and democracy. However, in some other instances, intra-EU differences can also be a source of strength for the Community, and may even help Europe's digital constitution gain legitimacy and credibility. Inconsistencies and disagreements are an inevitable part of democratic lawmaking. Different Member States' positions check and balance one another, forcing the European Union toward compromises that often suppress more extreme policy positions—in any direction. For example, the European Union's strong commitment to data privacy accommodates more exceptions for national security because of the position France has articulated. The European Union's robust rights-driven A.I. Act is likely to be more innovation-friendly because of the pressures from the digitally advanced EU countries. What further balances EU regulation is the pursuit of dual goals—one protective of rights and fairness, the other mindful of free trade. In addition, these internal conflicts and contradictions have not eradicated the core commitments underlying Europe's digital constitution that give the European tech regulations their distinct character.

#### *E. Digital Protectionism and Regulatory Imperialism*

A prevalent concern of the U.S. government and the business community has been that Europe's digital constitution is an instrument for digital protectionism. For example, critical voices in the United States trace the European Union's antitrust investigations into the most successful American tech companies to Europe's desperate, envy-driven attempt to offset the U.S. companies' technological edge by tilting the market in favor of their weaker European rivals.<sup>290</sup> In 2016, Apple's lawyer conveyed this sentiment by accusing the Commission of choosing Apple as a “convenient target” for an EU antitrust chief driven by “headlines.”<sup>291</sup> In 2018, President Trump reacted to the \$5 billion EU competition fine on Google by complaining that “American businesses were at a disadvantage in

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289. See Sam Fleming et al., *EU Identity Crisis: Poland, Hungary and the Fight Over Brussels' Values*, FIN. TIMES (Dec. 4, 2020), <https://www.ft.com/content/bfa58276-1868-4011-9891-ccd363dc68dc>.

290. See Mark Scott, *E.U. Commission Opens Antitrust Inquiry into E-Commerce Sector*, N.Y. TIMES (May 6, 2015), <https://www.nytimes.com/2015/05/07/business/international/european-commission-e-commerce-inquiry-american-tech-companies.html>.

291. See Julia Fioretti, *Apple Appeals Against EU Tax Ruling, Brussels Says No Cause for Low Tax Bill*, REUTERS (Dec. 18, 2016), <https://www.reuters.com/article/us-eu-apple-taxavoidance-idUSKBN148007>.

Europe”<sup>292</sup> and that “[Europeans] truly have taken advantage of the U.S., but not for long!”<sup>293</sup>

Recently, U.S. concerns about the European Union’s antitrust protectionism have centered on the DMA, which is seen as narrowly targeting only the largest U.S. tech firms that the DMA designates as digital gatekeepers. The U.S. Commerce Secretary, Gina Raimondo, has acknowledged that the Biden Administration has “a great many concerns of the DMA” and that her department “hear[s] [this] from the tech industry all the time.”<sup>294</sup> Some members of the U.S. Congress similarly expressed concern about the European Union’s “‘digital sovereignty’ campaign” and the DMA’s adverse effect on U.S. companies in a letter addressed to President Biden in 2021.<sup>295</sup> The DMA also became a target of relentless lobbying by U.S. tech companies, efforts that ultimately accomplished little in terms of reining in the European Union’s regulatory ambitions.<sup>296</sup> The final text of the DMA, adopted in 2022, was hailed as transformative by EU institutions and strongly criticized by digital gatekeepers, including Apple and Google.<sup>297</sup>

Other U.S. legislators and business leaders have pointed out that the European Union’s antitrust protectionism is consistent with the European broader digital agenda marked by anti-American bias. Commenting on the European Union’s \$5 billion antitrust fine imposed on Google, Republican Senator Orrin Hatch lamented in 2018 that: “[t]he EU has a history of engaging in regulatory, tax & competition actions & proposals that disproportionately hit U.S. tech companies. This decision calls into question whether these actions are anything more than a series of discriminatory revenue grabs.”<sup>298</sup> Head of International Affairs for the U.S. Chamber of Commerce, Myron Brilliant, echoed this sentiment, noting that

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292. See Adam Satariano & Jack Nicas, *E.U. Fines Google \$5.1 Billion in Android Antitrust Case*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html>.

293. See John Cassidy, *Why Did the European Commission Fine Google Five Billion Dollars?*, NEW YORKER (July 20, 2018), <https://www.newyorker.com/news/our-columnists/why-did-the-european-commission-fine-google-five-billion-dollars>; see Donald J. Trump (@realDonaldTrump), TWITTER (July 19, 2018), <https://twitter.com/realDonaldTrump/status/1019932691339399168>.

294. See Stuart Lauchlan, *US, EU Tech Policy is Divided by More Than the Atlantic. Can the New Trade and Technology Council Realistically Bridge the Gap?*, DIGINOMICA (Sept. 29, 2021), <https://diginomica.com/us-eu-tech-policy-divided-more-atlantic-can-new-trade-and-technology-council-realistically-bridge>.

295. See Rep. Suzan DelBene (@RepDelBene), TWITTER (June 10, 2021), <https://twitter.com/RepDelBene/status/1403124892871139328>.

296. See Javier Espinoza, *How Big Tech Lost the Antitrust Battle with Europe*, FIN. TIMES (Mar. 21, 2022), <https://www.ft.com/content/cbb1fe40-860d-4013-bfcf-b75ee6e30206?shareType=nongift>.

297. See Javier Espinoza, *Big Tech Attacks Tough EU Measures Aimed at Tackling Its Market Power*, FIN. TIMES (Mar. 25, 2022), <https://www.ft.com/content/0bc9378b-3e27-45e2-92d8-7c462427f876?shareType=nongift>.

298. See Senate Finance Committee (@SenFinance), TWITTER (July 18, 2018), <https://twitter.com/SenFinance/status/1019605981968371712>.



“[u]nfortunately, some EU officials seem to think the best way to boost the fortunes of European tech firms is by discriminating against their U.S. competitors[.]”<sup>299</sup> Nick Clegg, Meta’s head of global affairs, commented on the proposed DSA in October 2020, warning the European Union that “[a] shift towards digital protectionism would be self-defeating. Far from putting Europe at the cutting edge, it could accelerate the splintering of the internet, leaving Europe a bystander as U.S. and Chinese companies dominate.”<sup>300</sup> This commentary captures the prevailing sentiment among the U.S. political leadership and the business community, which assumes that the European Union’s digital agenda displays a distinct anti-American bias.

Whether the European Union is engaged in digital protectionism can be difficult to verify. For example, the European Union is adamant that its antitrust enforcement record is consistent with a genuine concern about consumer welfare and the fairness of the marketplace.<sup>301</sup> Yet, there is admittedly a fine line between the protection of consumer interest and protectionism, and the true motivations of regulators are at times hard to detect. It is undeniable that U.S. tech companies have been a frequent target of the European Union’s antitrust enforcement.<sup>302</sup> At the same time, it is not evident that the European Union is targeting these companies because of their nationality as opposed to their sheer market dominance and alleged abusive practices.<sup>303</sup> For instance, there is no European search engine that the Commission is seeking to protect when challenging Google’s practices. Further, the original complaint against Google came from another U.S. company, Microsoft, and not from a European competitor.<sup>304</sup>

Many other EU antitrust challenges against U.S. tech firms also have other U.S. firms as primary complainants or beneficiaries. Epic Games, a U.S.-based video game and software developer, complained to the Commission about Apple, and would directly benefit from an adverse EU

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299. See Myron Brilliant, *Data Drives the Trans-Atlantic Economy. Can the U.S. and Europe See Eye to Eye?*, BARRON’S (Sept. 28, 2021), <https://www.barrons.com/articles/data-drives-the-trans-atlantic-economy-can-the-u-s-and-europe-see-eye-to-eye-51632784047>.

300. See Nick Clegg, *Europe Should Tear Down Digital Walls Not Build New Ones*, FIN. TIMES (Oct. 19, 2020), <https://www.ft.com/content/98cf847c-96f9-4558-9a30-7d72ea4e79c2>.

301. E.g., Javier Espinoza, *EU Tech Policy is Not Anti-American, Says Margrethe Vestager*, IRISH TIMES (June 20, 2021), <https://www.irishtimes.com/business/technology/eu-tech-policy-is-not-anti-american-says-margrethe-vestager-1.4598477>.

302. Case T-604/18, *Google & Alphabet v. Comm’n*, 2018 O.J. 21; Case T-612/17, *Google & Alphabet v. Comm’n*, 2017 O.J. 37; European Commission Press Release IP/21/3143, *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector* (June 22, 2021); European Commission Press Release IP/21/2061, *Antitrust: Commission Sends Statement of Objections to Apple on App Store Rules for Music Streaming Providers* (Apr. 30, 2021); European Commission Press Release IP/21/2848, *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct of Facebook* (June 4, 2021).

303. See Bradford, *supra* note 15, at 241–47.

304. See Ian Wishart, *Microsoft Files Anti-Corruption Complaint Against Google*, POLITICO (Mar. 31, 2011), <https://www.politico.eu/article/microsoft-files-anti-competition-complaint-against-google>.

decision in the European Union's pending antitrust case against Apple.<sup>305</sup> Yelp has been a frequent critic of Google, urging the European Union to challenge Google's anticompetitive practices.<sup>306</sup> Similarly, the European Union's antitrust ruling against Intel originated from a complaint by the company's U.S. rival, AMD.<sup>307</sup> A closer look at the European antitrust battles thus reveals that they often have U.S. companies on both sides of the dispute, making it harder to sustain a claim that these battles reflect an anti-American bias.<sup>308</sup> Recent empirical research into EU merger control further suggests that the European Union is not challenging acquisitions of European companies by foreign parties more vigorously, or adopting a more lenient approach vis-à-vis European companies seeking to merge, as those accusing the European Union of antitrust protectionism might assume.<sup>309</sup>

Instead of portraying Europe's digital constitution as a protectionist instrument designed to benefit U.S. tech companies' weaker European rivals, it is more accurate to describe the political process in the European Union as being responsive to European citizens. Various large public opinion surveys indicate that the EU pro-regulation approach has the strong backing of the European citizenry.<sup>310</sup> European political elites are also ideologically less divided than their U.S. counterparts and are therefore better able to respond to the public demand for more stringent regulations. Parties across the ideological spectrum in Europe may differ in the extent of their support for digital regulation, but they share a fundamental commitment to a regulated market economy. The DMA illustrates this political consensus particularly well. The monumental law was adopted in the European Parliament with 588 votes in favor, 11 against, and 31 abstentions, with parties across the political spectrum contributing to resounding support for the law.<sup>311</sup> This degree of consensus stands in stark

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305. See Epic Games, *Epic Game Files EU Antitrust Complaint Against Apple*, EPIC GAMES (Feb. 17, 2021), <https://www.epicgames.com/site/en-US/news/epic-games-files-eu-antitrust-complaint-against-apple>.

306. See James Kanter, *Yelp Joins Critics of European Union Antitrust Settlement with Google*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/technology/yelp-joins-critics-of-european-union-settlement-with-google.html>.

307. See David Lawsky, *Intel to Pay AMD \$1.25 Billion, Settle Disputes*, REUTERS (Nov. 12, 2009), <https://www.reuters.com/article/us-intel-amd-idUSTRE5AB2LL20091112>; Case T-286/09 RENV, Intel Corp. v. Comm'n, ECLI:EU:T:2022:19 (Jan. 26, 2022); Case C-413/14 P, Intel Corp. v. Comm'n, ECLI:EU:C:2017:632 (Sept. 6, 2017).

308. See Bradford, *supra* note 15, at 243.

309. See Anu Bradford et al., *Is EU Merger Control Used for Protectionism? An Empirical Analysis*, 15 J. EMPIRICAL LEGAL STUD. 165, 167 (2018).

310. See, e.g., *Special Eurobarometer 477: Report Democracy and Elections*, at 5 (Nov. 2018), <https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=67373>; *Special Eurobarometer 503: Report Attitudes Towards Digitalisation on Daily Lives*, at 49 (Mar. 2020), <https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=72615>.

311. See *European Parliament's Plenary Adopts the Digital Services Act and Digital Markets Act*, ECOMMERCE EUROPE (July 7, 2022), <https://ecommerce-europe.eu/news-item/european-parliaments-plenary-adopts-the-digital-services-act-and-digital-markets-act>.

contrast to the highly partisan U.S. Congress, which remains deadlocked on a variety of important policy issues, including digital regulation.<sup>312</sup> This strong public support and the broad political consensus have lent political momentum and democratic legitimacy to Europe's digital constitution.

Even if Europe's digital constitution was not, at least primarily, driven by digital protectionism, it could be criticized as facilitating European regulatory imperialism. This criticism is often associated with the Brussels Effect, which externalizes the European digital agenda across foreign markets. According to critics, the globalization of EU digital rules through the Brussels Effect compromises the democratic prerogatives of foreign sovereigns and undermines the political autonomy of their citizens. These voices accuse the European Union of exporting its norms abroad without seeking the consent of foreign regulators, companies, or internet users.<sup>313</sup> For example, the European Union has been accused of engaging in "data imperialism," deploying the GDPR to "conquer the world all over again" by "imposing ever tougher privacy rules on governments and companies from San Francisco to Seoul."<sup>314</sup>

It is difficult to deny that the Brussels Effect constrains foreign governments' regulatory freedom by often overriding their preferences. For instance, if the Commission prohibits a merger between two U.S. companies that U.S. regulators have cleared, it is the more stringent EU decision that prevails over the U.S. decision.<sup>315</sup> This dynamic reveals the logic whereby the European Union's stringent digital regulations often eclipse the United States' lenient regulations simply by virtue of being more stringent. Many Americans may be uneasy with unelected European civil servants ultimately deciding the fate of a transaction involving U.S. companies. After all, American citizens cannot hold European politicians accountable for decisions they disagree with. This counter-majoritarian element inherent in the Brussels Effect arguably undermines the ability of foreign governments to serve their citizens in accordance with their democratically established preferences. The U.S. government may therefore assert that the Brussels Effect undermines its political autonomy and regulatory sovereignty over its digital economy.

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312. Emily Birnbaum, *Tech Spent Big on Lobbying Last Year*, POLITICO (Jan. 24, 2022), <https://www.politico.com/newsletters/morning-tech/2022/01/24/tech-spent-big-on-lobbying-last-year-00001144>; Dustin Volz, *Facebook's Zuckerberg Faces Senate Hearing but Little Hope for Action*, REUTERS (Apr. 9, 2018), <https://www.reuters.com/article/us-facebook-privacy-congress/facebook-zuckerberg-faces-senate-hearing-but-little-hope-for-action-idUSKBN1HH08G>.

313. See, e.g., Editorial, *Regulatory Imperialism*, WALL ST. J. (Oct. 26, 2007), <https://www.wsj.com/articles/SB119334720539572002>.

314. See Mark Scott & Laurens Cerulus, *Europe's New Data Protection Rules Export Privacy Standards Worldwide*, POLITICO (Jan. 31, 2018), <https://www.politico.eu/article/europe-data-protection-privacy-standards-gdpr-general-protection-data-regulation>.

315. Bradford, *supra* note 15, at 101.

The European Union can counter this criticism by arguing that it is simply regulating its own market, which it has the sovereign right to do. All the European Union is doing is asking any company—whether domestic or foreign—doing business in Europe to play by European rules.<sup>316</sup> If tech companies' business considerations lead them to voluntarily extend EU regulations across their global operations, the European Union can hardly be accused of regulatory imperialism. For example, the European Union is not compromising foreign sovereign interests if Meta chooses to adopt the European Union's definition of hate speech to govern its global operations or if Google decides to offer GDPR protections to internet users in the United States or across Latin America. One may also argue that the Brussels Effect does not compromise American democracy but rather offsets flaws in how American democracy operates. Many Americans worry that extensive business lobbying has distorted the American democratic process and legislative agenda, especially after the U.S. Supreme Court's ruling in *Citizens United* paved the way for unlimited corporate spending to influence elections.<sup>317</sup> The EU legislative process, while neither flawless nor perfectly democratic,<sup>318</sup> is less susceptible to corporate influence when compared to that of the United States. In the European Union, business interests are typically balanced with the influence that civil society groups exert over regulation.<sup>319</sup> Thus, an argument—even if a controversial one—exists that the Brussels Effect may partially offset the overrepresentation of corporate interests in the United States by restoring some of the consumer interests that have been overridden in the American political process.

Despite the occasional criticism, some Americans welcome the Brussels Effect. Public opinion surveys indicate that 75% of the Americans believe there should be more governmental regulation of what companies can do with personal data.<sup>320</sup> U.S. civil society organizations also frequently point to the European Union as an example when advocating for regulatory

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316. See, e.g., Margrethe Vestager, Competition Commissioner, Opening Remarks at the ICN Merger Workshop: Merger Review: Building a Global Community of Practice (Sept. 24, 2015); Sir Leon Brittan, Vice President of the European Commission, Address at the WTO High Level Symposium on Trade and the Environment (Mar. 15, 1999).

317. See *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 372 (2010).

318. See Joseph H. H. Weiler et al., *European Democracy and its Critique: Five Uneasy Pieces* (Eur. Univ. Inst., Working Paper No. 95/11, 1995), <http://cadmus.eui.eu/handle/1814/1386>.

319. See ANDREAS DÜR ET AL., *THE POLITICAL INFLUENCE OF BUSINESS IN THE EUROPEAN UNION* 161–62 (2019).

320. See Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RES. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws/>; see *The Data Privacy Feedback Loop 2020*, TRANSCEND (2020), <https://www.datocms-assets.com/16414/1597336087-transcenddataprivacyfeedbackloop20201.pdf>.

reform at home.<sup>321</sup> For example, the American Civil Liberties Union has said that “the U.S. can learn from the approach being taken by the European Union” and that “Congress should look to this model and similarly enact comprehensive privacy legislation.”<sup>322</sup> U.S.-based advocacy group Consumer Action has also described U.S. consumer rights as being inadequately protected by state and federal laws: “As global firms adapt to the EU’s data protection law, we’re hopeful that all consumers will benefit from stricter data security and gain a reasonable measure of control over their personal information that so many others prosper from the EU’s strong regulation[.]”<sup>323</sup> This suggests that any foreign criticism of the Brussels Effect is unlikely to be uniform, and examples of foreign stakeholders embracing the reach of Europe’s digital constitution abound as well.

It is also not clear that all U.S. lawmakers worry about European digital rules compromising U.S. policy interests. Congress itself is now considering several legislative reforms that, if successful, would closely align the U.S. law with that of Europe’s digital constitution.<sup>324</sup> When the U.S. Commerce Secretary Gina Raimondo expressed concern about the European Union’s DMA targeting U.S. tech companies, Senator Elizabeth Warren pointed out how Raimondo’s remarks “appear to publicly undermine the Administration’s previously announced policies to protect consumers and workers from Big Tech monopolies.”<sup>325</sup>

While some are optimistic that the tide is turning in the United States, more skeptical voices maintain that the market-driven values are deeply

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321. See Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897, 920–28 (2009) (discussing how REACH, a piece of EU chemicals legislation, has been leveraged by U.S. nongovernmental organizations to push for more disclosures and greater safety standards “in the field of U.S. chemicals production, consumption, and regulation”). See generally KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013).

322. See Neema Singh Guliani & Jay Stanley, *The Landmark European Law that Could Change Facebook and Improve Privacy in America*, ACLU (Apr. 12, 2018), <https://www.aclu.org/blog/privacy-technology/internet-privacy/landmark-european-law-could-change-facebook-and-improve>.

323. See Warwick Ashford, *GDPR Will Have Positive Ripple Effect, Says US Consumer Group*, COMPUT. WKLY. (Feb. 27, 2018), <https://www.computerweekly.com/news/252435774/GDPR-will-have-positive-ripple-effect-say-US-consumer-group>.

324. Press Release, Sen. Mark R. Warner, *Legislation to Reform Section 230 Reintroduced in the Senate, House* (Feb. 28, 2023), <https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house>; H.R. REP. NO. 117-8, pt. 1, at 376–405 (2020); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021); Press Release, Rep. Ro Khanna, *Release: Rep. Khanna Releases ‘Internet Bill Of Rights’ Principles, Endorsed By Sir Tim Berners-Lee*, (Oct. 4, 2018), <https://khanna.house.gov/media/press-releases/release-rep-khanna-releases-internet-bill-rights-principles-endorsed-sir-tim>; H.R. 5815, 115th Cong. (2018), <https://www.govinfo.gov/content/pkg/BILLS-115hr5815ih/html/BILLS-115hr5815ih.htm>.

325. See Letter from Elizabeth Warren, Senator, to Gina Raimondo, Secretary of Commerce (Dec. 14, 2021), [https://www.washingtonpost.com/context/warren-letter-to-commerce-on-raimondo-remarks-on-e-u-tech-policies/d18a8f20-d2b3-464f-8efc-b2df7c82151f/?itid=lk\\_inline\\_manual\\_10](https://www.washingtonpost.com/context/warren-letter-to-commerce-on-raimondo-remarks-on-e-u-tech-policies/d18a8f20-d2b3-464f-8efc-b2df7c82151f/?itid=lk_inline_manual_10).

entrenched in American institutions and the American mindset, making it difficult to reverse the behavior of the largest tech companies that arose from unconstrained techno-optimism. For example, it is questionable that Congress will fundamentally overhaul Section 230, the law that sustains the current norms of free speech online.<sup>326</sup> Reforming content moderation is genuinely difficult, and the threat of government censorship remains a danger that Americans are hardwired to avoid. Tech companies' outsized influence over the political process in the United States is also hindering attempts to reform digital regulation. For example, together, Apple, Amazon, Google, and Meta spent more than \$55 million on lobbying the federal government in 2021, up from \$34 million in 2020.<sup>327</sup> In 2018, a former congressional aide explained that a privacy reform was hindered by the leverage tech companies wield in Washington D.C., commenting that "lobbyists outnumber consumer privacy advocates in Washington 20 to 1 or 30 to 1."<sup>328</sup>

Aside from relentless lobbying targeting U.S. lawmakers, perhaps the biggest impediment to legislative reform in the U.S. is the political dysfunction that has to date paralyzed any meaningful legislation in Congress. Even when Democrats and Republicans agree that tech regulation is needed, they cannot agree on the content of that regulation. For example, while Republicans are concerned that platforms are censoring conservative speech, Democrats worry about harmful content that arise from platforms taking advantage of their Section 230 liability shield.<sup>329</sup> In this political environment, any ambitious legislative reform in the United States is unlikely to emerge from Washington. Given the inability of Congress to enact many key laws—whether on data privacy, antitrust, or content moderation—the best hope for the United States may, indeed, lie in Europe's digital constitution and the ability of the Brussels Effect to deliver to Americans the kind of digital regulation that they have increasingly come to support.

#### IV. CONCLUSION

This Article has uncovered a common value foundation for a range of European digital regulations—including data privacy, artificial intelligence, content moderation, online copyright, antitrust, digital taxation, and

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326. Citron & Franks, *supra* note 9, at 46–48; Lemley, *supra* note 9, at 306–10.

327. See Emily Birnbaum, *Tech Spent Big on Lobbying Last Year*, POLITICO (Jan. 24, 2022, 10:24 AM), <https://www.politico.com/newsletters/morning-tech/2022/01/24/tech-spent-big-on-lobbying-last-year-00001144>.

328. See Dustin Volz, *Facebook's Zuckerberg Faces Senate Hearing but Little Hope for Action*, REUTERS (Apr. 9, 2018), <https://www.reuters.com/article/us-facebook-privacy-congress/facebook-zuckerberg-faces-senate-hearing-but-little-hope-for-action-idUSKBN1HH08G>.

329. Citron & Franks, *supra* note 9, at 46–48; Lemley, *supra* note 9, at 307–10.

protection of platform workers—and argued that those regulations combined amount to Europe's digital constitution, designed to steer the digital economy towards European values. The discussion has both unveiled the vastness of the European regulatory agenda and shown its penetrating impact on U.S. tech companies. In addition, it has evaluated the strengths and shortcomings of that regulatory agenda with the goal of guiding the European Union—and foreign governments eager to emulate the European Union—towards more sound regulation of the digital economy. This concluding section appraises Europe's digital constitution in the era of tech wars and geopolitical uncertainty and asks whether those European constitutional commitments now need to be revisited, or even rewritten, in order for the European Union to defend its interests and values in an increasingly contested global digital order. After all, Europe's digital constitution is, no doubt, a living constitution that needs to remain relevant and resilient in the constantly evolving digital order.

In recent years, new concerns have emerged as salient for the European Union's policy agenda, shaping its approach towards digital regulation. In today's tense geopolitical environment, European political leadership is stressing the European Union's need to increase its technological self-sufficiency in an effort to boost its strategic and industrial capabilities. “[W]e must have mastery and ownership of key technologies in Europe,” declared Ursula von der Leyen, President of the European Commission, in her inaugural speech at the European Parliament in November 2019.<sup>330</sup> This is one of many recent statements by European leaders that emphasize the importance of Europe's strategic autonomy, including its digital sovereignty. In its 2020 Communication, “Shaping Europe's Digital Future,” the Commission identified “the integrity and resilience of our data infrastructure, networks and communications” as a foundation of European technological sovereignty.<sup>331</sup> Only by developing and deploying Europe's own capacities can Europe reduce its dependency on others for the most crucial technologies. These capacities, according to the Commission, will also reinforce “Europe's ability to define its own rules and values in the digital age[.]”<sup>332</sup>

The European Union's recent push for strategic autonomy and digital sovereignty remains a contested policy goal. Some associate these terms with a desirable goal to bolster European capabilities while others see them as an

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330. See Ursula von der Leyen, Eur. Comm'n President-Elect, Speech in the European Parliament Plenary on the Occasion of the Presentation of Her College of Commissioners and Their Programme (Nov. 27, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_19\\_6408](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_6408).

331. *Commission Communication on Shaping Europe's Digital Future*, at 3 (Feb. 2020), [https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf).

332. *Id.*

undesirable attempt to build a “fortress Europe” through protectionist measures.<sup>333</sup> At its core, digital sovereignty emphasizes the need for the European Union to retain—or to regain—the freedom to make its own choices in the digital age, to reduce its dependencies on large U.S. tech companies, and to avoid being at the mercy of the U.S.-China tech war. Europeans navigate the internet using a search engine powered by algorithms created by Google, engage in online conversations moderated by Facebook or Twitter, remain connected using iPhones built by Apple, and store their data in clouds managed by Amazon and Microsoft. The European Union’s reliance on U.S. technologies today exceeds its dependency on technologies emanating from China.<sup>334</sup> Nonetheless, China’s growing influence in the digital realm adds to the European sense of vulnerability. Europeans are growing increasingly concerned that reliance on China’s Huawei as a provider of 5G network technology exposes them to Chinese government surveillance, as Beijing may gain access to any data Huawei obtains while operating critical infrastructure in Europe.<sup>335</sup> This— together with the pressure exerted by the U.S. government—has led some European governments to reverse their earlier decisions to rely on Huawei as a 5G network provider.<sup>336</sup>

Europe’s concern over its supply chain dependencies is well-founded. Approximately 80% of the world’s semiconductors are manufactured in

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333. See Mario Monti, *Europe Must Not Forget About the Single Market*, FIN. TIMES (May 22, 2023), <https://www.ft.com/content/510ee7d7-a356-430a-989d-579ad309b751>; FRANCES G. BURWELL & KENNETH PROPP, *THE EUROPEAN UNION AND THE SEARCH FOR DIGITAL SOVEREIGNTY: BUILDING “FORTRESS EUROPE” OR PREPARING FOR A NEW WORLD?* 5–7(2020).

334. See Jeremy Shapiro, *Introduction: Europe’s Digital Sovereignty*, in *EUROPE’S DIGITAL SOVEREIGNTY: FROM RULEMAKER TO SUPERPOWER IN THE AGE OF US-CHINA RIVALRY* 6, 10 (Carla Hobbs ed., 2020).

335. See Javier Espinoza, *EU Considers Mandatory Ban on Using Huawei to Build 5G*, FIN. TIMES (June 6, 2023), <https://on.ft.com/3NfwWTX>; NIS COOPERATION GROUP, *SECOND REPORT ON MEMBER STATES’ PROGRESS IN IMPLEMENTING THE EU TOOLBOX ON 5G CYBERSECURITY* (2023), <https://ec.europa.eu/newsroom/dae/redirection/document/96519>; European Commission Press Release IP/23/3309, *Commission Announces Next Steps on Cybersecurity of 5G Networks in Complement to Latest Progress Report by Member States* (June 15, 2023), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3309](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3309); Johan Van Overtveldt, *Six Reasons Why Xi Jinping’s China Cannot be Trusted*, BRUSSELS REP. (Apr. 27, 2021), <https://www.brusselsreport.eu/2021/04/27/six-reasons-why-xi-jinpings-china-cannot-be-trusted>; Laurens Cerulus et al., *Europe Wants to Upgrade its Huawei Plan*, POLITICO (June 14, 2023, 4:28 PM), <https://www.politico.eu/article/europe-plots-huawei-plan-upgrade>.

336. See Robbie Gramer, *Trump Turning More Countries in Europe Against Huawei*, FOREIGN POLY (Oct. 27, 2020, 4:03 PM), <https://foreignpolicy.com/2020/10/27/trump-europe-huawei-china-us-competition-geopolitics-5g-slovakia>. Poland and Romania were among the nations that joined forces with the U.S. See Jill Colvin, *US and Poland Sign Agreement to Cooperate on 5G Technology*, AP NEWS (Sept. 2, 2019, 2:06 PM), <https://apnews.com/article/europe-donald-trump-ap-top-news-international-news-politics-9a90e16d903947709998dd7a2dde8733>; *Romania, US Sign Memorandum on 5G Technologies ‘In Line with Rule of Law Principles’*, ROM. INSIDER (Aug. 22, 2019), <https://www.romania-insider.com/romania-us-5g-memorandum>.



Asia today.<sup>337</sup> By comparison, Europe used to be a leading producer of computer chips, contributing 44% to the global production in the 1990s.<sup>338</sup> That market share has dwindled to 10% today, leaving the European Union dependent on the United States for general chip design capacity and Asia for chip manufacturing.<sup>339</sup> According to Commissioner Thierry Breton, Europe was “naïve” to outsource much of its semiconductor capabilities abroad and now “needs to redress the balance.”<sup>340</sup> Batteries are another sector where the United States and the European Union remain dependent on Asian producers. Currently, Chinese, Japanese, and Korean companies account for 90% of global production of battery cells.<sup>341</sup>

The European Union has pursued both a defensive and an offensive strategy to reduce European dependencies on foreign technologies, while developing greater digital capabilities of its own. The Huawei controversy has ignited a broader conversation in Europe about the need to protect strategic technology assets from foreign acquirers, resulting in a more careful screening of foreign direct investment in such technologies.<sup>342</sup> The European Union has also moved to combat unfair foreign subsidies, including the Chinese government’s practice of funding its companies’ acquisitions of EU companies or their bids for government contracts in the European Union.<sup>343</sup> The European Union has further strengthened its export control regime, restricting the outflow of dual-use technologies, including cyber-surveillance tools, advanced computing, and A.I.,<sup>344</sup> and

337. Goldman Sachs, *Why the CHIPS Act Is Unlikely to Reduce US Reliance on Asia*, GOLDMAN SACHS (Oct. 26, 2022), <https://www.goldmansachs.com/intelligence/pages/why-the-chips-act-is-unlikely-to-reduce-the-us-reliance-on-asia.html>.

338. See Natalia Drozdiak, *EU’s Breton Says Time to Fix ‘Naïve’ Approach to Chip Supply*, BLOOMBERG (May 5, 2021, 9:33 AM), <https://www.bloomberg.com/news/articles/2021-05-05/europe-looks-to-secure-chip-supply-after-naive-past-approach>.

339. See Thierry Breton, *Inside the Future: Europe’s Plan to Thrive in the Global Microchip Race*, EUR. COMM’N (May 21, 2021), [https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/inside-future-europes-plan-thrive-global-microchip-race\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/inside-future-europes-plan-thrive-global-microchip-race_en); Thierry Breton, *Inside the Future: Europe’s Plan to Thrive in the Global Microchip Race*, LINKEDIN (May 21, 2021), <https://www.linkedin.com/pulse/inside-future-europes-plan-thrive-global-microchip-race-breton>.

340. See Drozdiak, *supra* note 338.

341. See Mark Scott & Joshua Posaner, *Europe’s Big Battery Bet*, POLITICO (July 26, 2020, 12:00 PM), <https://www.politico.eu/article/europe-battery-electric-tesla-china>.

342. See Regulation 2019/452, of the European Parliament and of the Council of 19 March 2019, Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 791), 1–14.

343. See *Provisional Agreement Resulting From Interinstitutional Negotiations Subject: Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market*, COM (2021) 0223 final (July 11, 2022), [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231\\_EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf); James McBride & Andrew Chatzky, *Is ‘Made in China 2025’ a Threat to Global Trade?*, COUNCIL ON FOREIGN REL. (May 13, 2019, 8:00 AM), <https://www.cfr.org/background/made-china-2025-threat-global-trade>.

344. See Regulation 2021/821, of the European Parliament and of the Council of 20 May 2021, Setting Up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items (Recast), 2021 O.J. (L 206) 1; *Strengthened EU Export Control Rules Kick In*, EUR. COMM’N (Sept. 9, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_4601](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_4601).

adopted new laws aimed at enhancing Europe's cyber resilience and cyber defenses.<sup>345</sup> European governments are also resorting to new industrial policy measures, including the granting of government subsidies—a practice commonly associated with China and heavily criticized by the European Union.<sup>346</sup> Subsidy races are unfolding in cloud computing, batteries, and semiconductors where the European Union—alongside the United States, China, and several other governments—is looking to shore up its capabilities and to shed its dependency on foreign technologies.<sup>347</sup>

While most commentators likely agree that a European Union with more capabilities and fewer strategic dependencies is a goal worth pursuing, it remains disputed how such a goal should be achieved. The underlying debate raises hard questions of whether and how the European Union can reconcile its commitment to economic openness and international cooperation with ensuring self-sufficiency around key technologies. Another question is whether an unintended consequence of the European Union's digital sovereignty agenda is that it may even lend legitimacy to more extreme variants of digital sovereignty that authoritarian governments, including, most prominently, China and Russia, are pursuing. For example, China deploys the notion of digital sovereignty to justify the extensive government control of the digital sphere that goes beyond protectionism

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345. See *Proposal for a Directive of the European Parliament and of the Council on Measures for a High Common Level of Cybersecurity Across the Union, Repealing Directive (EU) 2016/1148*, COM (2020) 823 final (Dec. 16, 2020).

346. McBride & Chatzky, *supra* note 343; Philip Blenkinsop, *EU Warns of 'Unfair' Chinese Subsidies in Green Deal Plan - Draft*, REUTERS (Jan. 30, 2023, 10:27 AM), <https://www.reuters.com/markets/eu-warns-unfair-chinese-subsidies-green-deal-plan-draft-2023-01-30>; MARK LINSKOTT, FOR WTO REFORM, MOST ROADS LEAD TO CHINA. BUT DO THE SOLUTIONS LEAD AWAY? (2021).

347. See *About EBA250*, KNOWLEDGE INNOVATION COMMUNITY INNOENERG, <https://www.eba250.com/about-eba250> (last visited Aug. 17, 2022); Scott & Posaner, *supra* note 341; Scott Malcomson, *The New Age of Autarky: Why Globalization's Biggest Winners are Now on a Mission for Self-Sufficiency*, FOREIGN AFFS. (Apr. 26, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-26/new-age-autarky>; John Edwards, *Chips, Subsidies, Security, and Great Power Competition*, LOWY INST. (May 28, 2023), <https://www.lowyinstitute.org/publications/chips-subsidies-security-great-power-competition>; *America Takes on China with a Giant Microchips Bill*, THE ECONOMIST (July 29, 2022), <https://www.economist.com/united-states/2022/07/29/america-takes-on-china-with-a-giant-microchips-bill>; Ann Cao, *China Gave 190 Chip Firms US\$1.75 Billion in Subsidies in 2022 as It Seeks Semiconductor Self-Sufficiency*, S. CHINA MORNING POST (May 7, 2023, 9:00 AM), <https://www.scmp.com/tech/tech-war/article/3219697/china-gave-190-chip-firms-us175-billion-subsidies-2022-it-seeks-semiconductor-self-sufficiency>; Jillian Deutsch, *EU Approves €8 Billion in State Subsidies for Chip Research*, BLOOMBERG (June 8, 2023, 8:06 AM), <https://www.bloomberg.com/news/articles/2023-06-08/eu-approves-8-billion-state-subsidies-for-chip-research#xj4y7vzkg>; Paul Timmers, *How Europe Aims to Achieve Strategic Autonomy for Semiconductors*, BROOKINGS (Aug. 9, 2022), <https://www.brookings.edu/articles/how-europe-aims-to-achieve-strategic-autonomy-for-semiconductors>; Pieter Haeck, *Europe's Chips Strategy Stagers Past the Starting Line*, POLITICO (Apr. 19, 2023, 5:30 PM), <https://www.politico.eu/article/with-its-chips-deal-europe-arrives-only-at-the-start-of-a-global-race>.

and competitiveness concerns and severely limits individual freedoms.<sup>348</sup> The more the European Union—or the United States and other Western governments—step in to actively shape the digital economy, the less convincing their criticism becomes when they ask China to loosen its reins over the Chinese digital economy.

While there is no uniform European view on how to balance the European Union's commitment to openness with its need for greater digital sovereignty, the general political environment today is conducive to a more nationalist economic policy orientation in Europe. The combination of the populist governments in several EU Member States, China's growing economic clout and assertiveness, the removal of the United Kingdom's free market voice from the EU legislative process following Brexit, and the heightened sense of insecurity in a volatile geopolitical environment may have a cascading effect that will pave the way towards a new economic settlement between the state and the markets, ushering in some industrial policy-driven reforms in the process. Protectionism is also becoming increasingly common across the world, as reflected in more nativist policy orientations in China and the United States alike. Consequently, several European leaders are now calling for the European Union to rethink and adjust its policies to better navigate the increasingly unpredictable and hostile world.<sup>349</sup> However, if the European Union starts embracing digital protectionism, there is a risk that techno-protectionism will become the global norm. After all, EU regulators should keep in mind that the Brussels Effect—the European Union's ability to externalize its regulations—is a potent mechanism for exporting both good and bad regulations alike.

Ultimately, the European Union will likely undertake this quest for digital sovereignty mindful of its core values that were discussed in Part I—fundamental rights, democracy, and fairness—which set limits on how the

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348. See “Zhongguo Hulianwang Zhuangkuang” Baipishu (Yingwen Ban) (《中国互联网状况》白皮书 (英文版)) [“The Internet in China” White Paper (English Version)]: Foreword, Guowuyuan Xinwen Bangongshi (国务院新闻办公室) [St. Council Info. Off. China] (June 8, 2010), <http://www.scio.gov.cn/zxbd/nd/2010/Document/667385/667385.htm>; “Zhongguo Hulianwang Zhuangkuang” Baipishu (Yingwen Ban) (《中国互联网状况》白皮书 (英文版)) [“The Internet in China” White Paper (English Version)]: IV. Basic Principles and Practices of Internet Administration, Guowuyuan Xinwen Bangongshi (国务院新闻办公室) [St. Council Info. Off. China] (June 8, 2010), [http://www.scio.gov.cn/zxbd/nd/2010/Document/667385/667385\\_4.htm](http://www.scio.gov.cn/zxbd/nd/2010/Document/667385/667385_4.htm).

349. See *La doctrine Macron: une conversation avec le Président français* [The Macron Doctrine: A Conversation with the French President], GRAND CONTINENT (Nov. 16, 2020), <https://legrandcontinent.eu/fr/2020/11/16/macron>; Charles Michel, President of the European Council, Speech at the Brussels Economic Forum: Recovery Plan: Powering Europe's Strategic Autonomy (Sept. 8, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/09/08/recovery-plan-powering-europe-s-strategic-autonomy-speech-by-president-charles-michel-at-the-brussels-economic-forum>.

European Union can go about achieving its greater strategic autonomy. For example, it is not clear Europeans actually want a “European Google” if that requires submitting to the company’s “surveillance capitalism” in ways that compromise individuals’ fundamental rights to data privacy. Europeans are also not prepared to adopt the Chinese model of surveillance even if that model has given China an advantage in the tech race due to the amount of data its government and companies can leverage. Thus, even in its newfound pursuit for digital sovereignty, the European Union is expected to be constrained by its constitutional commitment to a digital order that is rooted in respect for fundamental rights, the defense of democracy, and the promotion of fairness. At the same time, how Europe’s digital constitution will evolve in today’s challenging geopolitical environment will be a crucial test of the resilience and the continuing normative appeal of that constitution—in Europe and in the rest of the world.